NORTH CAROLINA REPORTS

VOLUME 310

SUPREME COURT OF NORTH CAROLINA

10 JANUARY 1984

30 APRIL 1984

RALEIGH
1985

CITE THIS VOLUME
310 N.C.

TABLE OF CONTENTS

THE SUPREME COURT
OF
NORTH CAROLINA

Chief Justice

JOSEPH BRANCH

Associate Justices

JAMES G. EXUM, JR.
LOUIS B. MEYER
BURLEY B. MITCHELL, JR.
HARRY C. MARTIN
HENRY E. FRYE
EARL W. VAUGHN[1]

Retired Chief Justices

WILLIAM H. BOBBITT
SUSIE SHARP

Retired Justices

J. WILL PLESS, JR.
I. BEVERLY LAKE
DAN K. MOORE
WALTER E. BROCK
J. FRANK HUSKINS
DAVID M. BRITT
J. WILLIAM COPELAND[2]

Clerk

J. GREGORY WALLACE

Librarian

FRANCES H. HALL

ADMINISTRATIVE OFFICE OF THE COURTS

Director

FRANKLIN E. FREEMAN, JR.

Assistant Director

DALLAS A. CAMERON, JR.

APPELLATE DIVISION REPORTER

RALPH A. WHITE, JR.

ASSISTANT APPELLATE DIVISION REPORTER

CHRISTIE SPEIR PRICE

---

1. Appointed Associate Justice by Gov. James B. Hunt, Jr. and took office 2 January 1985.

2. Retired as Associate Justice 31 December 1984.

TRIAL JUDGES OF THE GENERAL COURT OF JUSTICE

SUPERIOR COURT DIVISION

First Division

DISTRICT	JUDGES	ADDRESS
1	J. HERBERT SMALL	Elizabeth City
	THOMAS S. WATTS[1]	Elizabeth City
2	WILLIAM C. GRIFFIN[2]	Williamston
3	DAVID E. REID, JR.	Greenville
	HERBERT O. PHILLIPS III	Morehead City
4	HENRY L. STEVENS III	Kenansville
	JAMES R. STRICKLAND	Jacksonville
5	BRADFORD TILLERY	Wilmington
	N. B. BAREFOOT	Wilmington
6	RICHARD B. ALLSBROOK	Roanoke Rapids
7	FRANKLIN R. BROWN	Tarboro
	CHARLES B. WINBERRY, JR.	Rocky Mount
8	JAMES D. LLEWELLYN	Kinston
	PAUL MICHAEL WRIGHT[3]	Goldsboro
	Second Division	
9	ROBERT H. HOBGOOD	Louisburg
	HENRY W. HIGHT, JR.[4]	Henderson
10	JAMES H. POU BAILEY	Raleigh
	EDWIN S. PRESTON, JR.	Raleigh
	ROBERT L. FARMER	Raleigh
	HENRY V. BARNETTE, JR.	Raleigh
11	WILEY F. BOWEN	Dunn
12	D. B. HERRING, JR.	Fayetteville
	COY E. BREWER, JR.	Fayetteville
	E. LYNN JOHNSON	Fayetteville
13	GILES R. CLARK	Elizabethtown
14	THOMAS H. LEE	Durham
	ANTHONY M. BRANNON	Bahama
	J. MILTON READ, JR.[5]	Durham
15A	D. MARSH MCLELLAND	Burlington
15B	F. GORDON BATTLE	Chapel Hill
16	B. CRAIG ELLIS	Laurinburg
	Third Division	
17A	MELZER A. MORGAN, JR.	Wentworth
17B	JAMES M. LONG	Pilot Mountain
18	W. DOUGLAS ALBRIGHT	Greensboro
	EDWARD K. WASHINGTON	High Point
	THOMAS W. ROSS	Greensboro
	JOSEPH JOHN[6]	Greensboro
19A	THOMAS W. SEAY, JR.	Spencer
	JAMES C. DAVIS	Concord
19B	RUSSELL G. WALKER, JR.	Asheboro
20	F. FETZER MILLS	Wadesboro
	WILLIAM H. HELMS	Wingate

DISTRICT	JUDGES	ADDRESS
21	WILLIAM Z. WOOD	Winston-Salem
	JUDSON D. DERAMUS, JR.	Winston-Salem
	WILLIAM H. FREEMAN	Winston-Salem
22	ROBERT A. COLLIER, JR.	Statesville
	PRESTON CORNELIUS	Mooresville
23	JULIUS A. ROUSSEAU, JR.	North Wilkesboro
	Fourth Division	
24	CHARLES C. LAMM, JR.	Boone
25	FORREST A. FERRELL	Hickory
	CLAUDE S. SITTON	Morganton
26	FRANK W. SNEPP, JR.	Charlotte
	WILLIAM T. GRIST	Charlotte
	KENNETH A. GRIFFIN	Charlotte
	ROBERT M. BURROUGHS	Charlotte
	CHASE BOONE SAUNDERS	Charlotte
27A	ROBERT W. KIRBY	Cherryville
	ROBERT E. GAINES	Gastonia
27B	JOHN R. FRIDAY	Lincolnton
28	ROBERT D. LEWIS	Asheville
	C. WALTER ALLEN	Asheville
29	HOLLIS M. OWENS, JR.	Rutherfordton
30	JAMES U. DOWNS	Franklin
	JOSEPH A. PACHNOWSKI[7]	Bryson City

SPECIAL JUDGES

DONALD L. SMITH	Raleigh
JAMES ARTHUR BEATY, JR.	Winston-Salem
JOHN B. LEWIS, JR.	Farmville
MARY MCLAUCHLIN POPE	Southern Pines
FRED J. WILLIAMS[8]	Durham
LAMAR GUDGER[9]	Asheville
JANET M. HYATT[10]	Waynesville
DONALD W. STEPHENS[11]	Raleigh

1. Appointed Regular Judge 12/1/84.
2. Appointed 1/1/85 to replace Elbert S. Peel, Jr. who died 10/16/84.
3. Elected 1/3/85 to replace R. Michael Bruce.
4. Appointed 12/1/84.
5. Appointed 1/3/85 to replace John C. Martin.
6. Appointed 12/3/84.
7. Appointed 12/1/84.
8. Appointed 1/1/85 to replace Arthur L. Lane.
9. Appointed 9/28/84 to replace Charles C. Lamm.
10. Appointed 1/8/85 to replace Russell G. Walker, Jr.
11. Appointed 1/1/85 to replace Thomas S. Watts.

EMERGENCY JUDGES

JUDGES	ADDRESS
HENRY A. MCKINNON, JR.	Lumberton
SAMUEL E. BRITT	Lumberton
HAL H. WALKER	Asheboro

DISTRICT COURT DIVISION

DISTRICT	JUDGES	ADDRESS
1	JOHN T. CHAFFIN (Chief)	Elizabeth City
	GRAFTON G. BEAMAN	Elizabeth City
	J. RICHARD PARKER	Manteo
2	HALLETT S. WARD (Chief)	Washington
	JAMES W. HARDISON	Williamston
	SAMUEL C. GRIMES[1]	Washington
3	E. BURT AYCOCK, JR. (Chief)	Greenville
	JAMES E. RAGAN III	Oriental
	JAMES E. MARTIN	Bethel
	H. HORTON ROUNTREE	Greenville
	WILLIE LEE LUMPKIN III	Morehead City
	JAMES RANDAL HUNTER	New Bern
4	KENNETH W. TURNER (Chief)	Rose Hill
	WALTER P. HENDERSON	Trenton
	STEPHEN M. WILLIAMSON	Kenansville
	JAMES NELLO MARTIN	Clinton
	WILLIAM M. CAMERON, JR.	Jacksonville
5	GILBERT H. BURNETT (Chief)	Wilmington
	CHARLES E. RICE	Wrightsville Beach
	JACQUELINE MORRIS-GOODSON	Wilmington
	ELTON G. TUCKER	Wilmington
6	NICHOLAS LONG (Chief)	Roanoke Rapids
	ROBERT E. WILLIFORD	Lewiston
	HAROLD P. MCCOY, JR.	Scotland Neck
7	GEORGE BRITT (Chief)	Tarboro
	ALLEN W. HARRELL	Wilson
	ALBERT S. THOMAS, JR.	Wilson
	QUINTON T. SUMNER	Rocky Mount
8	JOHN PATRICK EXUM (Chief)	Kinston
	ARNOLD O. JONES	Goldsboro
	KENNETH R. ELLIS	Fremont
	RODNEY R. GOODMAN, JR.	Kinston
	JOSEPH E. SETZER, JR.	Goldsboro
9	CLAUDE W. ALLEN, JR. (Chief)	Oxford
	BEN U. ALLEN	Henderson

DISTRICT	JUDGES	ADDRESS
	CHARLES W. WILKINSON	Oxford
	J. LARRY SENTER	Franklinton
10	GEORGE F. BASON (Chief)	Raleigh
	STAFFORD G. BULLOCK	Raleigh
	GEORGE R. GREENE	Raleigh
	RUSSELL G. SHERRILL III	Raleigh
	PHILIP O. REDWINE	Raleigh
	NARLEY LEE CASHWELL	Apex
	WILLIAM A. CREECH	Raleigh
	L. W. PAYNE	Raleigh
11	ELTON C. PRIDGEN (Chief)	Smithfield
	WILLIAM A. CHRISTIAN	Sanford
	KELLY EDWARD GREENE	Dunn
	EDWARD H. MCCORMICK[2]	Lillington
12	SOL G. CHERRY (Chief)	Fayetteville
	CHARLES LEE GUY	Fayetteville
	LACY S. HAIR	Fayetteville
	ANNA ELIZABETH KEEVER	Fayetteville
	WARREN L. PATE	Raeford
	PATRICIA ANN TIMMONS[3]	Fayetteville
13	WILLIAM C. GORE, JR. (Chief)[4]	Whiteville
	LEE GREER, JR.	Whiteville
	ROBERT W. LONG[5]	Shallotte
	JERRY A. JOLLY[6]	Tabor City
14	DAVID Q. LABARRE (Chief)[7]	Durham
	KAREN G. SHIELDS	Durham
	ORLANDO HUDSON[8]	Durham
15A	JASPER B. ALLEN, JR. (Chief)	Burlington
	WILLIAM S. HARRIS, JR.	Graham
	JAMES KENT WASHBURN	Burlington
15B	STANLEY PEELE (Chief)	Chapel Hill
	DONALD LEE PASCHAL	Siler City
	PATRICIA HUNT	Chapel Hill
16	JOHN S. GARDNER (Chief)	Lumberton
	CHARLES G. MCLEAN	Lumberton
	HERBERT LEE RICHARDSON	Lumberton
	ADELAIDE G. BEHAN	Lumberton
17A	PETER M. MCHUGH (Chief)	Reidsville
	ROBERT R. BLACKWELL	Reidsville
17B	FOY CLARK (Chief)	Mount Airy
	JERRY CASH MARTIN	Mount Airy
18	THOMAS G. FOSTER, JR. (Chief)[9]	Greensboro
	WILLIAM L. DAISY	Greensboro
	EDMUND LOWE	High Point
	ROBERT E. BENCINI	High Point
	WILLIAM K. HUNTER	High Point

DISTRICT	JUDGES	ADDRESS
	PAUL THOMAS WILLIAMS[10]	Greensboro
	SHERRY FOWLER ALLOWAY[11]	Greensboro
19A	ROBERT L. WARREN (Chief)	Concord
	FRANK M. MONTGOMERY	Salisbury
	ADAM C. GRANT, JR.	Concord
	CLARENCE E. HORTON, JR.	Kannapolis
19B	L. T. HAMMOND, JR. (Chief)	Asheboro
	WILLIAM M. NEELY	Asheboro
20	DONALD R. HUFFMAN (Chief)	Wadesboro
	KENNETH W. HONEYCUTT	Monroe
	RONALD W. BURRIS	Albemarle
	MICHAEL EARLE BEALE	Southern Pines
	W. REECE SAUNDERS, JR.	Rockingham
21	ABNER ALEXANDER (Chief)	Winston-Salem
	JAMES A. HARRILL, JR.	Winston-Salem
	R. KASON KEIGER	Winston-Salem
	JOSEPH JOHN GATTO	Winston-Salem
	FRANK YEAGER	Walkertown
	LYNN BURLESON[12]	Winston-Salem
	ROLAND HARRIS HAYES[13]	Winston-Salem
22	LESTER P. MARTIN, JR. (Chief)	Mocksville
	ROBERT W. JOHNSON	Statesville
	SAMUEL ALLEN CATHEY	Statesville
	GEORGE THOMAS FULLER	Lexington
23	SAMUEL L. OSBORNE (Chief)	Wilkesboro
	MAX F. FERREE	Wilkesboro
	EDGAR GREGORY	Wilkesboro
24	ROBERT HOWARD LACEY (Chief)	Newland
	ROY ALEXANDER LYERLY	Banner Elk
	CHARLES PHILIP GINN	Boone
25	LIVINGSTON VERNON (Chief)	Morganton
	SAMUEL McD. TATE	Morganton
	L. OLIVER NOBLE, JR.	Hickory
	EDWARD H. BLAIR	Lenoir
	DANIEL R. GREEN, JR.	Hickory
26	JAMES E. LANNING (Chief)	Charlotte
	L. STANLEY BROWN	Charlotte
	WILLIAM G. JONES	Charlotte
	DAPHENE L. CANTRELL	Charlotte
	WILLIAM H. SCARBOROUGH	Charlotte
	T. PATRICK MATUS II	Charlotte
	RESA L. HARRIS	Charlotte
	ROBERT P. JOHNSTON	Charlotte
	W. TERRY SHERRILL	Charlotte

DISTRICT	JUDGES	ADDRESS
	MARILYN R. BISSELL[14]	Charlotte
	RICHARD ALEXANDER ELKINS[15]	Charlotte
27A	J. RALPH PHILLIPS (Chief)[16]	Gastonia
	DONALD E. RAMSEUR	Gastonia
	BERLIN H. CARPENTER, JR.	Gastonia
	LARRY B. LANGSON[17]	Gastonia
27B	GEORGE HAMRICK (Chief)	Shelby
	JAMES THOMAS BOWEN III	Lincolnton
	JOHN M. GARDNER	Shelby
28	WILLIAM MARION STYLES (Chief)	Black Mountain
	EARL JUSTICE FOWLER, JR.	Arden
	PETER L. RODA	Asheville
	ROBERT HARRELL	Asheville
29	ROBERT T. GASH (Chief)	Brevard
	ZORO J. GUICE, JR.	Hendersonville
	THOMAS N. HIX	Hendersonville
	LOTO J. GREENLEE	Marion
30	ROBERT J. LEATHERWOOD III (Chief)	Bryson City
	JOHN J. SNOW, JR.	Murphy
	DANNY E. DAVIS	Waynesville

---

1. Appointed 1/1/85.
2. Appointed 12/3/84 to replace W. Pope Lyon who retired 11/30/84.
3. Appointed 9/17/84.
4. Appointed Chief Judge 12/3/84 to replace William E. Wood.
5. Appointed 12/3/84 to replace Roy D. Trest.
6. Appointed 12/3/84.
7. Appointed Chief Judge 1/1/85 to replace J. Milton Read, Jr. who went on Superior Court bench.
8. Appointed 12/10/84 to replace William G. Pearson II.
9. Appointed Chief Judge 12/31/84 to replace Joseph R. John who went on Superior Court bench.
10. Appointed 12/3/84 to replace Robert L. Cecil who retired.
11. Appointed 12/3/84 to replace John F. Yeattes, Jr., who retired.
12. Appointed 12/3/84.
13. Appointed 9/27/84.
14. Appointed 12/3/84.
15. Appointed 9/28/84.
16. Appointed Chief Judge 12/3/84 to replace Lewis Bulwinkle who resigned 11/30/84.
17. Appointed 12/4/84.

ATTORNEY GENERAL OF NORTH CAROLINA

Attorney General

LACY H. THORNBURG

Administrative Deputy Attorney General

LESTER D. ROARK

Special Assistant to the Attorney General

PHILLIP J. LYONS

Senior Deputy Attorneys General

ANDREW A. VANORE, JR.
EUGENE A. SMITH, JR.
WILLIAM W. MELVIN

Deputy Attorney General

JEAN A. BENOY

Special Deputy Attorneys General

MILLARD R. RICH, JR.
MYRON C. BANKS
T. BUIE COSTEN
JACOB L. SAFRON
JAMES B. RICHMOND
HERBERT LAMSON, JR.
WILLIAM F. O'CONNELL
JOHN R. B. MATTHIS
EDWIN M. SPEAS, JR.
ANN REED DUNN
CHARLES J. MURRAY
ISAAC T. AVERY III
H. AL COLE, JR.
RICHARD N. LEAGUE
CLAUDE W. HARRIS
I. B. HUDSON, JR.
JO ANNE SANFORD
DANIEL C. OAKLEY
REGINALD L. WATKINS
DAVID S. CRUMP
RALF F. HASKELL
J. MICHAEL CARPENTER
JAMES J. COMAN

Assistant Attorneys General

WILLIAM B. RAY
WILLIAM F. BRILEY
THOMAS B. WOOD
CHARLES M. HENSEY
ROBERT G. WEBB
ROY A. GILES, JR.
JAMES E. MAGNER, JR.
GUY A. HAMLIN
ALFRED N. SALLEY
GEORGE W. BOYLAN
ROBERT R. REILLY, JR.
RICHARD L. GRIFFIN
JAMES M. WALLACE, JR.
ARCHIE W. ANDERS
ELIZABETH C. BUNTING
ELISHA H. BUNTING, JR.
ALAN S. HIRSCH
SANDRA M. KING
JOAN H. BYERS
DONALD W. GRIMES
NONNIE F. MIDGETTE
DOUGLAS A. JOHNSTON
JAMES PEELER SMITH
THOMAS F. MOFFITT
GEORGE W. LENNON
MARILYN Y. RICH
DAVID R. BLACKWELL
NORMA S. HARRELL
THOMAS H. DAVIS, JR.
DENNIS P. MYERS
KAYE R. WEBB
DANIEL F. MCLAWHORN
TIARE B. SMILEY
HENRY T. ROSSER
LUCIEN CAPONE III
FRANCIS W. CRAWLEY
MICHAEL D. GORDON
JAMES C. GULICK
HARRY H. HARKINS, JR.
GRAYSON G. KELLEY
R. BRYANT WALL
RICHARD L. KUCHARSKI
ROBERT E. CANSLER
LEMUEL W. HINTON
SARAH C. YOUNG
STEVEN M. SHABER
W. DALE TALBERT
THOMAS G. MEACHAM, JR.
FRED R. GAMIN
RICHARD H. CARLTON
BARRY S. MCNEILL
CLIFTON H. DUKE
STEVEN F. BRYANT
JANE P. GRAY
JOHN F. MADDREY
WILSON HAYMAN
EVELYN M. COMAN
GEORGE C. WINDHAM
JANE R. THOMPSON
CHRISTOPHER P. BREWER
THOMAS J. ZIKO
WALTER M. SMITH
MARY E. ANANIA
JOHN R. CORNE
DANIEL C. HIGGINS
MICHAEL L. MORGAN
PHILIP A. TELFER
DAVID E. BROOME, JR.
FLOYD M. LEWIS
CHARLES H. HOBGOOD
WILLIAM N. FARRELL, JR.
EDMOND W. CALDWELL, JR.
DAVID R. MINGES
NEWTON G. PRITCHETT, JR.
ELLEN B. SCOUTEN

DISTRICT ATTORNEYS

DISTRICT	DISTRICT ATTORNEY	ADDRESS
1	H. P. Williams	Elizabeth City
2	Mitchell O. Norton	Williamston
3A	Thomas D. Haigwood	Greenville
3B	W. David McFadyen, Jr.	New Bern
4	William H. Andrews	Jacksonville
5	Jerry Lee Spivey	Wilmington
6	David Beard	Murfreesboro
7	Howard S. Boney, Jr.	Tarboro
8	Donald Jacobs	Goldsboro
9	David Waters	Oxford
10	Randolph Riley	Raleigh
11	John W. Twisdale	Smithfield
12	Edward W. Grannis, Jr.	Fayetteville
13	Michael F. Easley	Whiteville
14	Ronald L. Stephens	Durham
15A	George E. Hunt	Graham
15B	Carl R. Fox	Carrboro
16	Joe Freeman Britt	Lumberton
17A	Philip W. Allen	Wentworth
17B	H. Dean Bowman	Dobson
18	Lamar Dowda	Greensboro
19A	James E. Roberts	Kannapolis
19B	Garland N. Yates	Asheboro
20	Carroll R. Lowder	Monroe
21	Donald K. Tisdale	Clemmons
22	H. W. Zimmerman, Jr.	Lexington
23	Michael A. Ashburn	Wilkesboro
24	James T. Rusher	Boone
25	Robert E. Thomas	Newton
26	Peter S. Gilchrist III	Charlotte
27A	Joseph G. Brown	Gastonia
27B	Thomas M. Shuford, Jr.	Lincolnton
28	Ronald C. Brown	Asheville
29	Alan C. Leonard	Rutherfordton
30	Marcellus Buchanan III	Sylva

PUBLIC DEFENDERS

DISTRICT	PUBLIC DEFENDER	ADDRESS
3	DONALD C. HICKS III	Greenville
12	MARY ANN TALLY	Fayetteville
15B	J. KIRK OSBORN	Chapel Hill
18	WALLACE C. HARRELSON	Greensboro
26	ISABEL S. DAY	Charlotte
27	ROWELL C. CLONINGER, JR.	Gastonia
28	J. ROBERT HUFSTADER	Asheville

CASES REPORTED

ORDERS OF THE COURT

PETITIONS TO REHEAR

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

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

GENERAL STATUTES CITED AND CONSTRUED

G.S.	
1-52(1)	Pearce v. Highway Patrol Vol. Pledge Committee, 445
1-52(5)	Wall v. Stout, 184
1-53	Henry v. Deen, 75
1-313(4)	Red House Furniture Co. v. Smith, 617
1-480	Red House Furniture Co. v. Smith, 617
1-539.21	Carver v. Carver, 669
1A-1	See Rules of Civil Procedure infra
7A-454	State v. Watson, 384
8-58.12	State v. Robinson, 530
8-58.13	State v. Robinson, 530
14-17	State v. Hinson, 245
14-27.2	State v. Roberts, 428
14-27.2(a)(2)a & b	State v. Roberts, 428
14-27.4	State v. Thomas, 369
14-27.6	State v. Robinson, 530
14-33(b)(1)	State v. Roberts, 428
14-39	State v. Corley, 40
14-39(a), (b)	State v. Alston, 399
14-209	Henry v. Deen, 75
15-144	State v. Hinson, 245
15-144.1	State v. Roberts, 428
15-144.2	State v. Roberts, 428
15-155	State v. Price, 596
15-170	State v. Robinson, 530
15-1001(a)	State v. Smith, 108
15A-101(4)(a)	State v. Boone, 284
15A-701(b)(4) & (6)	State v. Marlow, 507
15A-701(b)(7)	State v. Jones, 716
15A-704(b)(1)	State v. Marlow, 507
15A-903	State v. Robinson, 530
15A-904(a)	State v. Adcock, 1

G.S.	
15A-909	State v. Marlow, 507
15A-923(e)	State v. Price, 596
15A-926(b)(2)	State v. Marlow, 507
15A-927(c)(2)a	State v. Marlow, 507
15A-951(a)	State v. Marlow, 507
15A-957	State v. Watson, 384
15A-958	State v. Watson, 384
15A-977	State v. Boone, 284
15A-977(d), (f)	State v. Horner, 274
15A-1214(h), (i) & (j)	State v. Watson, 384
15A-1225	State v. Stanley, 353
15A-1232	State v. Hobson, 555
	State v. Horner, 274
15A-1321	State v. Adcock, 1
15A-1340.3	State v. Higson, 418
15A-1340.4	State v. Thompson, 209
15A-1340.4(a)	State v. Higson, 418
	State v. Lattimore, 295
15A-1340.4(a)(1)(a)	State v. Lattimore, 295
15A-1340.4(a)(1)(c)	State v. Corley, 40
	State v. Murray, 541
15A-1340.4(a)(1)(o)	State v. Lattimore, 295
15A-1340.4(a)(2)(l)	State v. Lattimore, 295
15A-1443(a)	State v. Horner, 274
	State v. Lawson, 632
	State v. Smith, 108
15A-2000(e)(9)	State v. Moose, 482
	State v. Stanley, 332
15A-2000(e)(10)	State v. Moose, 482
15A-2000(f)(2)	State v. Moose, 482
20-141(h)	Murdock v. Ratliff; Conner Homes v. Ratliff; Ratliff v. Moss, 652

RULES OF CIVIL PROCEDURE CITED AND CONSTRUED

CONSTITUTION OF UNITED STATES CITED AND CONSTRUED

RULES OF APPELLATE PROCEDURE CITED AND CONSTRUED

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 July 25, 1984, the following individuals were admitted:

SAMUEL BEHRENDS IV ..... Raleigh, applied from the District of Columbia
JOHN EVANGELIST CAMPION III ..... Cary, applied from the State of Ohio
E. RONALD COFFMAN ..... Charlotte, applied from the State of Kentucky
JOHN MARTIN CONLEY ..... Chapel Hill, applied from the State of Massachusetts
DALE E. HOLLAR ..... Raleigh, applied from the District of Columbia

Given over my hand and Seal of the Board of Law Examiners this 26th day of July, 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 named person duly passed the examinations of the Board of Law Examiners as of the 11th day of July, 1984, and said person has been issued a certificate of this Board:

HAROLD REID HOKE ..... Matthews

Given over my hand and Seal of the Board of Law Examiners this the 10th day of September, 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 named persons duly passed the examinations of the Board of Law Examiners as of the 18th day of August, 1984, and said persons have been issued certificates of this Board:

JOHN MITCHELL ABERMAN ..... Rock Hill, South Carolina
GLENN BRIAN ADAMS ..... Fayetteville
JEFFERSON HODGES ADAMS ..... Raleigh
MARY LUNDAY ADAMS ..... Hendersonville
HELEN ELAINE ALEXANDER-HOOVER ..... Durham
ROBERT MICHAEL ALLEN ..... Charlotte
RICHARD J. ANDERSON ..... Spruce Pine
WILLIAM MARK APPLE ..... Durham
C. MURPHY ARCHIBALD ..... Charlotte
JOSEPH STANLEY ATWELL ..... Jamestown
BRUCE FREDERICK BAER ..... Fayetteville
MIRIAM J. BAER ..... Chapel Hill
MARCIA E. BAKER ..... Wilmette, Illinois
ROSALIND BAKER ..... Lexington
MICHAEL CHARLES BALOG ..... Katy, Texas
JOHN PHILLIP BARKLEY ..... Newton
KEVIN L. BARNETT ..... Charlotte
WILLIAM DOAK BARNHARDT ..... Rocky Mount
BRENT DAVID BARRINGER ..... Salisbury
DARNELL ALFORD BATTON ..... Buies Creek
MONTY CARROLL BECK ..... Lexington
JOHN HENRY BELSER, JR. ..... Winston-Salem
RICHARD C. BELTHOFF, JR. ..... Chapel Hill
ARTHUR L. BERGER ..... Chapel Hill
STEPHEN ROLAND BERLIN ..... Winston-Salem
PAMELA WEAVER BEST ..... Roanoke Rapids
GARY WILLIAM BIGELOW ..... Chapel Hill
MARC DAVID BISHOP ..... Chapel Hill
THOMAS KEITH BLACK ..... Greensboro
WILLIAM MOCK BLACK, JR. ..... Raleigh
ALAN JAY BLAKE ..... Hope Mills
ANNA NEAL BLANCHARD ..... Raleigh
DEBORAH IRENE BLAND ..... Spring Lake
PHILLIP EDWARD BOLTON ..... Advance
KATHERINE S. BONAN ..... Madison, Connecticut
CLIFFORD RICKY BOWMAN ..... Mount Airy
ROBERT DANIEL BOYCE ..... Raleigh
SARA CHARLENE BOYKIN ..... Stantonsburg
KEN R. BRAMLETT, JR. ..... Charlotte
CAROL ANN BRASWELL ..... Winston-Salem
BRENDA GAY BREWER ..... Brevard
JENNIFER D. BROCK-MARTIN ..... Mocksville
DEBORAH P. BROWN ..... Fayetteville
JEFFERSON WHITAKER BROWN ..... Chattanooga, Tennessee

STEPHEN BLAYNE BROWN ..... Tullahoma, Tennessee
WILLIAM WALTER BROWNING ..... Durham
CRAIG PENNINGTON BUIE ..... Hartsville, South Carolina
KENNETH LEE BURGESS ..... Battleboro
JUDY JO ULMER BURKE ..... Chapel Hill
SANDRA DENT BURNS ..... Greensboro
STEPHEN TIMOTHY BYRD ..... Cary
JAMES PALMER CAIN ..... Winston-Salem
CAROLE LYNN CALDER ..... Greenville
ROBERT EDWARD CALDER ..... Wilmington
KENNETH R. CAMPBELL ..... Buies Creek
KIMBERLY ANN CANADY ..... Greer, South Carolina
JOHN JOSEPH CARPENTER ..... Rutherfordton
ERNEST RAWLS CARTER, JR. ..... Powellsville
PATRICIA BRADSHAW CARTER ..... Charlotte
GARLAND STUART CASSADA ..... Roanoke, Virginia
LEROY RUSSELL CASTLE ..... Durham
TODD ROBERT CERWIN ..... Burlington, Wisconsin
RICKY WAYNE CHAMPION ..... Durham
SUSAN LOUISE OWEN CHITWOOD ..... Brevard
JOHN GRAHAM CLARK III ..... Greenville
KIM STAFFORD CLARKE ..... Kernersville
TAMELA GAY CLAYTON ..... Rockingham
PHILIP WILLIAM CLEMENTS ..... Saratoga Springs, New York
V. ELAINE COHOON ..... Virginia Beach, Virginia
CURTIS C. COLEMAN III ..... Hickory
JANET ROBIN COLEMAN ..... Coats
JESSIE ANN MARIE CONLEY ..... Winston-Salem
JAMES LEON CONNER II ..... Saxapahaw
NANCY LOUISE CONNOLLY ..... Southern Pines
JOHN WESLEY COPELAND, JR. ..... Raleigh
MANUEL L. COSTA ..... Chapel Hill
JONATHAN BALDRIDGE COVEY ..... Winston-Salem
GEORGE C. COVINGTON ..... Greensboro
JAMES KENT COWARD, JR. ..... Sylva
ROBERT WAYNE CRAMER ..... Raleigh
ROBERT ORR CRAWFORD III ..... Burlington
MAURICE GREG CRUMPLER ..... Fayetteville
ROBERT MICHAEL CURRAN ..... Carrboro
JUDITH MILSAP DANIELS ..... Parkton
REBECCA JOHNSON DAVIDSON ..... Chapel Hill
JAMES THOMAS DAVIS ..... Forest City
PAUL ERIC DAVIS ..... Raleigh
RANDALL ALLEN DAVIS ..... Goldsboro
BENJAMIN PAUL DEAN ..... Jacksonville
KATHRYN COOK DEANGELO ..... Crofton, Maryland
FRANK STEPHEN DEARMIN ..... Westfield
DAVISON MCDOWELL DOUGLAS ..... Charlotte
DONNA KAY DOUGLAS ..... Whiteville
RANDOLPH C. DOW ..... Whispering Pines

JOSEPH PATRICK DUGDALE ..... Rural Hall
DAVID MARSHALL DUKE ..... Mineral, Virginia
STEPHEN ALAN DUNN ..... New Bern
JOHN ANDREW DWYER, JR. ..... Whiteville
CATHERINE CALDWELL EAGLES ..... Marianna, Arkansas
DANIEL MARTIN ELLISON ..... Miami, Florida
HENRY LEE EVANS, JR. ..... Greensboro
RALPH ANTHONY EVANS ..... Watha
CHRISTOPHER PERRY EXLINE ..... High Point
JUDITH FABRICANT ..... Brookline, Massachusetts
KIM ALBERT FADEL ..... Charlotte
FRANCES R. FISCHBEIN ..... Charleston, South Carolina
RANDOLPH MICOL FLETCHER ..... Valdese
DANNIE BEALE FOGLEMAN ..... Greenville, South Carolina
JOSEPH H. FORBES, JR. ..... Shawboro
ROBERT ANDREW FORD ..... Winston-Salem
KIMBERLY ELISE FOX ..... Advance
GUSTI W. FRANKEL ..... Durham
WILLIAM DOLAN FROST II ..... Sault Ste. Marie, Michigan
STEVEN HOWARD GARFINKEL ..... Greensboro
RICHARD C. GASKINS, JR. ..... Belmont, Massachusetts
GLENN SCOTT GENTRY ..... Chapel Hill
STEPHEN THOMPSON GHEEN ..... Raleigh
MOSES BRAXTON GILLAM III ..... Windsor
JAMES HOWARD GILLEY, JR. ..... Winston-Salem
FRANCIS KEVIN GORHAM ..... Raleigh
LUDIE DARLENE GRAHAM ..... Lake Waccamaw
THOMAS EDWARD GRAHAM ..... Salem, West Virginia
ALISON LEIGH GRAY ..... Charlotte
VICKI YVONNE GREGORY ..... Connelly Springs
JOHN LEBARON GROSHON ..... Charlotte
RICHARD NOEL GUSLER ..... Burlington
KENNETH BRUCE GWYNN ..... Charlotte
DONNA HARPER HAMILTON ..... Winston-Salem
STANLEY HAMMER ..... Buies Creek
PAUL ANTHONY HARDISON ..... Sneads Ferry
KEITH HENDERSON HARRELL ..... Burlington
RANDOLPH HERMAN HARRY ..... Moyock
NANCY R. HATCH ..... Columbia, South Carolina
SUSAN ELIZABETH HAUSER ..... Winston-Salem
LU PENDLETON HAYES ..... Lillington
SUSANNE F. HAYES ..... Raleigh
MELINDA HAYNIE ..... Greenville
RONNIE KAREN MANDELKER HAZEN ..... Lynbrook, New York
DORA L. HEAD ..... Winston-Salem
JOHN MARK HEAVNER ..... Vale
JAMES WILSON HERRING, JR. ..... Fayetteville
CLINTON CARNELL HICKS ..... Henderson
NELSON KYLE HICKS ..... Oxford
MYRON TAYLOE HILL, JR. ..... Kinston

SHEILA P. HOCHHAUSER ..... Raleigh
ROBERT PEEL HOLMES IV ..... New Bern
BILLY DAVIS HORNE, JR. ..... Stedman
PAUL WILLIAM HORRELL ..... Durham
JOSEPH THOMAS HOWELL ..... Rocky Mount
JAMES GRIER HOYT ..... Durham
CYNTHIA C. HUMPHRIES ..... Winston-Salem
STEPHEN ROY HUNTING ..... Charlotte
MICHAEL DEAN HURST ..... Miami, Florida
SUSAN SHELL IDDINGS ..... Raleigh
ELIZABETH B. JOHNSON ..... Dunn
JON STEPHEN JOHNSON ..... Matthews
MICHAEL ALLAN JOHNSON, JR. ..... Kannapolis
STEPHEN ANTHONY JOHNSON ..... Roanoke, Virginia
LINWOOD LEE JONES ..... Tarboro
MATTHEW STEVEN KARRES ..... Charlotte
GEORGE E. KELLY III ..... Carlisle, Massachusetts
JOHN BRENDAN KELLY ..... Carrboro
SARAH KATHERINE KELLY ..... Winston-Salem
PHILIP GLENN KIRK ..... Wendell
MARK ELLIOTT KLASS ..... Lexington
BARBARA ANNE KNOX ..... Greensboro
GEORGE RUSSELL KORNEGAY III ..... Mount Olive
GILBERT CHARLES LAITE III ..... Camden, Maine
BOYD LEE LAMBERT, JR. ..... Charlotte
MICHAEL KIRK LANDS ..... Charlotte
LAUREN A. LARSON ..... Middletown, Ohio
STEVEN CRAIG LAWRENCE ..... Fayetteville
WILLIAM DAVID LEARNER, JR. ..... Charlotte
STEVEN JOSEPH LEPPER ..... Victorville, California
PHYLLIS HUFFMAN LEWIS ..... Charlotte
SUSAN CARRIE LEWIS ..... Walnut Cove
WILLIAM PAUL LEWIS II ..... Parkton
TRACY KENYON LISCHER ..... Durham
SCOTT DAVID LIVINGSTON ..... Liverpool, New York
CHRISTOPHER W. LOEB ..... Gainesville, Georgia
JOHN FLETCHER LOGAN ..... Buies Creek
RICHARD AARON LOVE ..... Sanford
SHARON HICE LOWE ..... Lowgap
JANET M. LYLES ..... Polk County
AMY LYNNE MA ..... Chapel Hill
CONSTANCE MALLON-LINK ..... Cherry Hill, New Jersey
JAMES BRYAN MALLORY III ..... Winston-Salem
ELIZABETH CAROLYN MARSHALL ..... Raleigh
JOHN ALBERT MAXFIELD ..... Raleigh
KENT JOHN MCCREADY ..... Wilmington, Delaware
WILLIAM LESTER MCGUIRT ..... Monroe
DOUGLAS FRASER MCINTOSH ..... Buies Creek
SUSAN HOWERTON MCINTYRE ..... Morehead City
JAMES DEVAINE MCKINNEY III ..... Arlington, Virginia

RICKYE ANN MCKOY ..... Dunn
CARLENE MARIE MCNULTY ..... Suffern, New York
RANDY MEARES ..... Fair Bluff
FREDERICK CHAPIN MEEKINS, JR. ..... Cary
JULIA WESLEY MERRICKS ..... Charleston, West Virginia
LAURIE MESIBOV ..... Chapel Hill
KEVIN L. MILLER ..... Charlotte
STEVEN MONTAGUE MITCHELL ..... Chapel Hill
CATHY LYNN MOORE ..... Los Angeles, California
JAMES REDFERN MORGAN, JR. ..... Winston-Salem
WILLIAM H. MOSS ..... Durham
THOMAS B. MURPHY ..... Efland
GALE RENEE MURRAY ..... Warrenton
JERRY TALMADGE MYERS ..... Monroe
MARTHA LEANN NEASE ..... Carrboro
PATRICIA MAY NECE ..... Leasburg
HARRY RUSSELL NEIGHBORS, JR. ..... Marion
GORDON E. NELSON ..... Apex
ILENE BERENTER NELSON ..... Caldwell, Idaho
THOMAS LYNN NESBIT ..... Concord
KIMBERLY BETH NOE ..... Barboursville, West Virginia
JAMES CHRISTOPHER OATES ..... Charlotte
ARTHUR WILLIAM O'CONNOR, JR. ..... Nashville, Tennessee
HORACE WILLIAM PALMER, JR. ..... Gastonia
DAVID MCLEAN PARKER ..... Clinton
WAYNE JAMES PAYNE ..... Elizabeth City
MARTHA TAYLOR PEDDRICK ..... Greensboro
RALPH STUART PENNINGTON ..... Wilmington
FRANK JAMES PERGOLIZZI ..... West Babylon, New York
JIMMIE WATKINS PHILLIPS, JR. ..... Lexington
DAVID CARTER PICKETT ..... Durham
JOEL ARTHUR PINELES ..... North Bellmore, New York
RAY KEARNEY PLEASANT ..... Angier
MARY LOUISE POTTER ..... Charlotte
JAMES MARION POWELL ..... Greensboro
STEPHANIE ANN CLAVAN POWELL ..... Cumberland, Maryland
ANITA RUTH POWERS ..... Wallace
KENNETH MICHAEL PROPST ..... Hickory
VINCENT FRANK RABIL ..... Clemmons
REBEKAH LOUISE RANDOLPH ..... Winston-Salem
MARTIN KARL REIDINGER ..... Chapel Hill
ALLISON JANET RICE ..... Port Jefferson, New York
JANET HRONES ROACH ..... Waldron, Washington
EARLE DUKES ROBERTS, JR. ..... Charlotte
GORDON ERIN ROBINSON, JR. ..... Jacksonville
MARGARET CAVITT ROBISON ..... Greensboro
PATRICK FRANCIS ROCHE ..... Jacksonville
PATRICK MICHAEL ROSENOW ..... Durham
MARGARET A. ROWLES ..... Charlottesville, Virginia
LYNNE ELLEN ROWLEY ..... Rochester, New York

CATHY MARIE RUDISILL ..... Catawba
JEFFREY SCANLAND RUPE ..... Winston-Salem
SANDRA JEAN SAIN ..... Monroe
B. J. SANDERS ..... Morrisville
D. BLAINE SANDERS ..... Johnson City, Tennessee
VANCE ALAN SANDERS ..... Franklin
FREDERICK GLENN SAWYER ..... High Point
NORMAN VINCENT SCHAICH ..... Lenoir
ROBERT MICHAEL SCHMIDT III ..... Fayetteville
THOMAS DAVID SCHROEDER ..... Aurora, Nebraska
MICHAEL FREDERICK SCHULTZE ..... Charlotte
CYNTHIA LOUISE SECHLER ..... Hockessin, Delaware
DAVID AARON SENTER ..... Lillington
ROBERT KEITH SERRA ..... Durham
FREDERICK KINGSLEY SHARPLESS ..... Chapel Hill
JIM KEMP SHERRON III ..... Raleigh
J. STEPHEN SHI ..... Charlottesville, Virginia
LESLIE DALE SIMMONS II ..... Clarksburg, West Virginia
PAMELA HUESSY SIMON ..... Statesville
DAVID THOMAS SIMPSON, JR. ..... Waxhaw
CHERYL LEIGH THORNTON SLOAN ..... McLeansville
DAVID COVENTRY SMITH ..... Winston-Salem
CHRISTOPHER E. STAUB ..... Dayton, Ohio
CLARENCE H. STEINER ..... Pittsburgh, Pennsylvania
APRIL EVANS STEPHENSON ..... Siler City
JAMES BENJAMIN STEPHENSON II ..... Henderson
LORI RENEE STERRETT ..... Euclid, Ohio
KENNETH BRUCE STEWART ..... Holly Springs
ROBIN JAYNE STINSON ..... Winston-Salem
JEFFREY ALAN STONEROCK ..... Troy, Ohio
NANCY KATHRYN STOVER ..... Chillicothe, Ohio
NICHOLAS ANDREW STRATAS ..... Raleigh
SUSAN ELAINE STRAYHORN ..... Chapel Hill
DONALD R. STRICKLAND ..... Chapel Hill
EILEEN MCDERMOTT TAYLOR ..... Charlotte
TERRY GRACE MORRIS TAYLOR ..... Hickory
LINDA KAYE TEAL ..... Raeford
JOHN MICHAEL THOMAS ..... Greensboro
GERALD ANTHONY TINGEN ..... Roxboro
ALAN E. TOLL ..... Winston-Salem
DENNIS JOHN TOMAN ..... Carrboro
DONALD HUGH TUCKER, JR. ..... Greenville
BRIAN EDWARD UPCHURCH ..... Buies Creek
SAMUEL D. WALKER ..... Durham
DAVID MARION WARREN ..... Spring Hope
LINDA ANN WARREN ..... Annapolis, Maryland
ALICE J. WASHINGTON ..... Chapel Hill
CHRISTOPHER THOMAS WATKINS ..... Mebane
REAGAN HALE WEAVER ..... Raleigh
STEPHEN AUBREY WEST ..... Greensboro

STANLEY ZEIGLER WHITE ..... Fayetteville
WALTER CREDLE WHITE, JR. ..... Rocky Mount
JAMES CRAIG WHITLEY ..... Belmont
DAVID BRAXTON WILSON ..... Salisbury
THOMAS JOHNSTON WILSON, JR. ..... Lincolnton
JOHN IGNATIUS WINN ..... Laurinburg
GARY ROBERT WOLF ..... Winston-Salem
LINDA KINKADE WOOD ..... Raleigh
JO ANN RAGAZZO WOODS ..... Chapel Hill
LINDA J. WRIGHT ..... Pinetops
WILLIAM EMERSON WRIGHT ..... Durham
J. CRAIG YOUNG ..... Nashville
STANLEY DAVID YOUNG ..... Asheville
DAVID ALLEN YOUNGDAHL ..... Greensboro
KEVIN BREWER YOW ..... Lewisville

Given over my hand and Seal of the Board of Law Examiners this the 10th day of September, 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 August 29, 1984, the following individuals were admitted:

FREDERICK A. BURKE ..... Raleigh, applied from the State of Tennessee
JAMES ROBERT FOX ..... Walnut Cove, applied from the District of Columbia
CHESTER FRANKLIN HAYES ..... Raleigh, applied from the State of Massachusetts
MARCUS WHITTMAN WILLIAMS ..... Ahoskie, applied from the State of Minnesota

Given over my hand and Seal of the Board of Law Examiners this 10th day of September, 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 named persons duly passed the examinations of the Board of Law Examiners as of the 14th day of September, 1984, and said persons have been issued certificates of this Board:

DANIEL DAVID ADDISON ..... Chapel Hill
KELLEY JO BADGER ..... Palm Beach Gardens, Florida
WILLIAM IRWIN BELK ..... Winston-Salem
JAMES GREGORY BELL ..... Pembroke
ROBERT HANEY BENFIELD, JR. ..... Charlotte
WILLIAM PROCTOR BENJAMIN ..... Greensboro
LAURIE BENNETT ..... Durham
RONALD B. BLACK ..... Raleigh
A. BODDIE ..... Florence, Alabama
CAROL ANN BOST ..... Carrboro
THERESA ANNE CATHERINE BOUCHER ..... Durham
BARRY STEPHEN BROWN ..... Mooresville
EMMA LULA BULLARD ..... Wilson
ROLLY LEE CHAMBERS ..... Williamsburg, Virginia
GREGORY PARKER CHOCKLETT ..... Charlotte
LETO COPELEY ..... Charlotte
ANITA RENEE DAVIS ..... Sanford
ALEXANDER MACFARLAND DONALDSON ..... Gloucester, Virginia
KENNETH JASON DUKE ..... Henderson
STEPHEN GARY ELLIS ..... Waynesville
REGINA FAITH FLOYD-DAVIS ..... Wilmington
NANCY J. GLICKMAN ..... Fairview
DEBORAH LOWDER HILDEBRAN ..... Raleigh
MARTIN L. HOLTON III ..... Jamestown
LORRIE LEIGH HOWARD ..... Statesville
FINESSE G. HULL-SIMMONS ..... New Bern
JACK WARREN JENKINS ..... Greenville
JAMES WILBURN JOYNER ..... Leicester
THOMAS A. KNOTH ..... Fairborn, Ohio
SARA ELLIOTT KROME ..... Cincinnati, Ohio
SUSAN DIANE LARSON ..... Greensboro
FREDERICK WAYNE LEONHARDT ..... Daytona Beach, Florida
RICHARD D. LOCKLEAR ..... Pembroke
DARRELL CARDWELL MCKENZIE ..... Durham
RICHARD WATSON MOORE ..... Winston-Salem
DAVID E. MORRIS ..... Winston-Salem
THOMAS DEAN MYRICK ..... Greensboro
MARY ANNE FRITZ NIXON ..... Durham
JOHN ALEXANDER OBIOL ..... Asheville
SUSAN HUBBARD POLLITT ..... Chapel Hill
ALEXIS JANE PREASE ..... Whiteville
THOMAS FREDERICK RAMER ..... Ada, Ohio
ROBERT G. RAYNOR ..... New Bern
CURTIS JEROME RODGERS ..... Plymouth

ALLAN PAUL ROOT ..... Brooklyn, New York
LOUISE CRITZ ROOT ..... Hamptonville
DELAMBERT STOWE ROSE ..... Belmont
STEVEN MICHAEL RUDISILL ..... Greensboro
MARJORIE MANNING RUTHERFORD ..... Pinehurst
EDWARD WALTER SCARBORO, JR. ..... Rolesville
JOHN CARL SCHAFER ..... Winston-Salem
NANCY LEE EBERT SCOTT ..... Durham
SHERRY KAY SHURDEN ..... Jefferson City, Tennessee
GEORGE LEE SIMPSON III ..... Gainesville, Georgia
STEVEN DREXELL SIMPSON ..... Raleigh
DAVID PHILLIP STEWART ..... Stoneville
MARION D. STRATAKOS ..... Charlotte
LELAND QUINTIN TOWNS ..... Jamaica Plain, Massachusetts
BRETT RANDALL TURNER ..... Chapel Hill
STEPHEN ANTHONY TURNER ..... Sanford
JAMES EDWARD VAUGHAN ..... Troy, Ohio
DAVID S. WALLS ..... Pittsburgh, Pennsylvania
WILLIAM ROBERT WHITEHURST ..... Washington, D.C.
LESLIE OLIVER WICKHAM, JR. ..... Chapel Hill

Given over my hand and Seal of the Board of Law Examiners this the 4th day of October, 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 individual was admitted to the practice of law in the State of North Carolina:

On September 21, 1984, the following individual was admitted:

PHILIP R. SKAGER ..... High Point, applied from the State of Indiana

Given over my hand and Seal of the Board of Law Examiners this 4th day of October, 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 named person duly passed the examinations of the Board of Law Examiners as of the 21st day of September, 1984, and said person has been issued a certificate of this Board:

MARCUS EDISON HILL ..... Asheville

Given over my hand and Seal of the Board of Law Examiners this the 4th day of October, 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 October 19, 1984, the following individuals were admitted:

PAUL R. BORDER III ..... Raleigh, applied from the State of Ohio
THOMAS W. D'ALONZO ..... Cary, applied from the State of Ohio
THOMAS PIERCE GIBBS FRANKLIN .... Charlotte, applied from the State of Missouri
WAYNE LOUIS GOODRUM ..... Durham, applied from the State of Kentucky
GERALD POLSTER GOULDER ..... Greensboro, applied from the State of Ohio
MARY ELIZABETH MANTON ..... Durham, applied from the State of Ohio
DENNIS MICHAEL REID ..... Reidsville, applied from the State of Ohio
JAMES DAVID RODKEY ..... Raleigh, applied from the State of Ohio

Given over my hand and Seal of the Board of Law Examiners this 22nd day of October, 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 named person duly passed the examinations of the Board of Law Examiners as of the 18th day of August, 1984, and said person has been issued a certificate of this Board:

DAVID ROBERT SCHMITT ..... Wilmington

Given over my hand and Seal of the Board of Law Examiners this the 20th day of November, 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 named persons duly passed the examinations of the Board of Law Examiners as of the 21st day of December, 1984, and said persons have been issued certificates of this Board:

BARBARA G. BECK ..... Greenville
PAUL D. BRANDES ..... Chapel Hill
ALICE CARVER BYNUM ..... Durham
NICHOLAS CRAIG RICHARD EMPSON ..... Durham
DENNIS WAYNE GADDY ..... Raleigh
ROBIN HAMMOND ..... Raleigh
KELLY VALLANDINGHAM HAZLETT ..... Kernersville
WALTER CLINTON HOLTON, JR. ..... Winston-Salem
RICHARD S. KANE ..... Raleigh
DONNY JOEL LAWS ..... Burnsville
MARTHA WRAY LOWRANCE ..... Raleigh
FLOYD B. MCKISSICK, JR. ..... Manson
JOHN CHRISTIAN MOHR ..... Chapel Hill
GAIL M. SCHOENECKER ..... Kernersville
ERIN C. WARD ..... Jacksonville
HUGH ADDISON WINTERS III ..... Carrboro

Given over my hand and Seal of the Board of Law Examiners this the 9th day of January, 1985.

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

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

On January 4, 1985, the following individuals were admitted:

LESLIE D. BRAM ..... Chapel Hill, applied from the State of Pennsylvania
JAMES T. CONRAD ..... Winston-Salem, applied from the State of Wisconsin
TYRUS VANCE DAHL, JR.
Winston-Salem, applied from the States of Tennessee and Oklahoma
O. LLOYD DARTER, JR. ..... Chapel Hill, applied from the State of New York
2nd Department
WAYNE WARREN JUCHATZ .... Winston-Salem, applied from the State of New York
2nd Department

Given over my hand and Seal of the Board of Law Examiners this 9th day of January, 1985.

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. BILLY RAYE ADCOCK

No. 121A83

(Filed 10 January 1984)

1. **Constitutional Law § 60; Jury § 7.2— fair cross section of community—burden of showing violation**

In order to establish a prima facie case of violation of the fair cross section principle, a defendant must show that: (1) the group alleged to have been excluded is a distinctive group; (2) the representation of the group in question within the venire is not fair and reasonable with respect to the number of such persons in the community; and (3) this underrepresentation is due to systematic exclusion of the group in the jury selection process.

2. **Constitutional Law § 60; Jury § 7.4— fair cross section of community—failure to show violation**

Defendant, a white man tried by an all white jury, failed to establish a prima facie case showing a violation of the fair cross section principle where he presented evidence tending to show an absolute disparity of 7.8% of underrepresentation of black citizens on the jury panel in the county, since (1) such evidence failed to show that the representation of the group in question within the venire was not fair and reasonable with respect to the number of such persons in the community, and (2) defendant offered no evidence to show that there was any systematic exclusion of the group in the jury selection process.

3. **Constitutional Law § 31; Jury § 7.3— jury list—failure to order update analysis at State's expense**

The trial court did not err in the denial of defendant's motion that the State be required to pay a fee for an expert to conduct an update analysis of the county jury panel and master jury list where (1) defense counsel was of the opinion that the expert could establish a 10% absolute disparity of underrepresentation of black citizens on the jury in the county, but such evidence would not establish a prima facie violation of the fair cross section principle,

and (2) defendant failed to show a reasonable likelihood that the expert's services would have materially assisted defendant in his defense or that without such evidence he probably would not have received a fair trial.

4. Criminal Law § 135.3; Jury § 7.11— death qualification of jurors

The trial court did not err in denying defendant's motion to prohibit death qualification of jurors in this first degree murder prosecution.

5. Jury § 6.4— questioning prospective jurors—views on capital punishment

Both the State and the defendant have a right to question prospective jurors about their views on the death penalty so as to insure a fair and impartial verdict. The extent and manner of inquiry into prospective jurors' qualifications in a capital case is a matter that rests largely in the trial judge's discretion, and his rulings will not be disturbed absent a showing of an abuse of that discretion.

6. Jury § 6— denial of motion for individual voir dire

The trial court did not abuse its discretion in the denial of defendant's motion for an individual voir dire of prospective petit jurors.

7. Jury § 7.11— death penalty—duty to set aside personal belief—refusal to instruct

The trial court in a first degree murder case did not abuse its discretion in denying defendant's request that each individual juror be instructed prior to his voir dire examination that, in the event defendant is found guilty of first degree murder, his duty as a juror requires him to subordinate his personal feelings about the death penalty and to consider whether a sentence of death should be imposed.

8. Criminal Law § 101.4— refusal to sequester jury—no abuse of discretion

The trial court did not abuse its discretion in denying defendant's motion to sequester the jury in a first degree murder case because of pretrial and trial publicity.

9. Criminal Law § 101— motion to prohibit misconduct by deceased's family members

The trial court in a first degree murder case did not err in denying defendant's motion to prohibit the "exhibition" of deceased's family members to the jury where there was no evidence in the record to suggest any impropriety on the part of any member of the victim's family.

10. Jury § 7— challenge for cause—preservation of exception

In order to preserve an exception to the court's denial of a challenge for cause, defendant must (1) exhaust his peremptory challenges *and* (2) thereafter assert his right to challenge peremptorily an additional juror.

11. Jury § 6.3— improper statement in question to juror—absence of prejudice

The trial court in a first degree murder case did not abuse its discretion in overruling defendant's objection to the prosecutor's statement in a question to a prospective juror that if defendant failed to show to the satisfaction of the jury that he was insane at the time of the alleged act "and the jury does find

that he committed the alleged act beyond a reasonable doubt, then the jury must return a verdict of guilty," although the statement did not set forth all the elements of murder, where an extensive voir dire was conducted in the case, the court properly instructed on the elements of the crime, and defendant failed to demonstrate prejudice.

12. Constitutional Law § 30— defendant's statements to witnesses not discoverable

Statements made by defendant to two witnesses which were inculpatory and which were offered into evidence by the State were not discoverable under G.S. 15A-904(a) and were not required to be disclosed at trial under the rule of *State v. Hardy*, 293 N.C. 105.

13. Criminal Law § 103— changing ruling on evidence during trial

It is not error for a trial judge to change his ruling on the admissibility of evidence during the course of the trial.

14. Criminal Law § 50.2— defendant's awareness of victim's death—incompetency of witness

Defendant's sister was not competent to testify as to defendant's awareness or lack of awareness of the victim's death since such testimony was beyond the realm of the witness's personal knowledge.

15. Criminal Law § 89.5— prior statement of witness—admissibility for corroboration—slight variances

A witness's prior written statement was properly admitted for corroboration where the variations were slight and none contradicted the witness's testimony. Even if a reference in the statement to defendant's having shot at the decedent the day before she was killed amounted to more than a slight variation from the witness's testimony, its admissibility was not prejudicial error where (1) the trial court gave a limiting instruction to the jury to consider the written statement only if and to the extent it corroborated the witness's testimony, and (2) there was other evidence in the record that defendant shot at decedent the day before the killing as well as other substantial evidence tending to show premeditation and deliberation.

16. Criminal Law § 162.3— inadmissibility of witness's answer—motion to strike

When a question does not indicate the inadmissibility of the answer, defendant should move to strike the answer as soon as its inadmissibility becomes known, and failure to so move constitutes a waiver of objection.

17. Criminal Law § 102.3— cure of impropriety in jury argument

The impropriety of the prosecutor's jury argument that "[t]he fact that this defendant is up here being judged in this Court indicates that he has acted improperly . . . against people in North Carolina, and against you as the people in this community" was cured when the trial court immediately sustained defendant's objection thereto and instructed the jury to disregard the statement.

18. Criminal Law § 5; Homicide § 28.7— instructions—distinguishing insanity as complete defense and diminished capacity defense

A defendant charged with first degree murder was not entitled to an instruction on diminished capacity, but the court's charge on diminished capacity was an error favorable to defendant. Moreover, the trial court adequately distinguished between insanity as a complete defense and insanity as a diminished capacity defense where the record shows that the diminished capacity instruction was clearly related to the charge on premeditation and deliberation and the charge on insanity as a complete defense came much later, and the jury could not have been confused by the order of the court's instructions.

19. Criminal Law §§ 112.6, 120— instruction on consequences of acquittal by reason of insanity

The trial court's use of the word "may" rather than "shall" in setting out the procedure for commitment hearings when a defendant is found not guilty by reason of insanity complied with the applicable statute, former G.S. 15A-1321, and could not have misled the jury to believe that defendant would be released without any commitment proceeding.

20. Criminal Law § 112.6— presumption as to sanity—instructions—use of "in doubt"

The trial court's instruction that "if you are *in doubt* as to the insanity of the defendant, the defendant is presumed under the law to be sane, and so you would find the defendant guilty if he is otherwise guilty" did not convey to the jury the message that defendant's burden of "satisfying" the jury of his insanity had been raised to that of "beyond a reasonable doubt" when considered in context with the court's other instructions, although the better practice would be to use the term "not satisfied" rather than "in doubt."

21. Criminal Law § 112.4— charge on circumstantial evidence—prior cases overruled

An instruction to the effect that a conviction may not be based upon circumstantial evidence unless the circumstances point to guilt and exclude to a moral certainty every reasonable hypothesis except that of guilt is unnecessary when a correct instruction on reasonable doubt is given. Prior decisions of the Supreme Court, to the extent that they hold otherwise, are expressly overruled.

22. Criminal Law § 131.1— motion for new trial—newly discovered evidence—inadmissibility of affidavit

An affidavit offered by defendant in support of his motion for appropriate relief on the ground of newly discovered evidence was clearly hearsay and was properly excluded by the trial judge. Furthermore, the affidavit would not have furnished a basis for a new trial where it tended only to contradict or impeach a former witness and was not of such a nature as to show that a different result would probably be reached at another trial.

Justice EXUM dissenting.

State v. Adcock

APPEAL by defendant from *Herring, Judge,* at the 8 November 1982 Session of DURHAM County Superior Court.

Defendant was charged in an indictment proper in form with the first-degree murder of Delores Lloyd Adcock. Defendant entered a plea of not guilty.

State's evidence tended to show that on the afternoon of 5 August 1980, the defendant in his car followed his wife in her car as she drove away from her place of employment at Northern Telecom near Durham. Mrs. Adcock turned off at the Avondale Drive exit and defendant followed. At the bottom of the ramp, defendant shot his wife. Her car rolled across the street, and defendant walked over on foot and shot her again. Then he drove away. Mrs. Adcock died as a result of the gunshot wounds.

Mrs. Adcock and defendant were married in 1962 and a boy and a girl were born to their marriage. Defendant and his wife were separated at the time of the shooting.

The victim's father and brother testified that defendant had threatened her on several occasions prior to her death. Kenneth Glenn, a friend of the defendant, testified that defendant told him in July 1980: "I think I am just going to go absolutely berserk crazy and end up blowing her brains out and going and killing myself too." At that time, defendant had in his possession a pistol.

Doctor Jerome Tift, a pathologist, testified that an autopsy of the body of Delores Adcock revealed two gunshot wounds—one in the upper arm and the other in the back of her skull. The latter wound was the cause of death.

Defendant called seven witnesses in his defense. Several testified that defendant had suffered from epilepsy in the past. Defendant's sister testified that following his separation from Delores, defendant seemed very depressed. Defendant's father offered similar testimony of defendant's depression and further stated that the family had a history of mental illness.

Dr. Robert Miller, a forensic psychiatrist, was called as an expert by defendant. Dr. Miller testified regarding his extended observation and treatment of defendant following defendant's commitment to John Umstead Hospital in late 1980. In his opinion, the defendant had been suffering from a manic-depressive

mental illness for approximately thirteen years. In addition, Dr. Miller also determined that defendant was suffering from the mental illness of multiple personality.

Since defendant claimed to have no memory of the circumstances immediately prior to and surrounding the shooting, Dr. Miller, with defendant's consent, employed hypnosis in an attempt to explore this amnesia as well as the existence of multiple personalities. In Dr. Miller's opinion, defendant's amnesia was genuine and at the time of the crime, he was suffering from such mental disease or defect that he did not understand the nature and quality of his act and the consequences of his act and he did not know that his act was wrong.

Defendant's own version of the circumstances surrounding the shooting came as a result of about fifteen sessions of hypnosis during which Dr. Miller helped defendant regain his memory. Based upon his conversations with defendant during these sessions, Dr. Miller summarized defendant's account of the shooting as follows: Defendant was very depressed about his wife's estrangement from him. He felt that if he could only talk with his wife, he could persuade her to return to him. On 5 August 1980, he drove to her place of employment and waited for her to get off work. He then followed her, honking his horn and blinking his lights. When she did not respond, defendant determined that the other person was not his wife. He followed her to the Avondale Drive exit at which time he noticed a gun on the seat of his car. Convinced that the driver of the car was not his wife, but rather some creature, defendant became more upset and confused. Defendant, according to Dr. Miller, felt that he must destroy the creature in order to save his wife. Defendant described the creature as a sack of potatoes with a face on it like that of his wife. Defendant shot the creature, and, according to Dr. Miller, felt he had done nothing wrong but rather had rid the world of the evil creature.

In rebuttal, the State called nine witnesses, several of whom testified that during the periods of time that they knew defendant, he appeared to them to be normal. Dr. Bob Rollins testified concerning his evaluation of defendant during defendant's stay at Dorothea Dix. He diagnosed defendant as having a mixed personality disorder, a disorder which has explosive antisocial hys-

terical and narcissistic features. In his opinion, defendant's claimed amnesia could not be confirmed. According to Dr. Rollins, the defendant knew the nature and consequences of his acts and could distinguish between right and wrong.

Dr. Billy Royal, a psychiatrist on the staff at Dorothea Dix, testified concerning his examination and observation of defendant during a three-month period. In his opinion, defendant did not show a multiple personality. Dr. Royal expressed no opinion as to defendant's criminal responsibility at the time of the shooting.

Defendant recalled Dr. Miller in surrebuttal who reaffirmed his original diagnosis and opinion concerning defendant's criminal responsibility.

The jury returned a verdict of guilty of first-degree murder. The jury found one aggravating circumstance but found it insufficient to impose the death penalty and instead recommended life imprisonment. The defendant appealed to this Court as a matter of right.

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

Jerry B. Clayton and Susan F. Olive, for defendant-appellant.

BRANCH, Chief Justice.

Defendant assigns as error the failure of the trial judge to quash the indictment charging him with murder and to quash the petit jury panel. He contends that the grand and petit jurors were selected in a discriminatory manner and did not represent a cross section of the community. By this assignment of error he also argues that the trial judge erred by refusing to order at State's expense an update analysis of Durham County jury panel and master jury list.

In support of the first portion of this assignment of error, defendant relies upon *Taylor v. Louisiana*, 419 U.S. 522 (1975), for the proposition that the sixth amendment guarantees that an accused must be tried by a jury composed of individuals who reflect a cross section of the community in which the crime was committed.

The defendant must carry the burden of showing a prima facie violation of this requirement by demonstrating that a distinctive group was clearly underrepresented as a result of the jury selection process. *Duren v. Missouri*, 439 U.S. 357 (1979). A person who seeks to carry this burden does not need to be a member of the discriminated class to assert his rights to a representative petit jury. *Taylor v. Louisiana*, 419 U.S. 522. When a defendant establishes such a prima facie case, the burden shifts to the State to rebut the established prima facie case. *State v. Hardy*, 293 N.C. 105, 235 S.E. 2d 828 (1977).

[1] In order to establish a prima facie case of violation of the fair cross section principle a defendant must show that: (1) the group alleged to have been excluded is a distinctive group; (2) the representation of the group in question within the venire is not fair and reasonable with respect to the number of such persons in the community; and (3) this underrepresentation is due to systematic exclusion of the group in the jury selection process. *State v. Price*, 301 N.C. 437, 272 S.E. 2d 103 (1980); *State v. Avery*, 299 N.C. 126, 261 S.E. 2d 803 (1980); *State v. Cornell*, 281 N.C. 20, 187 S.E. 2d 768 (1972); *see also Swain v. Alabama*, 380 U.S. 202 (1965). In *Price*, we held that a fourteen percent absolute disparity, standing alone, was not sufficient to show that black citizens were not fairly reflected in the jury pool. In *Cornell*, we found that purposeful discrimination based on race was not shown by evidence of underrepresentation of blacks on the jury panel by as much as ten percent. *Swain v. Alabama, supra*, held likewise.

Evidence of underrepresentation requires a comparison of the proportion of the identifiable group in the total population to the population called for jury service. *State v. Hough*, 299 N.C. 245, 262 S.E. 2d 268 (1980).

[2] In instant case, defendant, a white man tried by an all white jury, relied solely upon data prepared by Mr. James O'Reilly, of the Duke University Sociology Department, which tended to show an absolute disparity of 7.8 percent of underrepresentation of black citizens in Durham County on the jury panel. We therefore conclude that defendant has failed to offer evidence tending to show that the representation of the group in question within the venire was not fair and reasonable with respect to the number of such persons in the community; furthermore, defendant has of-

fered no evidence to show that there was any systematic exclusion of the group in the jury selection process. He has therefore failed to establish a prima facie case showing violation of the fair cross section principle set forth in *Price*, *Avery*, and *Cornell*.

[3] Neither do we find merit in defendant's contention that the trial judge erred in denying his motion for a fee for Mr. O'Reilly to update his data as to Durham County from 1979 to the date of the trial.

In *State v. Gray*, 292 N.C. 270, 233 S.E. 2d 905 (1977), we in part stated:

> There are, then, no constitutional or legal requirements that private investigators or expert assistance *always* be made available simply for the asking. (Citation omitted.) Our statutes, G.S. 7A-450(b) and 7A-454, as interpreted in *Tatum* and *Montgomery* require that this kind of assistance be provided only upon a showing by defendant that there is a reasonable likelihood that it will materially assist the defendant in the preparation of his defense or that without such help it is probable that defendant will not receive a fair trial. Neither the state nor the federal constitution requires more.

292 N.C. at 278, 233 S.E. 2d at 911 (emphasis in original).

We glean from our search of the transcript that defense counsel was of the opinion that he could establish a ten percent absolute disparity of underrepresentation of black citizens on the jury in Durham County if Mr. O'Reilly were paid for two days additional work. Assuming this to be true, we hereinabove have demonstrated that such evidence would not aid in establishing the prima facie case which defendant sought to raise. Further, defendant has failed to show a reasonable likelihood that Mr. O'Reilly's additional services would have materially assisted defendant in his defense or that without such evidence he probably would not have received a fair trial.

This assignment of error is overruled.

By his second assignment of error defendant contends that the jury selection procedures at trial deprived him of a fair and impartial trial in violation of the Sixth and Fourteenth Amendments to the United States Constitution.

[4] In support of his position defendant first avers that the trial court erred by denying his motion to prohibit death qualification of jurors.

This Court has consistently rejected this argument. *State v. Fincher*, 309 N.C. 1, 305 S.E. 2d 685 (1983); *State v. Taylor*, 304 N.C. 249, 283 S.E. 2d 761 (1981); *State v. Avery*, 299 N.C. 126, 261 S.E. 2d 803 (1980); *State v. Cherry*, 298 N.C. 86, 257 S.E. 2d 551 (1979); *State v. Montgomery*, 291 N.C. 235, 229 S.E. 2d 904 (1976). Defendant cites no precedent or argument which would persuade us to overrule this well-established line of authority.

We further find no merit in defendant's contention that the trial judge erred by denying his motion to limit the questions asked of jurors concerning their views on capital punishment.

[5] It is well recognized in this jurisdiction that both the State and defendant have a right to question prospective jurors about their views on the death penalty so as to insure a fair and impartial verdict. *State v. Crowder*, 285 N.C. 42, 203 S.E. 2d 38 (1974), *modified*, 428 U.S. 903 (1976). The extent and manner of inquiry into prospective jurors' qualifications in a capital case is a matter that rests largely in the trial judge's discretion and his rulings will not be disturbed absent a showing of an abuse of that discretion. *State v. Bryant*, 282 N.C. 92, 191 S.E. 2d 745 (1972), *cert. denied* 410 U.S. 987 (1973). Here defendant has failed to show any abuse of discretion on the part of the trial judge.

[6] Under this assignment of error defendant next contends that the trial judge erred by denying his motion for individual *voir dire* of prospective petit jurors.

In support of this position defendant cites *State v. Taylor*, 298 N.C. 405, 259 S.E. 2d 502 (1979); *State v. Thomas*, 294 N.C. 105, 240 S.E. 2d 426 (1978). Both of these cited cases stand for the proposition that a motion to examine prospective jurors individually is directed to the trial judge's sound discretion and his ruling will not be disturbed absent a showing of abuse of that discretion. *Accord State v. Jackson*, 309 N.C. 26, 305 S.E. 2d 703 (1983); *State v. Brown*, 306 N.C. 151, 293 S.E. 2d 569, *cert. denied*, 74 L.Ed. 2d 642 (1982). Again, defendant has shown no abuse of discretion on the part of the trial judge in instant case.

[7] Defendant filed a pretrial motion requesting the trial judge to instruct each juror prior to his *voir dire* examination as follows:

> (Members of the jury.) You may be asked questions concerning your attitude towards capital punishment. In this regard, I give you the following instructions. In the event that the defendant is found guilty of first degree murder, and only in that event, the law requires that the jury consider, on the basis of factors as to which I will instruct you, whether or not the death penalty should be imposed.
>
> Thus, in the event the defendant is found guilty of first degree murder, the law requires that even if you are absolutely opposed to capital punishment, you should *consider* whether a sentence of death should be imposed. You must not lightly disregard your obligation as a juror. Where possible, you should subordinate your personal feelings about capital punishment to the duty imposed by law. I repeat that this duty is that you *consider* whether a death sentence should be imposed in the case before you.
>
> In responding to the questions which will be put to you regarding the death penalty, you must keep in mind your duty as a juror as I have just explained it to you.

Defendant cites no authority to support this motion and our research discloses none. Again, defendant seeks to invade the discretionary power of the trial judge's duty to supervise and control the course of the trial. We find no abuse of discretion in the denial of this motion. Neither do we find error of omission or commission in the court's instructions to the jury concerning their duties in the trial of this case.

This assignment of error including subsections a through d is overruled.

[8] Defendant's third assignment of error is two-fold. He argues first that the trial judge abused his discretion in denying defendant's motion to sequester the jury. Defendant premised his motion on his contention that pretrial and trial publicity were unfairly prejudicial to the trial of his case. Defendant concedes that the decision to sequester an impanelled jury is ordinarily left to the sound discretion of the trial court. *State v. Davis*, 290 N.C.

511, 227 S.E. 2d 97 (1976); *State v. Hamilton*, 264 N.C. 277, 141 S.E. 2d 506 (1965), *cert. denied*, 384 U.S. 1020 (1966). A careful examination of defendant's exhibits, consisting of several newspaper articles primarily dealing with his hospitalization for mental illness, reveals that they are non-inflammatory and fall far short of tending to establish unfair prejudice. Defendant has failed to show an abuse of the court's discretion.

[9] Second, defendant argues that the trial court erred in denying his motion to prohibit the "exhibition" of deceased's family members to the jury. Defendant contends that the family members "positioned themselves at the courtroom door so that the jury would have to walk past them every morning upon entering the court." This "exhibition," according to defendant, denied him a fair and impartial trial because it inflamed the jury and caused them to render a guilty verdict. This contention is without merit. No evidence in the record suggests any impropriety on the part of any member of the victim's family and defendant has not only failed to show an abuse of discretion, he has failed to show in the first instance any adequate grounds for the exercise of discretion. *Compare State v. Stafford*, 203 N.C. 601, 166 S.E. 734 (1932).

Defendant's third assignment is overruled.

Defendant next contends, again in multi-faceted fashion, that he was denied a fair trial by the court's failure to dismiss jurors who expressed doubts about the insanity defense and also by the court's permitting the State to express during *voir dire* an inaccurate description of the burden of proof.

[10] Defendant's first contention fails in that he has not demonstrated that if there were error, it was prejudicial. Defendant challenged for cause the jurors who allegedly expressed doubts about the insanity defense. Upon the trial court's denial of the challenges for cause, defendant exercised his peremptory challenges. Defendant concedes there was no showing of prejudice under our well-settled rule that "a defendant, in order to preserve his exception to the court's denial of a challenge for cause, must (1) exhaust his peremptory challenges *and* (2) thereafter assert his right to challenge peremptorily an additional juror." *State v. Allred*, 275 N.C. 554, 563, 169 S.E. 2d 833, 838 (1969) (emphasis in original). Defendant failed here to assert an additional peremptory challenge.

[11] Defendant secondly argues within this assignment that the State presented an inaccurate description of the burden of proof during one of its questions to a prospective juror. In questioning a prospective juror, Dr. Bill L. Gunn, the following exchange occurred:

> Mr. Edwards: You do understand that the defendant does have a burden of showing to the satisfaction of the jury that he was insane at the time of the act alleged?
>
> Dr. Gunn: Yes.
>
> Mr. Edwards: That if he does not so satisfy the jury then—and the jury does find that he committed the alleged act beyond a reasonable doubt, then the jury must return a verdict of guilty?
>
> Dr. Gunn: (Nods head.) Yes.

Defendant's objection to the prosecutor's last statement was overruled. Defendant argues that the statement was incorrect because it did not set forth all the essential elements of murder. Thus, defendant argues, the statement misled the jurors concerning the State's burden of proof. We disagree.

It is the duty of the trial court "to see that a competent, fair and impartial jury is impaneled. . . ." *State v. Johnson*, 298 N.C. 355, 362, 259 S.E. 2d 752, 757 (1979). However, the court's rulings will not be reversed absent a showing of abuse of discretion. *State v. Phillips*, 300 N.C. 678, 268 S.E. 2d 452 (1980). In light of the extensive *voir dire* in this case, the proper instructions on the law by the judge, and defendant's inability in the first instance to demonstrate the clear prejudicial error in the State's question, we are not inclined to hold that the trial judge abused his discretion in overruling defendant's objection.

[12] In his fifth assignment, defendant challenges the admission of certain testimony concerning statements made by him to witnesses. He first contends that the court erred in finding that his statements to Betty Jane Denton and Kenny Glenn were not subject to discovery under G.S. 15A-904(a). Defendant apparently acknowledges that under our rule in *State v. Crews*, 296 N.C. 607, 252 S.E. 2d 745 (1979), he is only entitled to discover statements "made by him to persons *acting on behalf of the State*." *Id.* at 620, 252 S.E. 2d at 754 (emphasis added). Nevertheless, defendant relies on *State v. Hardy*, 293 N.C. 105, 235 S.E. 2d 828 (1977), and

asserts that such statements should have been discoverable at trial. Defendant's reliance upon *Hardy* is misplaced. *Hardy* dealt with the required disclosure of material at trial which is "favorable and material to the defense." *Id.* at 127, 235 S.E. 2d at 841. In the instant case, we are not concerned with matters favorable to defendant which are being suppressed by the prosecution. Here we are dealing with statements, made by defendant to witnesses, which are inculpatory in nature and which the State offered into evidence at trial against defendant. The statements were not discoverable under G.S. 15A-904(a); nor were they subject to required disclosure under the *Hardy* rule.

[13] Defendant also contends that the court erred in admitting the testimony of Deputy Kenneth Wilson. Initially, the trial court ruled Deputy Wilson's testimony inadmissible due to the prosecution's failure to provide it to defendant pursuant to requested discovery. Later, the trial judge reversed his decision and allowed the testimony.

Defendant here contends that the deputy's testimony was extremely prejudicial and that its admission was error pursuant to our rule that one superior court judge may not overrule another superior court judge. *See Davis v. Jenkins*, 239 N.C. 533, 80 S.E. 2d 257 (1954). Defendant, by analogy, argues that such a rule precludes a judge from reversing himself during the course of a trial. We disagree. It is not error for a judge to change his ruling on the admissibility of evidence. 1 Brandis, N.C. Evidence § 28 (2d rev. ed. 1982). Furthermore, a trial judge who determines that he has committed error during the course of a trial certainly should take whatever steps necessary to cure or correct a detected error. Curative action often precludes unnecessary and prolonged review by the appellate courts. This assignment is without merit.

[14] Defendant next contends that the trial court erred in refusing to allow the introduction of testimony by Shirley Lloyd. Ms. Lloyd, defendant's sister, testified regarding her contacts and communications with defendant following his arrest. During a portion of defendant's examination of this witness, the following took place:

> Q. When Mr. Edwards was focusing in on whether or not you felt that being depressed and sad and crying was an ap-

propriate response for a person who had been charged with first-degree murder, I believe you said that you were aware of the charges pending against him. What I want to ask, is do you know whether or not your brother was aware of those charges?

OBJECTION

OVERRULED

A. No, I am not. At that point I don't know whether he was aware or not.

Q. Did your brother say anything or do anything to cause you to have doubts as to whether or not he was aware of it?

OBJECTION

SUSTAINED

Q. Can you state what he said or did regarding the charges that had been brought, or regarding the death of his wife?

A. I am not sure if this is the first time I saw him, but he did tell me later that he didn't remember anything.

Q. Did he ever state to you anything concerning whether or not his wife was dead?

OBJECTION

SUSTAINED

Q. Do you know whether or not your brother knew that his wife was dead?

OBJECTION

SUSTAINED

Q. Did he ever state to you whether or not he knew that his wife was dead?

OBJECTION

SUSTAINED

Defendant contends that the purpose of the questions posed was to elicit testimony that defendant was not aware of his wife's

death or of the charges brought against him. Defendant argues that the excluded evidence was admissible and was relevant to rebut the State's cross-examination of the witness which tended to show that defendant's attitude and depression were normal responses for a person whose wife was dead and who had been charged with murder. We disagree.

It is elementary in the law of evidence that ordinarily a witness may only testify concerning matters within his own personal knowledge. *Robbins v. Trading Post*, 251 N.C. 663, 111 S.E. 2d 884 (1960). In the instant case, the fact of defendant's own awareness or lack of awareness of his wife's death was beyond the realm of the witness's personal knowledge and she was therefore not competent to testify concerning that matter. *Id.* Furthermore, regarding the defendant's awareness, or lack thereof, of charges having been brought, the witness testified unequivocally that she did not know whether he was aware or not. There was no error in the trial court's exclusion of the witness's testimony.

Defendant's next assignment relates to the admission of testimony of State's witnesses Betty Glenn, Wayne Joyner, Debbie Starnes, Carolyn Neely and Shirley Lloyd.

[15] Considering defendant's contentions seriatim, we turn first to the challenged testimony of Ms. Glenn. Ms. Glenn, a co-worker of decedent, testified concerning her knowledge of the events which transpired on 5 August 1980. She recalled the victim's having asked her to "stay close enough by her that if anything happened that I could get her some help." Ms. Glenn then testified that she followed decedent out of the parking lot onto the highway at which point the witness saw a light blue Volkswagen square-back pull over behind them. Ms. Glenn went on to recount the events which she witnessed prior to and surrounding defendant's shooting of his wife. The State then introduced a prior statement made by Ms. Glenn for purposes of corroboration. Defendant objected to the introduction of the statement and now maintains that it was erroneously admitted for corroborative purposes since it did not, in fact, corroborate her testimony. Ms. Glenn's written statement included statements made to her by the victim which were not contained in Ms. Glenn's testimony. For example, according to the written statements, the victim had mentioned to Ms. Glenn that she and defendant had separated and also that he

had shot at her the day before. Defendant contends these statements were noncorroborative and highly prejudicial since they tended to establish premeditation and deliberation. We disagree.

It is well settled in this jurisdiction that prior consistent statements are admissible as corroboration to strengthen the credibility of a witness. *See generally* 1 Brandis, *supra* § 51 (2d rev. ed. 1982) and cases cited therein. However, such statements are admissible only if they do, in fact, corroborate the witness. *State v. Patterson*, 288 N.C. 553, 220 S.E. 2d 600 (1975), *death sentence vacated*, 428 U.S. 904 (1976); *State v. Bagley*, 229 N.C. 723, 51 S.E. 2d 298 (1949).

> If the previous statements in corroboration are generally consistent with the witness's testimony, slight variations between them will not render the statements inadmissible. Such variations affect only the credibility of the evidence which is always for the jury.

State v. Britt, 291 N.C. 528, 535, 231 S.E. 2d 644, 650 (1977). In the instant case, most of the variations noted by defendant are slight. None of the variations contradicted the witness's testimony. *See State v. Britt*, 291 N.C. 528, 231 S.E. 2d 650 (1977). Assuming, *arguendo*, that the reference to the defendant's having shot at the decedent amounted to more than a slight variation from the witness's testimony, its admissibility was not prejudicial error. First, the trial court gave a limiting instruction to the jury to consider the written statement only if and to the extent it corroborated her testimony. *Id.* Second, there was other evidence in the record of defendant's having shot at the decedent on the day before the killing, as well as other substantial evidence tending to show premeditation and deliberation. We cannot perceive how the admission of this one reference, if error, could possibly amount to error sufficiently prejudicial to warrant a new trial. Furthermore, defendant made only a broadside objection and did not specify which portions he deemed objectionable. Since it is "the duty of the objecting party to call to the attention of the trial court the objectionable part," broadside objections to corroborative testimony "will not generally be sustained if any portion of such testimony is competent." *Id.* at 536, 231 S.E. 2d at 650.

[16] Defendant next challenges the admission of the following testimony of Wayne Joyner, his brother-in-law:

> Q: Okay, subsequent to that time has the defendant Billy Raye Adcock tried to borrow a sum of money from you, specifically a short while before the 5th of August, 1980?
>
> A: He came to my house one night and wanted to borrow thirty-five hundred dollars.
>
> Q: Did he tell you why he wanted the thirty-five hundred dollars?
>
> A: He said that he had helped some—
>
> OBJECTION
>
> OVERRULED
>
> A: I think he had helped some school kids with some project of selling some candy or something, and he took the money and paid a bill, and did something with it, and needed it to pay this back for a few days until he could get the money together.

Defendant contends that this evidence had no relevance to any issue in the case and only served to prejudice him "by depicting him as a person who takes and spends charity money raised by school kids." We note at the outset that defendant made only a general objection to the evidence, and it is well settled that "[a] general objection, if overruled, is ordinarily no good, unless, on the face of the evidence, there is no purpose whatever for which it could have been admissible." 1 Brandis, *supra* § 27. It is not the responsibility of the trial court to predict the grounds of every objection made to testimony. It is the duty of counsel claiming error to "demonstrate not only that the ruling was in fact incorrect, but also that he provided the judge with a timely and specifically defined opportunity to rule correctly." *Id.* This the defendant has not done. The witness had previously testified, without objection, that defendant had borrowed sums of money from him on several occasions. There is nothing on the face of the above stated question which indicates its objectionability. Apparently, it was the witness's response to which defendant registers objection, rather than the form of the question. Even so, as pointed out, defendant gave no grounds for objection. Furthermore, he made no motion

to strike the response. When the question does not indicate the inadmissibility of the answer, defendant should move to strike as soon as the inadmissibility becomes known. Failure to so move constitutes a waiver. *State v. Battle*, 267 N.C. 513, 148 S.E. 2d 599 (1966).

Defendant next challenges the admissibility of the testimony of Debbie Starnes, and of Carolyn Neely. We have carefully reviewed the evidence of both of these witnesses. We note at the outset that defendant here, as with the Witness Joyner, made only general objections which were overruled; thus he did not effectively preserve the alleged errors for review. 1 Brandis, *supra*. Furthermore, our review of the challenged testimony reveals nothing which, if error at all, would permit us to hold that there is a "reasonable possibility" that, absent the alleged error, "a different result would have been reached at trial." G.S. 15A-1443.

Defendant finally submits that the court erred in permitting the following question asked by the prosecutor in cross-examining the witness Shirley Lloyd:

> Q: Are those events, I am asking you, ma'am, if his mood was not consistent with the situation that he found himself in at that point?
>
> OBJECTION
>
> OVERRULED
>
> Q: . . . from your observation.
>
> A: Would you repeat it again very slowly.
>
> Q: Was his mood consistent in other words was his depression, his crying, his sadness, didn't you find that consistent with the situation that he was in? His wife was dead. She had been shot, he was charged with first-degree murder in the shooting. The shooting was being charged as a capital offense. Now, wasn't his depression, wasn't his crying, wasn't his sadness consistent with that situation, consistent with the situation he found himself in?
>
> Mr. Myrick: That calls for an opinion from her.
>
> Court: Overruled. It has been asked repeatedly, you may answer.

> A: Well, like I said, he didn't—I don't know why he was crying because he didn't say anything, maybe because he hadn't seen any of us. I don't know.

Defendant argues that the court erred in permitting the prosecutor to elicit opinion testimony from a lay witness. Assuming that there was error, we can find no prejudice.

First and foremost, the witness never answered the question. Second, the prosecutor had already asked virtually the same question two or three times without objection. Thus the defendant may be deemed to have waived his objection. *See* 1 Brandis, *supra* § 30.

This assignment, including sub-parts A, B (which itself included three different legal questions) and C is overruled.

[17] Defendant's eighth assignment concerns the prosecutor's closing argument to the jury. Defendant challenges the following statement made by the district attorney:

> The fact that this defendant is up here being judged in this Court indicates that he has acted improperly, has deviated, has committed a law [sic] against people in North Carolina, and against you as the people in this community.

Upon objection, the trial court immediately sustained the objection and instructed the jury to disregard the statement.

It is well settled that "argument of counsel must be left largely to the control and discretion of the presiding judge and that counsel must be allowed wide latitude in the argument of hotly contested cases." *State v. Monk*, 286 N.C. 509, 515, 212 S.E. 2d 125, 131 (1975). Even so, the arguments of counsel are not without limitations, and the "trial court has a duty, upon objection, to censor remarks not warranted by either the evidence of the law, or remarks calculated to mislead or prejudice the jury." *Id.* at 516, 212 S.E. 2d at 131. In the instant case, the statements were clearly improper; nevertheless, the court promptly sustained defendant's objection and instructed the jury to disregard the statements. The impropriety of the prosecutor's remarks were therefore cured. *State v. Pruitt*, 301 N.C. 683, 273 S.E. 2d 264 (1981); *State v. Sparrow*, 276 N.C. 499, 173 S.E. 2d 897 (1970), *cert. denied*, 403 U.S. 940 (1971).

[18] By his ninth assignment of error, the defendant contends that the trial judge erred in charging the jury to consider evidence on the issue of insanity only after finding that the State had proven all of the elements of the crime charged. While we have indicated that the better practice in a case such as this would be to submit the issue of insanity first, we have also specifically held that, nothing else appearing, it does not constitute reversible error first to submit the elements of the crime and to submit the issue of insanity last. *State v. Cooper*, 286 N.C. 549, 213 S.E. 2d 305 (1975).

Even so, defendant sets forth several grounds for his assertion that the inverse order of the charge confused the jury as to the relationship between the instruction on insanity as a complete defense and the following instruction, given in connection with the charge on first-degree murder, on insanity as a mental condition tending to negate premeditation and deliberation:

> [I]nsanity, which by its form precludes the mental processes of premeditation and deliberation, is a defense to the charge of murder in the first degree. A defendant who does not have the mental capacity to form an intent to kill, or to premeditate and deliberate upon the killing due to mental illness or insanity, cannot be lawfully convicted of murder in the first degree.

The above-quoted instruction amounts to an instruction on diminished capacity. *See State v. Cooper*, 286 N.C. 549, 213 S.E. 2d 305. This Court has consistently held that a defendant is not entitled to such an instruction *e.g., State v. Jerrett*, 309 N.C. 239, 307 S.E. 2d 339 (1983); and, in fact, here the defendant does not challenge the inclusion *per se* of the instruction, since the inclusion was favorable to him. Despite, however, its favorable inclusion, defendant claims that the trial judge did not adequately distinguish between insanity as a complete defense and insanity as a diminished capacity defense. We disagree. Our reading of the charge reveals that the diminished capacity instruction was clearly related to the charge on premeditation and deliberation, and the charge on insanity as a complete defense came much later. The distinction between the two defenses was clear, and we cannot perceive in what way the jury could have been confused by the order of the instructions. This assignment is overruled.

[19] By his tenth assignment, defendant challenges the trial judge's instruction regarding the consequences of a verdict of not guilty by reason of insanity. Defendant contends that the instruction given led the jury to believe that upon a verdict of acquittal due to insanity, defendant would be released without any commitment proceeding. Thus, he argues, fear on the part of jurors that he would be set free prompted them to render a verdict of guilty.

The challenged portion of the charge is as follows:

> I further instruct you, members of the jury, that when a defendant charged with a crime is found not guilty by reason of insanity, the trial court upon such additional hearing as is deemed necessary may direct that there be civil proceedings to determine whether the person should be involuntarily committed; and if the trial judge finds that there are reasonable grounds to believe that the defendant is mentally ill and is imminently dangerous to himself or others, and he determines upon appropriate findings of fact that it is appropriate to hold such involuntary commitment proceeding, he may order the defendant held in appropriate restraint pending these proceedings.
>
> If it is determined in those proceedings that the defendant is mentally ill and is at that time dangerous to himself or others, the court will order the defendant to be confined and treated as an in-patient at a state mental health facility, and this involuntary commitment will continue subject to periodic review, until the Chief of medical services of that facility, and the court, after a full evidentiary hearing, determines that the defendant is not in need of continued hospitalization.

Defendant contends that the use of the word "may," as underscored, left the impression that the possibility of commitment proceedings was tenuous and thus the instruction "only reinforced the idea that the insanity defense is a loophole." Defendant relies on *State v. Hammonds*, 290 N.C. 1, 224 S.E. 2d 595 (1976), in which the Court addressed this identical issue and stated:

> [U]pon request, a defendant who interposes a defense of insanity to a criminal charge is entitled to an instruction by the trial judge setting out in substance the commitment pro-

cedures outlined in G.S. 122-84.1 applicable to acquittal by reason of mental illness.

Id. at 15, 224 S.E. 2d at 604.

The Court elaborated further in *State v. Bundridge*, 294 N.C. 45, 239 S.E. 2d 811 (1978):

> The gist of G.S. 122-84.1 is that the trial judge shall hold a defendant who is acquitted on the grounds of insanity for further hearings to determine whether he is imminently dangerous to himself or others.

Id. at 53, 239 S.E. 2d at 817.

Defendant places particular emphasis on the use of the word "shall" in the above-quoted statement. He essentially maintains that the court should have used "shall" in the instant case. We disagree. Notably, the statute upon which the *Bundridge* language rested, G.S. 122-84.1, used the word "shall" in setting out the procedure for conducting commitment hearings when a defendant is acquitted on grounds of mental illness. That statute, repealed in 1977 (c. 711, s. 33, effective 1 July 1978), provided as follows:

> (a) Upon the acquittal of any criminal defendant on grounds of mental illness the trial court shall order the defendant held under appropriate restraint pending a hearing on the issue of whether the defendant is mentally ill and imminently dangerous to himself or others, as these terms are defined in Article 5A of this Chapter. The hearing shall be conducted in accordance with the provisions of G.S. 122-58.7 except that the hearing shall be held in a courtroom and need not be closed to the public. Evidence adduced at the trial of the defendant on the criminal charges on the issue of mental illness shall be admissible at the hearing. If the hearing cannot be conducted prior to the termination of the session of court in which the criminal trial was had, it shall be calendared in the district court in the same county within 10 days. If the court finds that the defendant-respondent is mentally ill and imminently dangerous to himself and others, it shall order him committed to a regional psychiatric facility designated by the Division of Mental Health and Mental Retardation Services for a period of not more than 90 days.

> The defendant shall thereafter be considered as though he had been committed initially under the provisions of Article 5A of this Chapter. If the court finds that the defendant is not mentally ill and imminently dangerous to himself or others, it shall order his discharge.
>
> (b) The provisions of this section supersede those provisions of G.S. 122-84 which prescribe the procedures to be used in the case of a defendant acquitted of a criminal charge by reason of mental illness.

In *State v. Harris*, 306 N.C. 724, 295 S.E. 2d 391 (1982), Justice Martin, speaking for the Court, further construed the requirement of *Hammonds*:

> In the present case, defendant argues . . . that the court did not give the instructions in sufficient detail. We hold that the instructions substantially comply with the requirements of *Hammonds* and *Bundridge*. Judge Hobgood gave the jury the central meaning of the statute: that if defendant was acquitted by reason of insanity, he would not be released but would be held in custody until a hearing could be held to determine whether he should be confined to a state hospital. This was sufficient to remove any hesitancy of the jury in returning a verdict of not guilty by reason of insanity, engendered by a fear that by so doing they would be releasing the defendant at large in the community.

Id. at 727, 295 S.E. 2d at 393.

In addition to the holding in *State v. Harris* that substantial compliance is sufficient to meet the requirements of *Hammonds*, we note that, upon repeal of G.S. 122-84.1, the legislature in 1977 enacted G.S. 15A-1321 to govern procedures following acquittal by reason of insanity. Significantly, the 1977 statute used the word "may," instead of "shall."[1] The trial judge in this case instructed the jury in almost the precise language of the applicable statute, which is also the form of the Pattern Jury Instruction. The trial court accurately and adequately charged the jury regarding pro-

1. Effective 1 October 1983, the legislature amended G.S. § 15A-1321 and reinserted the word "shall" in place of "may" wherever the former occurred in the 1977 statute.

cedures upon acquittal on the ground of insanity. This assignment is without merit.

[20] Defendant also argues under this assignment that the following instruction was erroneous:

> [I]f you are in doubt as to the insanity of the defendant, the defendant is presumed under the law to be sane, and so you would find the defendant guilty if he is otherwise guilty.

Defendant contends that this instruction, concededly in accord with the North Carolina Pattern Jury Instruction, improperly raised his burden of "satisfying" the jury as to his insanity to that of removing from their minds all doubt as to his sanity. While we must admit that the words used by the trial judge are arguably susceptible of different interpretations, we are constrained to hold that there was no prejudicial error in this portion of the charge as given.

First, the trial court amply and accurately charged the jury that the defendant's burden of proving insanity was only to "satisfy" them; the judge made it plain that the State's burden of proving the elements of the crime was "beyond a reasonable doubt," a standard of proof much more stringent than that placed upon defendant. Read contextually, then, assuming the challenged portion was ambiguous, it could not have so confused or misled the jury as to warrant the giving of a new trial in this case. *State v. Harris*, 223 N.C. 697, 28 S.E. 2d 232 (1943); *State v. Smith*, 221 N.C. 400, 20 S.E. 2d 360 (1942).

Secondly, we believe, when read contextually, the trial judge's statement is a correct statement of the law. It is well settled in this State that, in order to prove the elements of the crime charged, the prosecution is entitled to rely upon the presumption of sanity. *State v. Harris*, 223 N.C. 697, 28 S.E. 2d 232. Nothing else appearing, then, and assuming that proof is made out of the other elements of the crime, the defendant would be guilty. The burden of proving to the jury his insanity rests on the defendant and he must prove insanity to the satisfaction of the jury. *Id.* If they are not "satisfied," he has not met his burden and the presumption prevails. *Id.* As stated in *State v. Creech*, 229 N.C. 662, 51 S.E. 2d 348 (1949):

> [T]he whole matter in respect of the burden of proof and the burden of satisfaction, where insanity or mental debility is interposed as a defense, is thoroughly discussed in the case of *S. v. Harris*, [223 N.C. 697, 28 S.E. 2d 232], and it would only be a work of supererogation to restate it here. The presumption that the accused was sane and responsible for his acts persists until the contrary is shown to the satisfaction of the jury. Therefore, if the jury are left *in doubt* as to the sanity or responsibility of the accused, the presumption prevails.

Id. at 674, 51 S.E. 2d at 357. (Emphasis added.) *State v. Caddell*, 287 N.C. 266, 215 S.E. 2d 348 (1975).

Obviously, the phrase "in doubt" as used in the Pattern Jury Instruction and here in the trial judge's charge originated in the above-quoted language, later quoted with approval in *State v. Caddell*. "In doubt," as so used, in our opinion, means essentially the same as "uncertain," *see* Webster's Third New International Dictionary, 679 (1976), or in this case, "not satisfied." As used, and especially in the context of the trial judge's ample explanation of the defendant's lesser burden, we do not believe that the use of the phrase "in doubt" conveyed to the jury the message that defendant's burden had suddenly been raised to that of "beyond a reasonable doubt."

We believe, however, that in the future the better practice would be to substitute the term "not satisfied" in lieu of "in doubt." The former phrase comports with the established terminology in this area of the law and certainly erases any hint of ambiguity concerning defendant's burden of proving his insanity.

[21] By his assignment of error No. 11 defendant contends that the trial judge erred by failing to instruct the jury on the weight to be given circumstantial evidence.

Defendant in apt time, in writing, requested the following instruction:

> The State relies in part upon what is known as circumstantial evidence. Circumstantial evidence is evidence of facts from which other facts may logically and reasonably be deduced.
>
> Circumstantial evidence may be of two kinds. The first kind consists of a number of separate links, each link depend-

ing upon the other, and the series of links connecting to or from a chain. In such a case each link must be complete in itself and the resulting chain cannot be stronger than its weakest link. If you have a reasonable doubt as to any one or several of the links, then the chain is broken, and you would return a verdict of not guilty. The State must prove to you beyond a reasonable doubt each and every link of the chain of circumstances upon which it relies in order for you to return a verdict of guilty as charged.

The second kind of circumstantial evidence consists of a number of independent circumstances, all pointing in the same direction, similar to the strands of a rope. Although no one of the strands or circumstances may be sufficient in itself, all of them together may be strong enough to prove the guilt of the defendant, or, they may establish his innocence or raise in your minds a reasonable doubt as to his guilt.

Circumstantial evidence is recognized and accepted proof in a court of law. However, before you may rely upon circumstantial evidence to find the defendant guilty you must be satisfied beyond a reasonable doubt that not only is the circumstantial evidence relied upon by the State consistent with the defendant's being guilty but that it is inconsistent with his being innocent.

"Direct evidence is that which is immediately applied to the fact to be proved, while circumstantial evidence is that which is indirectly applied by means of circumstances from which the existence of the principal fact may reasonably be deduced or inferred." 1 Brandis, *supra*, § 76, p. 284.

In 2 Brandis, *supra*, § 210, p. 155, we find the following language:

Circumstantial evidence is recognized as "essential and, when properly understood and applied, highly satisfactory in matters of the gravest moment," but a conviction may not be based upon it unless the circumstances point to guilt and exclude to a moral certainty every reasonable hypothesis except that of guilt. Upon request, the judge should instruct

> the jury along this "moral certainty" line, but the instruction need follow no set formula.

(Footnotes omitted.)

The above-quoted statement from Brandis is as accurate a statement as could be made of this unsettled area of the law. Unquestionably circumstantial evidence is "essential and, when properly understood and applied, highly satisfactory in matters of the gravest moment." *Id. State v. Cash*, 219 N.C. 818, 15 S.E. 2d 277 (1941). In our opinion the language that a conviction cannot be based upon this type of evidence "unless the circumstances point to guilt and exclude to a moral certainty every reasonable hypothesis except that of guilt" is merely another way of saying that the jurors must be convinced of the defendant's guilt beyond a reasonable doubt. The quoted language sets forth the same measure of proof as contained in our recognized and approved instruction on reasonable doubt. However, whether the trial judge is required to give the "moral certainty" or "reasonable hypothesis" instruction when aptly requested is a beclouded area of the law in this jurisdiction. We find cases which hold that in criminal cases in which the State relies wholly or in part on circumstantial evidence it is sufficient to give the approved reasonable doubt charge. *State v. Adams*, 138 N.C. 688, 50 S.E. 765 (1905). Conversely, we find authority which tends to support defendant's position that it is error for the trial judge to refuse to give the "moral certainty" instruction when the State relies on circumstantial evidence and defendant aptly requests such instruction. *State v. Johnson*, 294 N.C. 288, 239 S.E. 2d 829 (1978); *State v. Branch*, 288 N.C. 514, 220 S.E. 2d 495 (1975), *cert. denied*, 433 U.S. 907 (1977); *State v. Willoughby*, 180 N.C. 676, 103 S.E. 903 (1920). We therefore deem it necessary to review these conflicting lines of authority.

In *State v. Adams*, 138 N.C. 688, 50 S.E. 765 (1905), the defendant was charged with first-degree murder. At trial, defendant, *inter alia*, requested the court to give the following instruction:

> 1. When circumstantial evidence is relied upon to convict, it must be clear, convincing, and conclusive in its connection and combination, and must exclude all rational doubt as to the defendant's guilt. And, therefore, if the evidence as to

> the footprints in this case is not clear, satisfactory, convincing, and conclusive to the minds of the jury—in other words, if such evidence does not point with moral certainty to the guilt of the defendant and to that of no other person—then the jury should acquit the defendant, unless the whole evidence in the case, after leaving out of consideration the evidence bearing upon the footprints, is sufficient to satisfy fully the minds of the jury as to the guilt of the defendant.

Id. at 691-92, 50 S.E. at 766.

The trial judge declined to give the instruction and his failure to do so was one of defendant's assignments of error. This Court, finding no error in the trial judge's rulings, stated:

> There is no particular formula by which the court must charge the jury upon the intensity of proof. "No set of words is required by the law in regard to the force of circumstantial evidence. All that the law requires is that the jury shall be clearly instructed, that unless after due consideration of the evidence they are 'fully satisfied' or 'entirely convinced' or 'satisfied beyond a reasonable doubt' of the guilt of the defendant, it is their duty to acquit, and every attempt on the part of the courts to lay down a 'formula' for the instruction of the jury, by which to 'gauge' the degrees of conviction, has resulted in no good." We reproduce these words from the opinion delivered by *Pearson, C.J.*, in *S. v. Parker*, 61 N.C., 473, as they present in a clear and forcible manner the true principle of law upon the subject. The expressions we sometimes find in the books as to the degree of proof required for a conviction are not formulas prescribed by the law, but mere illustrations. *S. v. Sears*, 61 N.C., 146; *S. v. Knox, ibid*, 312; *S. v. Norwood*, 74 N.C., 247. The law requires only that the jury shall be fully satisfied of the truth of the charge, due regard being had to the presumption of innocence and to the consequent rule as to the burden of proof. *S. v. Knox, supra.* The presiding judge may select, from the various phrases which have been used, any one that he may think will correctly inform the jury of the doctrine of reasonable doubt, or he may use his own form of expression for that purpose—provided, always, the jury are made to understand that they must be fully satisfied of the guilt of

> the defendant before they can convict him. In *S. v. Gee*, 92 N.C., 761, where the court below had refused to charge according to one of these supposed formulas, and told the jury that it was not a rule of law, but only an illustration, and intended to impress upon the jury the idea that they should be convinced beyond a reasonable doubt of the defendant's guilt, the Court, by *Smith, J.*, said: "We do not see in the charge, or in the manner of submitting the case to the jury, any error of which the defendant has a right to complain." If the judge charges the jury in substance that the law presumes the defendant to be innocent, and the burden is upon the State to show his guilt, and that upon all of the testimony they must be fully satisfied of his guilt, he has done all that the law requires of him, the manner in which it shall be done being left to his sound discretion, to be exercised in view of the facts and circumstances of the particular case.

Id. at 696-97, 50 S.E. at 767-68.

In *State v. Ewing*, 227 N.C. 535, 42 S.E. 2d 676 (1947), we find the following statements:

> [The rule as to the intensity of proof to convict] is, and has been from time almost immemorial, that to justify the conviction the jury must be convinced beyond a reasonable doubt of the guilt of the accused, and it applies no matter what mode of proof is involved. The angle of approach and review of circumstantial evidence is necessarily somewhat different. Nevertheless, statements to the effect that the evidence should "exclude a rational doubt as to the prisoner's guilt", or "exclude every rational hypothesis of innocence" are simply converse statements of the rule of reasonable doubt, universally applied, and do not handicap circumstantial evidence as an instrument of proof with the necessity of doing more. When reasonable inferences may be drawn from them, pointing to defendant's guilt, it is a matter for the jury to decide whether the facts taken singly or in combination produce in their minds the requisite moral conviction beyond a reasonable doubt.

Id. at 540, 42 S.E. 2d at 679 (citations omitted).

In *State v. Shook*, 224 N.C. 728, 32 S.E. 2d 329 (1944), the trial court instructed with respect to circumstantial evidence as follows:

> "The State relies in this case upon what is known as circumstantial evidence, which is the proof of various facts or circumstances which usually attend the main fact in dispute, and therefore, tends to prove its existence or to sustain by their consistencies the hypothesis of claim. Circumstantial evidence consists in reasoning from facts, which are known or proved, to establish such facts which are conjectured to exist. This must be proven to you, and beyond a reasonable doubt by the State, before this man can be found guilty."

Id. at 730, 32 S.E. 2d at 330. Finding these instructions to be adequate, this Court reasoned:

> The instruction regarding circumstantial evidence quoted in full in the statement, while not sufficiently clear and exact to be approved as a model, does not disclose prejudicial error—at least the assignment of error made by the appellant is untenable. The objection is that the judge did not add to the instruction given that, in order to justify a verdict of guilty, the circumstantial evidence must "exclude every reasonable hypothesis of innocence." That, indeed, it must do; but after all, the convincing effect of circumstantial evidence on the mind of the jury is measured by the same standard of intensity required of any other evidence—the jury must be convinced beyond a reasonable doubt as to every element of the crime before they find the defendant guilty of it, whether the evidence is wholly circumstantial, only partly so, or entirely what we sometimes refer to as direct. No set formula is required to convey to the jury this fixed principle relating to the degree of proof required for conviction.
>
> The instruction adopts the formula most often used and to which we sooner or later all refer—proof beyond a reasonable doubt.

Id. at 731, 32 S.E. 2d at 331. *Accord State v. Wall*, 218 N.C. 566, 11 S.E. 2d 880 (1940); *State v. Frady*, 172 N.C. 978, 90 S.E. 802 (1916); *State v. Lane*, 166 N.C. 333, 81 S.E. 620 (1914); *State v. Neville*, 157 N.C. 591, 72 S.E. 798 (1911).

Beginning with *State v. Willoughby*, 180 N.C. 676, 103 S.E. 903 (1920), this Court without explanation or discussion began to use language which seems to modify the rule announced in *Adams* and its progeny by engrafting a rule that if defendant aptly requested it the court *should* instruct on the "moral certainty" or "reasonable hypothesis" rule. In *Willoughby*, we find this terse statement by Allen, J., speaking for the Court:

> It may have been well to add that the circumstances found by the jury to exist must exclude every other reasonable conclusion except the guilt of the defendant, but the failure to do so is not reversible error *in the absence of a special request to so instruct the jury.*

Id. at 678, 103 S.E. at 904 (emphasis added).

Defendant was charged with conspiracy to commit larceny in *State v. Bennett*, 237 N.C. 749, 76 S.E. 2d 42 (1953). One of his assignments was the failure of the trial judge to charge on circumstantial evidence. Justice Ervin disposed of this assignment of error as follows:

> Since the State's case was based for the most part on direct evidence sufficient in itself to warrant conviction, the trial judge did not err in failing to give the jury specific instructions on circumstantial evidence. *The defendant did not request any such instructions at trial.*

Id. at 753, 76 S.E. 2d at 44 (emphasis added) (citations omitted).

Defendants were convicted of larceny and receiving stolen property in *State v. Warren*, 228 N.C. 22, 44 S.E. 2d 207 (1947). One of their assignments was the failure of the judge to define circumstantial evidence and to instruct the jury on this question. Justice Denny, speaking for the Court, stated:

> *In the absence of a request to do so*, the failure of the court to instruct the jury regarding circumstantial evidence, or as to what such evidence should show, will not be held for reversible error, if the charge is correct in all other respects as to the burden and measure of proof.

Id. at 24, 44 S.E. 2d at 209 (emphasis added).

In *State v. Branch*, 288 N.C. 514, 220 S.E. 2d 495 (1975), *cert. denied*, 433 U.S. 907 (1977), defendants were convicted of being accessories before the fact to murder and for conspiracy to commit

murder. The Court rejected Defendant Branch's challenge to the charge on circumstantial evidence and held that the charge was sufficient. The Court reiterated the *Willoughby* holding: "In the absence of a prior specific request for the charge now submitted by defendant, it is manifest that no reversible error was committed." *Id.* at 540, 220 S.E. 2d at 512-13.

In *State v. Johnson*, 294 N.C. 288, 239 S.E. 2d 829 (1978), defendant was convicted of first-degree murder and on appeal one of his assignments of error was based on the failure of the court to specially instruct on the quantum of proof to be used in reviewing circumstantial evidence. There the Court stated:

> Although defendant tendered no request for special instructions on circumstantial evidence, he argues that the court should be required to give such an instruction absent a request in cases in which the State relies totally on circumstantial evidence. We recently held, however, that "A general and correct charge as to the intensity or quantum of proof when the State relies wholly or partly on circumstantial evidence is adequate unless the defendant tenders request for a charge on the intensity of proof required for such evidence." *State v. Beach*, 283 N.C. 261, 272, 196 S.E. 2d 214, 221-222 (1973).

Id. at 294, 239 S.E. 2d at 832. *Accord, State v. Coward*, 296 N.C. 719, 252 S.E. 2d 712 (1979); *State v. Beach*, 283 N.C. 261, 196 S.E. 2d 214 (1973).

It is of interest to note that there is not a positive statement in any of these latter cases to the effect that the judge must give the moral certainty charge when requested to do so or that his failure to give the charge would result in prejudicial error. Neither do we find a case where the court granted a new trial because of the failure to so charge.

Our research discloses that both state and federal courts are increasingly abandoning the requirement that there be special instructions on proof of guilt by circumstantial evidence.

The United States Supreme Court considered this question in *Holland v. United States*, 348 U.S. 121 (1954). There the defendant was convicted of income tax evasion solely upon circumstantial evidence. On appeal he assigned as error the court's failure to instruct specifically on circumstantial evidence. Finding no error the Court speaking through Justice Clark, in part stated:

> The petitioners assail the refusal of the trial judge to instruct that where the Government's evidence is circumstantial it must be such as to exclude every reasonable hypothesis other than that of guilt. There is some support for this type of instruction in the lower court decisions, *Garst v. United States* (CA4th Va) 180 F 339, 343; *Anderson v. United States* (CA5th Tex) 30 F2d 485-487; *Stutz v. United States* (CA5th Fla) 47 F2d 1029, 1030; *Hanson v. United States* (CA6th Ohio) 208 F2d 914, 916, but the better rule is that where the jury is properly instructed on the standards for reasonable doubt, such an additional instruction on circumstantial evidence is confusing and incorrect.

Id. at 139-40.

The federal circuit courts have consistently followed the *Holland* rule. *United States v. Becker*, 62 F. 2d 1007 (2d Cir. 1933); *United States v. Austin-Bagley Corp.*, 31 F. 2d 229 (2d Cir.), *cert. denied*, 279 U.S. 863 (1929); *Taglianetti v. United States*, 398 F. 2d 558 (1st Cir. 1968), *aff'd per curiam*, 394 U.S. 316 (1969); *United States v. Warren*, 453 F. 2d 738 (2d Cir.), *cert. denied*, 406 U.S. 944 (1972); *United States v. Evans*, 239 F. Supp. 554 (E.D. Pa. 1965), *aff'd*, 359 F. 2d 776 (3d Cir.), *cert. denied*, 385 U.S. 863 (1966); *United States v. Johnson*, 337 F. 2d 180 (4th Cir. 1964), *cert. denied*, 385 U.S. 846 (1966); *Sowers v. United States*, 255 F. 2d 239 (5th Cir. 1958); *Continental Baking Company v. United States*, 281 F. 2d 137 (6th Cir. 1960); *United States v. Atnip*, 374 F. 2d 720 (7th Cir. 1967); *United States v. Francisco*, 410 F. 2d 1283 (8th Cir. 1969); *Urban v. United States*, 237 F. 2d 379 (9th Cir. 1956); *United States v. Martine*, 442 F. 2d 1022 (10th Cir. 1971); *Davis v. United States*, 433 F. 2d 1222, 1226 at n. 5 (D.C. Cir. 1970).

We think the language of Judge Learned Hand in *United States v. Becker*, 62 F. 2d 1007, is persuasive. We quote from that opinion:

> The judge failed to charge the jury as to circumstantial evidence, contenting himself with an entirely neutral statement of the opposed contentions of the parties, though he had been asked to say that such evidence was enough only when it foreclosed the hypothesis of innocence. He had with ample elaboration told them that they must be satisfied beyond fair doubt of the defendant's guilt, and that in our judgment was enough, though some courts have held other-

> wise. [Citations omitted.] The requirement seems to us a refinement which only serves to confuse laymen into supposing that they should use circumstantial evidence otherwise than testimonial. All conclusions have implicit major premises drawn from common knowledge; the truth of testimony depends as much upon these as do inferences from events. A jury tests a witness's credibility by using their experience in the past as to similar utterances of persons in a like position. That is precisely the same mental process as when they infer from an object what has been its past history, or from an event what must have preceded it. All that can be asked is that the importance of the result to the accused shall demand a corresponding certainty of his guilt; and this is commonly and adequately covered by telling them that the conclusion shall be free from fair doubt. To elaborate this into an inexorable ritual, or to articulate it for different situations, is more likely to impede, than to promote, their inquiry.

Id. at 1010.

Many of our sister states have likewise abandoned the rule requiring a special charge on circumstantial evidence and adopted the *Holland* rationale. *Allen v. State*, 420 P. 2d 465 (Alaska 1966); *State v. Harvill*, 106 Ariz. 386, 476 P. 2d 841 (1970); *Murray v. State*, 249 Ark. 887, 462 S.W. 2d 438 (1971); *People v. Bennett*, 183 Colo. 125, 515 P. 2d 466 (1973); *Henry v. State*, 298 A. 2d 327 (Del. Supr. 1972); *State v. Wilkins*, 215 Kan. 145, 523 P. 2d 728 (1974); *Wolf v. Commonwealth*, 214 Ky. 544, 283 S.W. 385 (1926); *State v. Jackson*, 331 A. 2d 361 (Me. 1975); *Metz v. State*, 9 Md. App. 15, 262 A. 2d 331 (1970); *Anderson v. State*, 86 Nev. 829, 477 P. 2d 595 (1970); *State v. Ray*, 43 N.J. 19, 202 A. 2d 425 (1964); and *State v. Murphy*, 113 R.I. 565, 323 A. 2d 561 (1974).

In his treatise on evidence Professor Wigmore discussed the probative value of direct and circumstantial evidence as follows:

> The rules of Admissibility have nothing to say concerning the weight of evidence when once admitted. * * * Indeed, it can be said that there are no rules, in our system of evidence, prescribing for the jury the precise effect of any general or special class of evidence. So far as logic and psychology assist us, their conclusions show that it is out of the question to make a general assertion ascribing greater weight to one class or the other.

1A Wigmore on Evidence § 26 (Tillers rev. 1983).

In instant case the trial judge correctly and fully charged on the theory of reasonable doubt and the jurors were told that if they had a reasonable doubt as to defendant's guilt they would return a verdict of not guilty. We are of the opinion that the reasonable doubt instruction and the "moral certainty" circumstantial evidence instruction encompass the same measure of proof. Therefore, recognizing that the purpose of a charge to the jury is to clarify the issues and apply the law to the evidence, we conclude that the giving of the "moral certainty" or the "reasonable hypothesis" instruction in addition to the reasonable doubt instruction would tend to confuse the jury by requiring them to engage in an unnecessary and repetitious application of the same measures of proof to the evidence in the case.

We hold that an instruction on circumstantial evidence to the effect that a conviction may not be based upon it unless the circumstances point to guilt and exclude to moral certainty every reasonable hypothesis except that of guilt is unnecessary when a correct instruction on reasonable doubt is given. We therefore expressly overrule any decisions of this Court to the extent they hold otherwise.

For the benefit of the bench and bar we would suggest that in any case based in part or wholly on circumstantial evidence that the following language be included in the charge:

> There are two types of evidence from which you may find the truth as to the facts of a case—direct and circumstantial evidence. Direct evidence is the testimony of one who asserts actual knowledge of a fact, such as an eyewitness; circumstantial evidence is proof of a chain of facts and circumstances indicating the guilt or innocence of a defendant. The law makes no distinction between the weight to be given to either direct or circumstantial evidence. Nor is a greater degree of certainty required of circumstantial evidence than of direct evidence. You should weigh all the evidence in the case. After weighing all the evidence, if you are not convinced of the guilt of the defendant beyond a reasonable doubt, you must find him not guilty.

1 E. Devitt & C. Blackmar, *Federal Jury Practice and Instructions* § 15.02 (3d Ed. 1977).

For reasons stated, we hold that the trial judge correctly refused to give the defendant's tendered instructions on circumstantial evidence.

As a part of this assignment of error the defendant also argues that the trial judge failed to sufficiently summarize his evidence. We do not believe that this assignment of error merits extended discussion. Suffice it to say that our examination of this record reveals that the trial judge, without expressing an opinion as to whether any fact had been proved, fully stated the contentions of defendant and the State so as to declare and explain the law arising on the evidence. G.S. 15A-1232.

[22] Defendant finally assigns as error the trial judge's ruling sustaining the State's objection to the introduction of an affidavit of Carolyn Neely at a post-conviction hearing for appropriate relief. Defendant's motion for appropriate relief was based in part on grounds of newly discovered evidence, and the affidavit was offered in support of those grounds.

In an evidentiary hearing for appropriate relief where the judge sits without a jury the moving party has the burden of proving by the preponderance of the evidence every fact to support his motion. G.S. 15A-1420(c)(5). The court must make findings of fact in support of its ruling. G.S. 15A-1420(c)(4). In hearings before a judge sitting without a jury "adherence to the rudimentary rules of evidence is desirable even in preliminary *voir dire* hearings. Such adherence invites confidence in the trial judge's findings." *State v. Davis*, 290 N.C. 511, 542, 227 S.E. 2d 97, 116 (1976).

The affidavit of Carolyn Neely offered by defendant was clearly hearsay and inadmissible. *State v. Spillars*, 280 N.C. 341, 185 S.E. 2d 881 (1972).

We note that even had the trial judge erred in his ruling on the basis that the evidence was hearsay, the affidavit would not have furnished a basis for a new trial on the theory of newly discovered evidence.

This court has held that the prerequisites for a new trial on the grounds of newly discovered evidence include the following:

. . .

6. That it does not tend only to contradict a former witness or to impeach or to discredit him. [citations omitted].

7. That it is of such a nature as to show that on another trial a different result will probably be reached and that the right will prevail. [citations omitted].

State v. Cronin, 299 N.C. 229, 243, 262 S.E. 2d 277, 286 (1980). Defendant failed to comply with either of these prerequisites.

This assignment of error is without merit.

From our examination of this entire record, we conclude that defendant received a fair trial free from prejudicial error.

No error.

Justice EXUM dissenting.

The nub of this case is the question of defendant's insanity. Insanity constitutes his entire defense. It is a close question on this record. Defendant's evidence of insanity is substantial as is the state's rebuttal. Errors, therefore, relating to this defense must be carefully examined.

I believe it was reversible error for the trial court to instruct the jury over defendant's objection regarding the permissive, but not mandated, commitment procedures which may have followed an acquittal on the grounds of insanity. As the majority correctly notes, the former statute required the trial judge to hold further hearings to determine whether an insanity acquittee should nevertheless be committed. The statute in effect when this case was tried permitted the court to conduct such a hearing but did not require it.

Defendant requested that these instructions on the permissive commitment procedures not be given. The trial court denied the request. I think it should have been honored. Even with the mandatory commitment procedure statute which previously existed, our rule was that a defendant who raised an insanity defense was entitled to have the jury instructed in accordance with the substance of the statute *upon his request. State v. Bundridge*, 294 N.C. 45, 239 S.E. 2d 811 (1978); *State v. Hammonds*, 290 N.C. 1, 224 S.E. 2d 595 (1976). In *Hammonds* this Court considered at length the rule in other jurisdictions regarding this kind of instruction. We noted that only one state required the instructions in the absence of defendant's request. Several states adopted the rule that defendant, upon request, was entitled to the instruction. One jurisdiction had held that a defendant was enti-

tled to the instruction "unless it affirmatively appears that defendant does *not* want such an instruction." *Hammonds*, 290 N.C. at 14, 224 S.E. 2d at 603 (emphasis original). So far as is revealed in *Hammonds*, no jurisdiction says the instruction ought to be given over the express objection of the defendant. Indeed, a majority of jurisdictions prohibit this kind of instruction altogether. Note, 13 Wake Forest L. Rev. 201 (1977). We have held that in the absence of a request or objection it is not error to tell the jury that a commitment hearing *will* be held if a defendant is acquitted by reason of insanity. *State v. Harris*, 306 N.C. 724, 295 S.E. 2d 391 (1982).

Under the former statute, a commitment hearing was required. The purpose of so instructing the jury was to advise them that an acquittal on the ground of insanity did not necessarily mean that defendant would be released altogether and that a hearing to determine this question would *inevitably* be held. *Hammonds*, 290 N.C. at 15, 224 S.E. 2d at 603-04. Under the statute governing this case, it was discretionary with the trial judge as to whether a commitment hearing following an insanity acquittal would even be held. This statute provided much less assurance to the jury that defendant would be otherwise committed, even if he was acquitted on the ground of insanity, than did the former statute. It is understandable why a defendant, like defendant here, might not wish the jury to be instructed regarding permissive, as opposed to mandatory, commitment procedures.

I think it is reversible error to instruct on these procedures if defendant requests, as he did here, that this instruction not be given.

I also believe it was reversible error for the trial court to instruct the jury on the insanity issue as follows:

> [I]f you are in doubt as to the insanity of the defendant, the defendant is presumed under the law to be sane, and so you would find the defendant guilty if he is otherwise guilty.

The burden is on defendant simply "to satisfy" the jury of his insanity. We have said that "to satisfy" the jury is "a standard no greater and at the same time one not significantly less than persuasion by a preponderance of the evidence." *State v. Hankerson*, 288 N.C. 632, 648, 220 S.E. 2d 575, 587 (1975), *rev'd on other grounds*, 432 U.S. 233 (1977). The defendant's burden of persuasion on an insanity issue is no greater, therefore, than a civil

litigant's burden in a civil case would be, *i.e.*, to persuade the jury by a preponderance of, or greater weight of, the evidence. Under this standard, a litigant is only required to "tip the scales" in the litigant's favor. The litigant with this burden must persuade the jury only that it is "more likely than not" that the facts in his favor are true. N.C. Pattern Jury Instructions—Civil 101.10. Thus a defendant claiming an insanity defense need satisfy the jury only that it is more likely than not that he is insane. A jury could be so satisfied and yet have some "doubt" about the question. Essentially the jury is dealing in probabilities, not certainties. The jury could believe it more probable, or more likely, than not that defendant was insane and yet still have a doubt about it.

STATE OF NORTH CAROLINA v. FRANK EDWIN CORLEY

No. 66A83

(Filed 10 January 1984)

1. Criminal Law § 75.2— voluntariness of confession—statement by officer that "things would be a lot easier" if defendant told the truth

In a prosecution for first degree murder, the trial court correctly denied defendant's motion to suppress his inculpatory statements where the totality of the circumstances clearly compelled the trial court's determination that the defendant's statements were not induced by any hope or fear arising from the conduct of the officers and, therefore, were voluntary. The evidence tended to show that defendant walked into the sheriff's department on the afternoon of August 4, 1982 and told Officer Lockman that he wanted to report a stolen car; Officer Lockman gave him paper and pen and left the room, returned later with another officer, and advised the defendant of his constitutional rights; defendant gave his statement indicating that a friend of his needed a place to put a new Corvette for a couple of days and defendant kept it at a house near his; after questioning defendant's sister briefly later on in the afternoon, another officer went in and again advised defendant of his constitutional rights, and defendant gave this officer a similar statement; a Detective Lambert obtained a written statement from defendant several hours later and testified that at some point in the questioning he told the defendant something similar to "things would be a lot easier on him if he went ahead and told the truth"; defendant gave Lambert a statement in which he indicated that a friend had asked him to help get a car, and defendant and his friend had gone to a Corvette car lot and left with one of the salesmen, and that upon driving to a point, defendant walked away and another man and defendant's friend hit the salesman and defendant found blood in the car; that defendant later said that the car salesman had been shot in the head; that defendant then proceeded to take the officer to where the car salesman's body could be found; that when the officers realized the body would be found in another county they took the defendant to the jail in that county and when defendant in-

dicated he was tired they left and came back the next morning, advised him of his rights, and defendant then gave a statement which indicated that he had taken the Corvette for a test drive and subsequently shot and killed the car salesman.

2. **Criminal Law § 112.6— failure to instruct on insanity—no error**

The trial court properly failed to instruct on the defense of insanity in a first degree murder prosecution where defendant presented expert testimony tending to show that he had a low stress tolerance as well as an antisocial personality type and that he tended to misconstrue situations and respond inappropriately; that such factors, when considered together with the defendant's alleged drug use on the day of the killing, rendered the defendant unable to form the specific intent to kill necessary for a finding of murder in the first degree. This evidence justified the instructions the trial court gave the jury concerning the effect of voluntary intoxication on the issue of specific intent, but it did not require an instruction on the defense of insanity.

3. **Kidnapping § 1.3— error in instructions concerning kidnapping in first degree—jury verdict considered as verdict of guilty of kidnapping in the second degree**

Where defendant was charged in the bill of indictment alleging all the essential elements of kidnapping in the first degree set forth in G.S. 14-39 but where the trial court erred in its charge to the jury by failing to include as an element of the offense of kidnapping in the first degree that the victim "either was not released in a safe place or had been seriously injured or sexually assaulted," and where the jury returned a verdict of guilty of kidnapping in the first degree, the jury necessarily found facts establishing the offense of kidnapping in the second degree, and the jury verdict will be considered as a verdict of kidnapping in the second degree.

4. **Criminal Law § 138— sentencing for larceny—aggravating factor that offense was committed for "pecuniary gain" improperly considered**

Since there was no evidence tending to show that defendant was hired or paid to commit any of the crimes charged, the trial court erred in finding as an aggravating factor that the larceny was committed for "pecuniary gain" within the meaning of G.S. 15A-1340.4(a)(1)(c), and the larceny case must be remanded to the trial court for resentencing.

Justice EXUM concurring in part and dissenting in part.

APPEAL by the defendant from Judgments of *Lewis, Judge*, entered November 20, 1982, in Superior Court, BUNCOMBE County. Heard in the Supreme Court October 6, 1983.

The defendant was tried upon bills of indictment, proper in form, charging him with murder in the first degree, kidnapping and larceny. The defendant having pled not guilty, the jury found him guilty of murder in the first degree on the basis of premeditation and deliberation and on the basis that the killing occurred during the commission of a felony. The jury also found the defendant guilty of kidnapping in the first degree and

larceny. After a separate sentencing proceeding, the jury recommended that the defendant be sentenced to life imprisonment for the murder. The kidnapping and larceny convictions were consolidated for judgment and the defendant received an additional sentence of imprisonment for forty years to begin at the expiration of the life sentence. The defendant appealed the judgment sentencing him to life imprisonment to the Supreme Court as a matter of right under G.S. 7A-27(a). On June 17, 1983, the Supreme Court allowed the defendant's motion to bypass the Court of Appeals on the kidnapping and larceny convictions.

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

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

MITCHELL, Justice.

The defendant has presented on appeal several assignments of error relating to the trial of the cases against him and other assignments relating solely to the sentencing procedures employed by the trial court. We find without merit the defendant's contentions that his inculpatory statements to law enforcement officers should have been excluded from evidence and that the trial court should have instructed the jury concerning the insanity defense. For error in the trial court's instructions to the jury, however, the judgment against the defendant for kidnapping in the first degree must be vacated and that case remanded for the entry of judgment against the defendant for kidnapping in the second degree and imposition of a sentence upon that judgment. The larceny case against that defendant must be remanded for resentencing as a result of the trial court's error in finding as an aggravating factor for purposes of sentencing that the offenses were committed for pecuniary gain.

The State offered evidence at trial tending to show the following:

Ted Sellars, a used car salesman, worked at David's Auto House in Buncombe County. At 4:10 p.m. on August 3, 1982, Sellars was with a customer and came in to get the keys to an orange Corvette. Sellars was next seen at approximately 4:15 p.m. at a nearby market where he purchased $2.00 worth of gas while an unidentified man who was driving the orange Corvette pumped the gas.

Jeffrey Blake testified that he and the defendant were friends and that he had seen the defendant with a handgun for the first time on August 1, 1982. Blake testified that he was with the defendant all day on August 3, 1982, until approximately 3:30 p.m. when Blake went to work. Blake testified that, to his knowledge, the defendant had not taken any drugs before Blake went to work but had some LSD in his possession. Blake saw the defendant again at approximately 9:30 p.m. on the same day. The defendant told Blake that he had a nice car that he wanted to show Blake and asked if Blake could take him to Florida. When Blake indicated that he could not leave his job, the defendant told him that he was only kidding about the car.

Billie Faye Hamilton testified that she saw the defendant at a campground at approximately 5:30 p.m. on August 3. The defendant drove up to her camper in an orange Corvette and asked her for a rag.

Michael Owen testified that he saw the defendant at the campground between 5:00 and 6:00 p.m. on August 3. The defendant pulled up in an orange Corvette which he said a friend had brought to him from Florida.

Victor DeCarlo testified that he lived in Cruso, North Carolina, next to the defendant's brother's house. The defendant came to DeCarlo's house in an orange Corvette at approximately 6:00 p.m. on August 3, 1982. The defendant asked if he could park the car in front of DeCarlo's house. The defendant told DeCarlo that he did not want to take the car up the driveway to his house as he was afraid the driveway might cause damage to the car. The defendant said that the car belonged to a friend of his in Florida.

Richard Alexander of the Haywood County Sheriff's Department testified that he was driving up the road where the defendant lived on August 4, 1982 in response to a call. He passed the defendant in the road at that time. Alexander saw an orange Corvette sitting at the end of the road about a quarter of a mile from the house in which the defendant was living. Having noticed that the car had no license tags, Alexander called his office to determine whether the vehicle was wanted or stolen.

After a *voir dire* hearing had been held concerning the admissibility of statements made by the defendant, Odell Lockman

of the Haywood County Sheriff's Department testified that the defendant came into the Sheriff's Department on the afternoon of August 4, 1982 and said that he wanted to report a stolen car. The defendant then told Lockman that there was a car he knew had been stolen by two boys. The defendant stated that he had seen a deputy looking at the car and wanted to come in and report the stealing of the car. Lockman asked the defendant if he wanted to make a statement against the two people who had stolen the car, and the defendant indicated that he did. Lockman gave the defendant paper and pen and left the room. The defendant then wrote out a statement in which he stated that an old friend named Eugene had brought the Corvette by the defendant's house at approximately 5:30 p.m. on August 3, 1982. Eugene told the defendant he needed a place to put the car for a few days. The defendant took the car for a drive while Eugene and others waited in another car. The defendant parked the car near his neighbor's house and gave Eugene the keys. Eugene said that he would be in touch with the defendant in a couple of days and left. The defendant stated that he had not heard from Eugene.

The State introduced other statements made by the defendant on August 4 and August 5. The defendant at first indicated that he had been present when others had attacked Sellars. He later made a statement in the nature of a confession, however, in which he admitted that he shot the deceased several times and left him in the woods. He then took the Corvette to the campground and cleaned the blood from the interior before taking it to his home. The defendant took law enforcement officers to the place where Sellars' body was found.

Dr. Paul Dittinger testified that he performed an autopsy on the deceased. He found five gunshot wounds to the left side of the head and one gunshot wound to the hand. In Dr. Dittinger's opinion, the cause of death was multiple gunshot wounds to the head.

The defendant offered evidence tending to show the following:

The defendant testified on his own behalf that he was with Jeffrey Blake on August 3, 1982. He was hitchhiking with Blake between 11:00 a.m. and 12:00 noon when he took some LSD. Later that afternoon, his sister took him to Asheville and left him. At

that time, he was still feeling the effects of the LSD which he said was very powerful.

He and the car salesman went out to test drive the Corvette that afternoon. The defendant testified that he remembered stopping at a gas station but did not remember minute by minute what he did there. He testified that he had an automatic pistol with him at that time. He remembered pulling the Corvette into some woods and telling Sellars to get out of the car. The last thing that he heard was a gunshot. The next thing he remembered was driving down a gravel road.

While he was walking his dog the next day, the defendant saw a member of the Sheriff's Department. The defendant was thinking about what had happened the day before and was scared and confused. He knew he had something on his conscience he wanted to get off and he went to the Sheriff's Department. At that time, the defendant knew to the best of his memory that Sellars was hurt. The defendant stated that he had a lot on his mind at that time and wanted to get it off, but he did not know how to put it.

The defendant testified that he at no time intended to kill the deceased. He could remember driving with Sellars, but he could not remember the actual killing. He admitted that the first statement he made at the Sheriff's Department was false but stated that at the time he made the statement he was not sure it was false.

The defendant testified that he seemed to remember taking the gun out and asking Sellars to get out of the car. Sellars would not get out of the car but just sat there. The defendant testified that Sellars then put his leg over the console and his arm on the seat. The last thing the defendant remembered was the gun going off.

Dr. Anthony Sciara, a licensed psychologist, testified that he met with the defendant in the Buncombe County Jail on three occasions in October and November of 1982. The results of tests given the defendant were consistent with a confused adolescent with some amount of thinking problems and an antisocial personality diagnosis. Dr. Sciara indicated that the defendant's personality style is that of an underincorporator who responds

rather than thinking through a situation carefully. Dr. Sciara also stated that the defendant had an extratensive problem solving style or tended to respond emotionally without thinking things through. Dr. Sciara additionally was of the opinion that the defendant suffers from a chronic lack of stress tolerance. Dr. Sciara testified that in his opinion the defendant might not have had the intent to kill anyone, but may have been responding reflexively in a stressful situation using poor judgment.

Dr. Dennis Christensen, a psychiatrist, testified that he interviewed the defendant on three occasions in the jail. In his opinion the defendant could not have formed the intent to kill Sellars.

[1] The defendant first assigns as error the trial court's denial of his motion to suppress all statements made by him to law enforcement officers. Prior to trial the defendant filed a written motion to suppress in which he contended that the suppression of this evidence was required on grounds that:

> 1) Its exclusion is required by the Constitution of the United States or the Constitution of North Carolina, in that the Defendant was not informed of his rights prior to making a statement, and was not afforded the opportunity to have a lawyer present upon the obtaining of any and all statements made by the Defendant while in custody.
>
> 2) The statements obtained from the Defendant were made as a result of substantial violation of the provisions of Chapter 15A of the General Statutes, in that the statements were made by the Defendant to the officers as a result of a plea bargain and/or promises of help that the officers might be able to procure for the Defendant if the Defendant cooperated, and that these actions by the officers were coercive in nature.

After conducting an extensive *voir dire* hearing, the trial court entered findings of fact and conclusions of law and denied this motion.

Before this Court, the defendant argues only one ground for the asserted inadmissibility of his statements. He argues that the investigating officers induced in him a hope or fear which resulted in his making inculpatory statements, and that those statements were, as a result, involuntary and inadmissible.

The defendant specifically bases his argument upon the finding of the trial court that during the investigations of the crimes charged Officer Lambert told the defendant that "things would be a lot easier on him if he went ahead and told the truth." The defendant contends that *State v. Pruitt*, 286 N.C. 442, 212 S.E. 2d 92 (1975) controls the present case and that the trial court, having made the quoted finding, was required as a matter of law to conclude that this statement by Officer Lambert was a suggestion of hope or fear which induced the defendant's statements and thereby rendered them involuntary and inadmissible for any reason. The defendant seems to contend, in other words, that the line of cases culminating in *Pruitt* established an absolute or per se rule requiring the exclusion of a defendant's confession as involuntary in any case in which the defendant is told prior to confessing that "things would be a lot easier on him if he went ahead and told the truth" or harder for him if he did not. We reject the use of any such absolute or per se rule in resolving issues surrounding the voluntariness and admissibility of confessions by defendants. We do not think that any such test is required by *Pruitt* or any other decision of this Court.

It is true that in *Pruitt* we said that the officer's statement that it would be harder on the defendant if he did not cooperate, "certainly . . . would imply a suggestion of hope that things would be better for defendant if he would cooperate, *i.e.* confess." *State v. Pruitt*, 286 N.C. at 458, 212 S.E. 2d at 102. In that case, however, we specifically pointed out that the statement by the officer that it would be harder on the defendant if he did not cooperate was preceded by other circumstances which tended to provoke fright in the defendant and overbear his will. *Id.* Further, we indicated in *Pruitt* that, once it is established that the procedural requirements of *Miranda v. Arizona*, 384 U.S. 436 (1966) have been met, the determination of whether the defendant's confession was voluntarily and understandingly made must be found from a consideration of the entire record. *State v. Pruitt*, 286 N.C. at 454, 212 S.E. 2d at 100. In such cases courts must look to the totality of the circumstances in determining whether the confession was in fact voluntarily and understandingly made. *State v. Fincher*, 309 N.C. 1, 19, 305 S.E. 2d 685, 697 (1983); *State v. Jackson*, 308 N.C. 549, 581, 304 S.E. 2d 134, 152 (1983); *State v. Branch*, 306 N.C. 101, 107, 291 S.E. 2d 653, 658 (1982); *State v.*

Thompson, 287 N.C. 303, 318, 214 S.E. 2d 742, 751 (1975); *State v. Wright*, 274 N.C. 84, 90, 161 S.E. 2d 581, 590 (1968). *See State v. Chamberlain*, 263 N.C. 406, 411, 139 S.E. 2d 620, 623 (1965) (totality of the circumstances test applied prior to the decision in *Miranda*).

Any possible confusion concerning the appropriate scope of the inquiry to be made in determining whether a defendant's confession was voluntarily and intelligently made was put to rest by our recent statement that:

> The North Carolina rule and the federal rule for determining the admissibility of a confession is the same. It is a rule or test of voluntariness in which the court looks at the totality of the circumstances of the case in determining whether the confession was voluntary.

State v. Jackson, 308 N.C. 549, 581, 304 S.E. 2d 134, 152 (1983). Further, we have recently indicated that this principle controls "without regard to whether the claim of inadmissibility rests upon constitutional grounds or rests solely upon our rule of evidence requiring the exclusion of involuntary confessions." *State v. Branch*, 306 N.C. at 108, 291 S.E. 2d at 658.

An absolute rule requiring exclusion of statements to law enforcement officers by a defendant in custody and who did not assert his right to counsel has been applied only in those cases in which the officers failed to comply with procedural safeguards required by *Miranda*. In cases in which the requirements of *Miranda* have been met and the defendant has not asserted the right to have counsel present during questioning, no single circumstance may be viewed in isolation as rendering a confession the product of improperly induced hope or fear and, therefore, involuntary. In those cases the court must proceed to determine whether the statement made by the defendant was *in fact* voluntarily and understandingly made, which is the ultimate test of the admissibility of a confession. In determining whether a defendant's statement was in fact voluntarily and understandingly made, the court must consider the *totality of the circumstances* of the case and may not rely upon any one circumstance standing alone and in isolation. *See State v. Lynch*, 279 N.C. 1, 13, 181 S.E. 2d 561, 568-69 (1971).

We turn then to an examination of the totality of the circumstances surrounding the defendant's inculpatory statements. The evidence for the State during the *voir dire* hearing to determine the admissibility *vel non* of the defendant's inculpatory statement tended to show the following:

The defendant walked into the Sheriff's Department on the afternoon of August 4, 1982 and told Deputy Odell Lockman that he wanted to report a stolen car. The defendant said that he had seen a deputy looking at a car which the defendant knew had been stolen by two other people. Lockman asked the defendant if he wanted to make a statement against the two. When the defendant indicated that he wanted to make a statement, Lockman gave him paper and pen and left the room.

Lockman returned to the room later with another officer and advised the defendant of his constitutional rights. Lockman obtained the statement the defendant had written out at that time. The defendant indicated in that statement that he had seen an old friend named Eugene on July 31, 1982. Eugene had asked the defendant if he wanted to make some money and told him that he needed a place to put a car for a couple of days. Eugene came to the defendant's house in a Corvette around 5:30 p.m. on August 3, 1982. The defendant took the car for a drive while Eugene and others waited in another car. The defendant parked the car near a neighbor's house and gave Eugene the keys. Eugene said he would be in touch with the defendant in a couple of days and left.

At approximately 5:00 p.m. on August 4, 1982, Lieutenant Will Annarino of the Asheville Police Department and another officer arrived at the Haywood County Sheriff's Department. After questioning the defendant's sister briefly, Annarino went into the room with the defendant. He showed the defendant the standard waiver of rights form which had been used by Lockman and the other officer in advising the defendant of his constitutional rights. Annarino asked the defendant whether he had been advised of and understood those rights and handed him the waiver of rights form. The defendant indicated that he understood them.

The defendant indicated that Eugene had come to the defendant's house the afternoon of the prior day driving the orange Corvette. His statement was essentially consistent with the statement he had given Lockman except that he indicated that he took

his sister to ride in the Corvette before parking it near a neighbor's house. Annarino left the room and Detective Ted Lambert of the Asheville Police Department questioned the defendant.

Detective Lambert obtained a written statement from the defendant at approximately 7:00 p.m. on August 4, 1982. Detective Lambert testified that, at some point during this sequence of questioning, he told the defendant that it would be best to tell the truth. He also testified that he told the defendant that he would tell the district attorney if the defendant cooperated and that in fact he had since told the district attorney that the defendant cooperated. The trial court found that the statement by Lambert at this point was that "things would be a lot easier on him if he went ahead and told the truth."

In the statement the defendant gave Lambert, the defendant said that Eugene asked him to help him get a car. The defendant went to the car lot on August 3 and left in the Corvette with Sellars. The defendant drove down a gravel road to a point where Eugene and others waited and told Sellars that he was not going to hurt him. The defendant told Sellars that he wanted the car. Eugene and another man then walked over to the car and the defendant walked away. The defendant did not know if Eugene and the other man hit Sellars, but there was blood in the car. Eugene and others put Sellars in another car and drove off. The defendant drove the Corvette to a campground and cleaned the blood from the car.

Haywood County Sheriff Charlie Arrington testified that he arrived at the Haywood County Sheriff's Department at approximately 10:00 p.m. on the evening of August 4, 1982, after having returned from unsuccessfully searching for Sellars' body. He advised the defendant of his constitutional rights and the defendant agreed to answer questions without a lawyer present. Sheriff Arrington told the defendant that Sellars might still be alive and asked the defendant to help find him. He told the defendant that there was a difference between assault and murder. The defendant then told Arrington that Sellars had not been hit with a stick but had been shot in the head. The defendant then asked to talk to Officer Lambert. The defendant told Lambert that Sellars had been shot and that the defendant could take him to where it had

happened. At the defendant's request Lambert and the defendant then got into one car and the other officers got into another car. The group drove as the defendant directed them to a point where Sellars' body was found.

Having determined that the victim was killed in Buncombe County and not in Haywood County, Lambert took the defendant to the Buncombe County Jail arriving at approximately 4:00 a.m. on August 5, 1982. Lambert told the defendant he would like to talk to him some more about the case. The defendant stated that he would rather not since he was tired. Lambert said that he was tired, too, and he would come back and talk to the defendant in the morning. The defendant said that that would be all right.

Lambert next saw the defendant at approximately 11:00 a.m. on August 5 and advised him of his constitutional rights. The defendant signed a standard waiver of rights form at that time. The defendant then told Lambert that he went to David's Auto House on August 3 to test drive the orange Corvette. He said that he had been thinking about stealing the car because he always wanted one. The defendant then stated to Lambert that:

> We traveled a distance of about 8 miles. There was a house there and I told Ted that was my mother's house. We pulled up in the driveway and I opened my door and said, "Ted you don't know me very well. I don't want to use this gun. I just want you to get out." He didn't get out. I told him again to get out. Then he put his leg over the console coming toward me. I then shot him in the head. He kept coming at me and I shot again I don't know how many times. He fell back into his seat and I went around and opened his door and took him out in the woods and laid him down.

The defendant took the stand and testified on his own behalf during the *voir dire* hearing. For the most part his testimony was consistent with the evidence offered by the State during the *voir dire* hearing. The defendant testified that Lambert told him that "he would make things a lot easier on me if I would go ahead and tell him everything I know." The defendant also testified that one of the officers cursed him at some point during the questioning and at another time called him a "punk." The defendant testified, however, that he was not afraid of the officers at any time during

any of the questioning. He testified that he was more "hurt" by the officer's rudeness to him than afraid.

At no point in the defendant's testimony during the *voir dire* hearing did he indicate that his final statement to Lambert was untrue or that he did not kill Sellars. At no time during the defendant's testimony did he say that any statement to him by Lambert or any other officer caused him to hope to gain in any way by confessing to the crimes under investigation.

The trial court made findings of fact essentially in accord with the evidence offered during the *voir dire* hearing by the State. With regard to the statement by Lambert to the defendant, however, the trial court made a finding in accord with the defendant's testimony and found as a fact that Lambert told the defendant that "things would be a lot easier on him if he went ahead and told the truth." Based upon these findings of fact, the trial court determined that the inculpatory statements by the defendant were not the result of any fear or hope of reward and were, therefore, voluntary and admissible.

In a *voir dire* hearing on the admissibility of a defendant's confession, the trial court must determine whether the State has borne its burden of showing by a preponderance of the evidence that the defendant's confession was voluntary. *State v. Johnson*, 304 N.C. 680, 285 S.E. 2d 792 (1982). The preponderance of the evidence test is not, however, to be applied by appellate courts in reviewing the findings of the trial court. *Id.* The findings by the trial court are conclusive and binding upon appellate courts if supported by competent evidence in the record. *Id.* This is true even though the evidence is conflicting. *State v. Jackson*, 308 N.C. 549, 304 S.E. 2d 134 (1983). The trial court's conclusions of law, however, are fully reviewable by appellate courts. *State v. Pruitt*, 286 N.C. 442, 212 S.E. 2d 92 (1975).

The findings of the trial court at the conclusion of the *voir dire* hearing in the present case were supported by plenary competent evidence. In fact, most of the findings were supported by the defendant's own sworn testimony during the *voir dire* hearing. Those findings are binding upon this Court. The totality of the circumstances clearly compelled the trial court's determination that the defendant's statements were not induced by any

hope or fear arising from the conduct of the officers and, therefore, were voluntary.

We also note that one of the grounds upon which the defendant sought by his written motion to have his statements suppressed was that his statements were excludable under G.S. 15A-974(2) as having been obtained as a result of a substantial violation of the provisions of Chapter 15A of the General Statutes. In enacting G.S. 15A-974(2) the legislature specifically adopted the well established totality of the circumstances standard for use by courts in determining whether a substantial violation of the provisions of Chapter 15A has occurred. Even if a substantial violation of Chapter 15A is found to exist, it must also appear that the confession was obtained "as a result of" such official illegality before it will be suppressed. *State v. Richardson*, 295 N.C. 309, 245 S.E. 2d 754 (1978).

Upon a review of the totality of the circumstances, it is readily apparent that no substantial violations of the provisions of Chapter 15A occurred in this case. Certainly, the defendant's statements were not obtained as a result of any such violation. We hold that the trial court correctly denied the defendant's motion to suppress his inculpatory statements.

[2] The defendant next assigns as error the trial court's failure to instruct the jury on the defense of insanity. It is not clear from the record that the defendant objected to the trial court's failure to give this instruction or that he in fact requested that the instruction be given. Assuming *arguendo* that this assignment of error is properly before us, we find it to be without merit because there was no evidence presented which would have required an instruction on the defense of insanity.

The test of insanity as a defense to a criminal prosecution in North Carolina is

> whether defendant, at the time of the alleged act, was laboring under such a defect of reason, from disease or deficiency of mind, as to be incapable of knowing the nature and quality of his act, or if he does know this, was by reason of such a defect of reason incapable of distinguishing between right and wrong in relation to such act.

State v. Vickers, 306 N.C. 90, 94, 291 S.E. 2d 599, 603 (1982). This test is widely known as the M'Naghten Rule.

The defendant presented expert testimony tending to show that he had a low stress tolerance as well as an antisocial personality type and that he tended to misconstrue situations and respond inappropriately. His evidence also tended to show that such factors, when considered together with the defendant's alleged drug abuse on the day of the killing, rendered the defendant unable to form the specific intent to kill necessary for a finding of murder in the first degree. This evidence justified the instructions the trial court gave the jury in this case concerning the effect of voluntary intoxication on the issue of specific intent. *See State v. Kirkley*, 308 N.C. 196, 302 S.E. 2d 144 (1983). The evidence did not, however, require an instruction on the defense of insanity. *See State v. Barfield*, 298 N.C. 306, 259 S.E. 2d 510 (1979); *State v. Jones*, 293 N.C. 413, 238 S.E. 2d 482 (1977). Further, it was not error for the trial court to refuse to instruct the jury that a mental disorder not falling within the M'Naghten Rule might in itself negate the elements of specific intent and premeditation and deliberation. *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). This assignment of error is without merit.

The defendant also assigns as error the action of the trial court in excluding for cause, prior to the guilt-innocence determination phase of his trial, prospective jurors who indicated that they could never under any circumstances vote to recommend a sentence of death. This argument is without merit. *State v. Avery*, 299 N.C. 126, 261 S.E. 2d 803 (1980).

For the foregoing reasons, we find that there was no prejudicial error relative to the defendant's trial and conviction for murder. We have determined, however, that certain errors relating to the remaining charges were committed by the trial court. We next undertake a discussion of those errors.

[3] We turn to a consideration of the defendant's conviction of kidnapping in the first degree. The language of subsection (a) of G.S. 14-39 creates and defines the offense of kidnapping. The language of subsection (b) addresses the degree of the crime and defines kidnapping in the first degree as a kidnapping in which the defendant does not release the victim in a safe place or in

which he seriously injures the victim or sexually assaults the victim. The two subsections taken together establish the elements of kidnapping in the first degree. *State v. Jerrett*, 309 N.C. 239, 261, 307 S.E. 2d 339, 351 (1983). The language of subsection (b) states essential elements of the offense of kidnapping in the first degree and does not relate to matters in mitigation of punishment. *Id.* To properly convict a defendant of kidnapping in the first degree, the State must allege and prove the applicable elements of both subsection (a) and subsection (b). *Id.*

The defendant in the present case was charged in a bill of indictment alleging all of the essential elements of kidnapping in the first degree set forth in G.S. 14-39. The jury returned a verdict finding the defendant guilty of the offense charged. The trial court erred in its charge to the jury, however, since it failed to include as an element of the offense of kidnapping in the first degree that the victim "either was not released in a safe place or had been seriously injured or sexually assaulted . . . ." G.S. 14-39(b); *State v. Jerrett*, 309 N.C. 239, 261, 307 S.E. 2d 339, 351 (1983).

The defendant is not, however, entitled to a new trial. In failing to submit the essential element of kidnapping in the first degree set forth in subsection (b) of G.S. 14-39, the trial court essentially submitted to the jury the offense of kidnapping in the second degree. *See State v. Gooch*, 307 N.C. 253, 257-58, 297 S.E. 2d 599, 602 (1982). In finding the defendant guilty of kidnapping in the first degree, the jury necessarily found facts establishing the offense of kidnapping in the second degree. *Id.* The jury's verdict will be considered a verdict of guilty of kidnapping in the second degree. *Id.* We, therefore, leave the verdict undisturbed but recognize it as a verdict of guilty of the lesser included offense of kidnapping in the second degree, vacate the judgment imposed upon the verdict of guilty of kidnapping in the first degree and remand the case to the Superior Court, Buncombe County, for judgment and resentencing as upon a verdict of guilty of kidnapping in the second degree.

[4] We next consider the defendant's conviction of larceny. The defendant contends that the trial court erred in sentencing him for larceny, since the trial court found that the larceny was committed for "pecuniary gain" within the meaning of G.S. 15A-

1340.4(a)(1)(c). As there was no evidence tending to show that the defendant was hired or paid to commit any of the crimes charged, the trial court erred in finding this aggravating factor to exist. *State v. Abdullah*, 309 N.C. 63, 306 S.E. 2d 100 (1983). As a result of this error, the case against the defendant for larceny must be remanded to the trial court for resentencing. *State v. Ahearn*, 307 N.C. 584, 602, 300 S.E. 2d 689, 701 (1983).

In fairness to the trial court, we point out that the trial court did not have the benefit of this Court's opinions in *Jerrett* and *Ahearn*. Both of those cases were decided after the trial giving rise to this appeal.

Case No. 82CRS18563, Murder in the First Degree—no error.

Case No. 82CRS18564, Larceny—remanded for resentencing.

Case No. 82CRS18565, Kidnapping—judgment vacated and remanded for judgment and resentencing.

Justice EXUM concurring in part and dissenting in part.

I.

Although I concur in the result reached by the majority regarding the admissibility of defendant's inculpatory statement, I write separately to clarify a point I believe is not clearly made in the majority opinion.

The law of North Carolina on the admissibility of confessions is that a confession induced from a defendant by suggestions of hope or fear on the part of interrogating officers is involuntary and, therefore, inadmissible. "It has been long the rule in this jurisdiction that confessions induced by force, threat, fear or promise of reward are inadmissible." *State v. Richardson*, 295 N.C. 309, 326, 245 S.E. 2d 754, 765 (1978). "A promise of leniency renders a confession involuntary only if the confession is so connected with the inducement as to be the consequence of it." *State v. Pressley*, 266 N.C. 663, 666-67, 147 S.E. 2d 33, 35 (1966). But "if promises or threats have been used, it must be made to appear that their influence has been entirely done away with before subsequent confessions can be deemed voluntary, and therefore admissible." *State v. Drake*, 113 N.C. 625, 628, 18 S.E. 166, 167

(1893) (confession made within hours after arresting officer told defendant it might be easier on him if he made an honest confession; held, confession inadmissible). We have also held that an implied promise of leniency made the day before the confession and followed by defendant's assertion of his right to silence and to counsel did not render the confession involuntary because the connection between the promise and the confession was "so attenuated." *State v. Chamberlain*, 307 N.C. 130, 146, 297 S.E. 2d 540, 550 (1982).

In my view, *Chamberlain* controls the result reached by the majority. Although the time of defendant's confession to Lambert is not clear from the trial court's findings, testimony on voir dire indicates it was made around 11 a.m. on 5 August, some eighteen hours after defendant voluntarily appeared at police headquarters. Lambert testified that he had earlier told defendant that he, Lambert, did not "believe" earlier exculpatory statements defendant had given to Annarino; "that it would be best to tell the truth"; and he, Lambert, "would tell the DA that [defendant] cooperated." According to Lambert's testimony, these statements occurred before defendant's exculpatory statement given at 7:05 p.m. on 4 August. Thus, some eighteen hours elapsed between any promise of leniency and defendant's confession. During most of that period, defendant was not interrogated by officers. During much of this time defendant led the officers to the victim's body. Furthermore, defendant, who testified at length, never claimed that he finally confessed because of a promise of leniency made by any officer. Thus, in this case, it is clear that the influence of Lambert's promise "had been entirely done away with" before defendant confessed.

Unless it is made to appear that the effect of a promise of leniency has been entirely dissipated so that the confession is not the product of, or induced by, the promise, the foregoing cases make it clear that a promise of leniency followed by a confession renders the confession involuntary and inadmissible.

In the absence of a promise or threat, then our rule is that we consider the totality of circumstances to determine the voluntariness with which a confession was made. *State v. Jackson*, 308 N.C. 549, 304 S.E. 2d 134 (1983). Where, however, a promise or threat is followed by confession, the only appropriate inquiry is

whether the promise or threat induced the confession. It is, of course, appropriate to consider the totality of circumstances in determining whether the effect of a promise or threat has been entirely dissipated so as not to have induced a subsequent confession where there is evidence to support such a determination. *State v. Chamberlain, supra.* If this is the vein in which the majority applies the totality of circumstances to resolve the confession admissibility question, then I have no quarrel with either the result or the analysis.

This Court said in *Pruitt*, 286 N.C. at 454, 212 S.E. 2d at 100:

> The fact that the technical procedural requirements of *Miranda* are demonstrated by the prosecution does not, however, standing alone, control the question of whether a confession was voluntarily and understandingly made. The answer to this question must be found from a consideration of the entire record.

But the Court held in *Pruitt* that the confessions were inadmissible because they were made "under the influence of fear *or* hope, *or* both, growing out of the language and acts of those who held him in custody." *Id.*, at 458, 212 S.E. 2d at 100 (emphasis supplied). These actions and this language were described in *Pruitt* as follows:

> In instant case the interrogation of defendant by three police officers took place in a police-dominated atmosphere. Against this background the officers repeatedly told defendant that they knew that he had committed the crime and that his story had too many holes in it; that he was 'lying' and that they did not want to 'fool around.' Under these circumstances one can infer that the language used by the officers tended to provoke fright. This language was then tempered by statements that the officers considered defendant the type of person 'that such a thing would prey heavily upon' and that he would be 'relieved to get it off his chest.' This somewhat flattering language was capped by the statement that 'it would simply be harder on him if he didn't go ahead and cooperate.' Certainly the latter statement would imply a suggestion of hope that things would be better for defendant if he would cooperate, *i.e.*, confess.

Id. Thus *Pruitt* simply reiterates and applies what has long been the law in North Carolina: In the absence of a promise or threat, all of the circumstances must be considered in determining the voluntariness of a confession. But if there is a promise or threat followed by a confession, nothing else appearing, the confession is involuntary and inadmissible.

Here, if defendant's confession was induced by Lambert's promise that "things would be a lot easier on him if he went ahead and told the truth," then his confession would be inadmissible. Our inquiry, therefore, should be limited simply to whether his confession was induced by this promise. A consideration of all the circumstances is certainly appropriate to this inquiry. Such consideration, as I have already shown above, convinces me that the confession was not induced by the promise. I assume this is what the majority intends by its reference to and application of the totality of circumstances test. I also assume the majority does not mean that if the circumstances show a confession was induced by a promise of leniency, that other circumstances might nevertheless somehow render the confession admissible.

II.

I also disagree with the majority's conclusion that the evidence was insufficient to raise an insanity issue. Apparently, the majority's conclusion is based on the fact that no one testified in terms of the M'Naghten test, *i.e.*, that defendant,

> at the time of the alleged act, was laboring under such a defect of reason, from disease or deficiency of mind, as to be incapable of knowing the nature and quality of his act, or if he does know this, was by reason of such a defect of reason incapable of distinguishing between right and wrong in relation to such act.

State v. Vickers, 306 N.C. 90, 94, 291 S.E. 2d 599, 603 (1982). This should not necessarily preclude submission of an insanity issue. Indeed, there is a growing body of opinion that mental health professionals should not be permitted to testify in terms of the legal standards for insanity. Rather, they should be permitted only to describe for the jury their clinical observations of defendant's behavior and the objective data they have collected about defendant's mental state. It is then the jury's task to decide whether

defendant meets the legal standard for insanity. *See generally* Kenny, *The Expert in Court*, 99 L. Q. Rev. 197 (1983); Arenella, *Reflections on the Current Proposals to Abolish or Reform the Insanity Defense*, 8 Am. J. of Law & Med. 271, 279 (1982); Morse, *Failed Explanations and Criminal Responsibility: Experts and the Unconscious*, 68 Va. L. Rev. 971 (1982); Morse, *Crazy Behavior, Morals and Science: An Analysis of Mental Health Law*, 51 So. Cal. L. Rev. 527 (1978).

The majority's position on this point at least is out of step with, if not a step backward from, the best current thinking on the insanity defense.

Here, defendant testified essentially that he did not recall precisely what happened at crucial times. He remembered being with the deceased and hearing a "gunshot." The next thing he remembered was driving down a gravel road. One expert psychologist, then president-elect of the North Carolina Psychological Association, tested and examined defendant extensively before the trial. He described in detail his clinical observations of defendant's mental state. He said that defendant did not "perceive accurately what's going on in the world" and that he was suffering from "a consistent personality defect that has been there for a considerably long period of time." This witness said that at the time of the shooting of the victim defendant "may have not had the intent to kill anyone but rather was responding reflexively in a stressful situation . . . ." A psychiatrist who had interviewed defendant several times before trial testified that defendant suffered from "the disease of chemical dependency" and was "a drug addict, an alcoholic." In this physician's opinion, the defendant at the time of the shooting of the victim "could not form an intent at that time to kill anyone. He was responding at a . . . kind of a reflex motion in a panic situation."

In my view, all of this testimony taken together was sufficient to permit the jury to consider whether at the time in question defendant was "laboring under such a defect of reason, from disease or deficiency of mind, as to be incapable of knowing the nature and quality of his act." *State v. Vickers*, 306 N.C. at 94, 291 S.E. 2d at 603.

STATE OF NORTH CAROLINA v. ROBERT HENRY McDOWELL

No. 195A82

(Filed 10 January 1984)

1. **Constitutional Law § 30— failure of prosecution to disclose evidence—due process**

The prosecution's failure to disclose evidence to the defense before trial may result in a deprivation of constitutional due process requiring a new trial where (1) the prosecution bases its case, in part, on testimony which it knew or should have known was perjured; (2) defendant requests, prior to trial, specific, material evidence favorable to the defense which is in the hands of the prosecution but which the prosecution fails to produce; or (3) the prosecution withholds material evidence favorable to defendant in the absence of a specific request from defendant for that evidence.

2. **Constitutional Law § 30— failure of prosecution to correct false testimony**

The passive failure of the prosecution to correct what it knows or should know is false testimony constitutes the knowing use of false evidence. However, in this case it cannot be said that the testimony of a witness about her descriptions of her assailant given to an SBI agent and her testimony that she had only seen defendant once before was false so that the prosecution had a duty to correct it.

3. **Constitutional Law § 30— failure of prosecution to disclose unrequested evidence—collateral attack—standard for determining materiality**

The proper standard to determine whether on collateral attack unrequested evidence known but not disclosed by the prosecution is material so that due process requires that defendant be given a new trial is: Would the evidence, had it been disclosed to the jury which convicted defendant, and in light of all other evidence which that jury heard, likely have created in the jury's mind a reasonable doubt which did not otherwise exist as to defendant's guilt?

4. **Constitutional Law § 30— failure of prosecution to disclose evidence—new trial based on improper legal conclusions**

The trial court's order granting defendant a new trial because of the failure of the prosecution to reveal certain information to defendant was not supported by appropriate legal conclusions where it was based upon conclusions that the prosecution's failure to disclose "raise[d] . . . constitutional and due process questions" and that a lower federal court might require "a new trial at some distant future."

5. **Criminal Law § 177.2— new explication of legal standard—remand for reconsideration**

When findings of fact must be made in light of a prevailing legal standard, a new explication of the standard by the Supreme Court justifies a remand of the case for reconsideration *de novo* based upon the new explication.

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

DEFENDANT'S motion for appropriate relief was allowed by *Judge Collier* on 5 December 1981, following an evidentiary hearing conducted at the 26 August 1981 Session of LEE Superior Court. After dismissing the state's purported appeal, we allowed the state's petition for writ of certiorari on 4 May 1982.

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

Richard A. Rosen and Patricia W. Lemley, UNC School of Law; James E. Ferguson; John Charles Boger, admitted pro hac vice, and Deborah Fins, for defendant appellee.

EXUM, Justice.

The question dispositive of this case is whether Judge Collier entered the order allowing defendant's motion for appropriate relief without applying the appropriate constitutional standard. Believing that he did, as the state contends, we vacate his order and remand the case to the superior court for a hearing *de novo*.

I.

The movant, Robert Henry McDowell, was convicted of first degree murder and felonious assault at the 3 December 1979 Criminal Session of Johnston Superior Court, Judge Smith presiding. After a sentencing hearing, the jury recommended that a sentence of death be imposed; the court entered judgment accordingly. Defendant was sentenced to twenty years' imprisonment on his felonious assault conviction. This Court found no error in either the guilt or sentencing phases of the trial proceedings. *State v. McDowell*, 301 N.C. 279, 271 S.E. 2d 286 (1980), *cert. denied*, 450 U.S. 1025, *reh'g denied*, 451 U.S. 1012 (1981).

On 19 May 1981 defendant filed a motion for appropriate relief, including a motion for stay of execution,[1] pursuant to Ar-

1. Upon the United States Supreme Court's denial of McDowell's petition for rehearing, this Court on 21 May 1981 terminated its stay of McDowell's execution. The execution was thereafter rescheduled for 5 June 1981 pursuant to G.S. 15-194 (1978) (current version of G.S. 14-194 codified in Cum. Supp. 1981).

ticle 89, Chapter 15A of the General Statutes. On 1 June 1981 Judge Farmer, presiding in Johnston Superior Court, allowed McDowell's motion to stay his execution pending further order of the court. On 6 August 1981 Judge Bowen, on the state's motion, transferred all matters then pending to Lee County where the case had arisen.[2]

Judge Collier heard defendant's motion for appropriate relief during the 24 August 1981 Criminal Special Session of Lee Superior Court. On 8 December 1981, Judge Collier awarded defendant a new trial. Judge Collier based his order for a new trial on his conclusion that the prosecution's failure to disclose certain information to defendant before or during his trial "raise[d] sufficient constitutional and due process questions" to make it likely a federal court will require "a new trial at some distant future date." After careful consideration of the order and the factual background upon which it rests, we conclude the order must be set aside and a new hearing had on defendant's motion for appropriate relief as amended. The order must be vacated because Judge Collier did not apply appropriate constitutional standards to his factual findings, an application which the trial court in the first instance should make.

Defendant filed his original motion for appropriate relief pursuant to N.C. Gen. Stat. § 15A-1415 (1978) *as amended in* § 15A-1415 (1981 Cum. Supp.). In it he relied entirely on the following portions of that statute:

> (3) The conviction was obtained in violation of the Constitution of the United States or the Constitution of North Carolina.
>
> (4) The defendant was convicted or sentenced under a statute that was in violation of the Constitution of the United States or the Constitution of North Carolina.
>
> . . . .
>
> (6) Evidence is available which was unknown or unavailable to the defendant at the time of the trial, which could not

2. Defendant's first trial was held in Lee County but ended in a mistrial. Thereafter, the case was transferred to Johnston County where defendant was tried, convicted and sentenced.

> with due diligence have been discovered or made available at that time, and which has a direct and material bearing upon the guilt or innocence of the defendant.

His original motion alleges: (1) constitutional errors in the jury selection process; (2) his death sentence was so arbitrarily imposed as to be in violation of the Eighth and Fourteenth Amendments to the United States Constitution; (3) failure to record the jury selection process violates the Sixth, Eighth and Fourteenth Amendments of the United States Constitution; (4) N.C. Gen. Stat. § 15A-2000 is unconstitutional; and (5) he was deprived of his right to effective assistance of counsel for the reason that his trial counsel did not adequately raise or explore the possibility of an insanity defense.

On 7 July 1981 defendant moved to amend his motion so as to allege his entitlement to a new trial under subsection (b)(6) of the statute, *i.e.*, newly discovered evidence. Defendant alleged that the newly discovered evidence consisted in part of the following: The state's only eyewitness to the crimes, Patsy Mason, had been well acquainted with defendant before the crime, although she told the jury she had seen him previously only one time and did not know him. Patsy Mason initially reported that her assailant was a white man, although defendant is black.

Upon these additional factual allegations, defendant contended he was entitled to a new trial on these grounds: (1) denial of effective assistance of trial counsel because of counsel's failure to discover the new evidence before trial; (2) denial of due process because of the state's failure to disclose this evidence; (3) deprivation of his Sixth Amendment right to confrontation and to a fair trial because of certain errors in evidentiary rulings by the trial court; and (4) violation of due process by the introduction of "irrelevant and gory photographs" at trial.

Defendant presented evidence before Judge Collier, however, solely to show: (1) newly discovered evidence; (2) denial of due process by the state's failure to disclose exculpatory evidence; and (3) excuse of one juror for cause at the guilt phase of trial because of her opposition to the death penalty.

At the close of the hearing, Judge Collier allowed the state and defense counsel time to submit written briefs. On 8 December

1981 Judge Collier entered a judgment awarding defendant a new trial. His order stated in pertinent part:

. . . .

3. Uncontradicted evidence at the hearing disclosed that information was contained in a police file that the only surviving eyewitness made a statement at the hospital in the emergency room shortly after her injury in response to a question about the race of her assailant that he was 'white.' This information was not specifically asked for nor voluntarily disclosed to the defendant's attorneys prior to or during the trial. The defendant is black. The witness was severely injured and apparently near the point of death from gashes to her face and head and about her body and unable to respond to other questions thereafter put to her at that time. Due to the serious question of her capacity at the time of the response as indicated by the evidence, its effect, if any, on the jury, is impossible to predict.

4. The witness was permitted to convey an impression to the jury that she had seen the defendant on only one previous occasion and then for a very brief period of time when the prosecution had information that she had been in the presence of the defendant on at least several previous occasions, knew him to some extent, and had talked with and danced with him.

5. Information about two recent prior alleged invasions of the victim's house by intruders of a different race than defendant which were reported to but unsubstantiated by police investigation was not disclosed to defendant's attorneys.

6. Information about a young person seeing a person on a white bicycle enter the front door of the house around 11:30 p.m. on the night of the attack was not disclosed to defendant's attorneys.

7. Information that eyewitness had given conflicting descriptions to the SBI while in the hospital was never disclosed to defendant's attorneys.

8. While the individual items of undisclosed information standing alone might be insufficient to be exculpatory under

all the circumstances attendant in the case and the separate incidents in themselves might not be sufficient to require a new trial, the cumulative effect of them all *raise sufficient constitutional and due process questions* especially in view of the fact that this is a capital case where the death sentence has been imposed and the conviction affirmed by the highest court of our state *and the substantial likelihood of a federal court requiring a new trial at some distant future date* after the existing evidence has grown even colder and memories dimmer and after the expenditure of what would otherwise be many thousands of dollars. Consequently, the ends of justice require awarding the defendant a new trial at the earliest reasonable time.

9. The question of guilt or innocence was not before this court and therefore not a proper consideration at this hearing. Every person charged with any crime, no matter how heinous or atrocious, is entitled to a fair trial that comports with the constitution and laws of our state and nation. The principles of law that occasionally shield those who have committed dastardly acts are the same principles of law that protect the innocent and us all from oppression and tyranny. To disregard these principles under any circumstances would be a violation of much that we stand for and that for which many have given their lives to preserve.

10. This decision was not entered into lightly nor without many hours of research and study of the evidence at the hearing, the briefs, the law, the trial transcript and the oral arguments. The decision is not intended to be critical of anyone connected with this case or its appeal. The matters and things on which this decision is based largely came to light only after the conviction of the defendant and after the conviction was affirmed by the Supreme Court. The undisclosed information was not deliberately withheld from the defendant's counsel but was either unknown to the prosecution or considered in good faith to be unexculpatory and therefore not required to be disclosed. [Emphasis supplied.]

Judge Collier did not address defendant's evidence relating to the excuse for cause of a trial juror nor did he address defendant's contention that he was entitled to a new trial for newly

discovered evidence under N.C. Gen. Stat. § 15A-1415. Defendant took no exception and made no cross assignments of error directed to these omissions. App. R. 10(d). Judge Collier ruled defendant was entitled to a new trial solely because of the prosecution's failure to disclose certain evidence in its possession to defendant before trial. We allowed the state's petition for certiorari to review the correctness of this ruling. This being the only question properly before us, we now address it.

II.

[1] In three situations, the prosecution's failure to disclose evidence to the defense before trial may result in a deprivation of constitutional due process requiring a new trial. In the first situation, the prosecution bases its case, in part, on testimony which it knew or should have known was perjured. *Napue v. Illinois*, 360 U.S. 264 (1959); *Mooney v. Holohan*, 294 U.S. 103 (1935). In the second situation, defendant requests, prior to trial, specific, material evidence favorable to the defense, which is in the hands of the prosecution but which the prosecution fails to produce. *Brady v. Maryland*, 373 U.S. 83 (1963). In the third situation, the prosecution withholds material evidence favorable to defendant in the absence of a specific request from defendant for that evidence. *United States v. Agurs*, 427 U.S. 97 (1976).

[2] Defendant contends this case falls in categories one and three, *i.e.*, the prosecutor knowingly used perjured testimony and the prosecution withheld unrequested material evidence. Defendant correctly states that the passive failure of the prosecution to correct what it knows or should know is false testimony constitutes the knowing use of false evidence.

> [I]t is established that a conviction obtained through use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment. The same result obtains when the State, although not soliciting false evidence allows it to go uncorrected when it appears.

Napue, 360 U.S. at 269. Defendant argues the state knowingly failed to correct certain testimony of Patsy Mason which it knew to be false. Defendant points specifically to Patsy's testimony about her descriptions of her assailant given to SBI Agent Scheppf and her testimony which created an "impression" she had only seen defendant once before.

Defendant argues that Patsy testified she told Agent Scheppf her assailant had "flat hair," when in fact she had described him as wearing a "bushy Afro." According to Agent Scheppf, however, Patsy gave several different descriptions. One of these descriptions was that her assailant had "short dark hair." Later, Patsy gave the "bushy Afro" description from which a composite drawing was made. Therefore, Patsy did not testify falsely when she said she had described her assailant as having "flat hair," which is, we believe, reasonably consistent with "short-hair." At least the difference in the two descriptions is not enough to establish that the witness is testifying falsely.

Patsy was also cross-examined as follows:

Q. Did you give her [Agent Scheppf] any other description?

A. What he was wearing.

Q. What did you say that he was wearing?

A. A dark pullover shirt and blue jeans.

Q. Now, did you notice the shoes that this person was wearing?

A. No.

Q. So you didn't describe those to her.

A. No.

Again, Patsy's testimony on this point was not false. It was consistent with a further description she had, in fact, given Agent Scheppf. Patsy never testified that the descriptions she testified about were the only descriptions she ever gave. That question was never put to her.

Finally, both the state and defendant knew before trial of witnesses who claimed they had seen Patsy and defendant "socializing" at several different nightspots, and both the state and defendant decided not to call these witnesses at defendant's trial. The mere existence of such witnesses does not establish that Patsy's testimony that she had seen defendant only once at an advancement center was perjurious. We cannot know, of course, whether Patsy or the witnesses who were never called are telling the truth about this fact.

This case, therefore, falls only into the third category set out above—failure of the prosecution to reveal certain unrequested evidence in its possession.

Upon a challenge regarding the prosecution's failure to disclose nonrequested evidence, the central inquiry involves the materiality of the withheld evidence. An assessment must be made of the impact which that evidence would have had on the determination of defendant's guilt, for "[s]uch a finding is permissible only if supported by evidence establishing guilt beyond a reasonable doubt." *Agurs*, 427 U.S. at 112. The somewhat elusive gauge used to measure the materiality of this nondisclosed evidence becomes the focus of the post-trial analysis. This analysis of materiality involves two basic questions: (1) What constitutes material evidence and (2) by whose eyes must this materiality be judged—the jury or trial judge? We consider each question *seriatim*.

A.

In *Agurs*, the Court did not define what standard of materiality applies to this third type of case. Rather, it explained two standards which did not apply. First, defendant need not establish that the "evidence probably would have resulted in acquittal." *Id.* at 111. In other words, defendant does not shoulder this very heavy burden generally required to obtain a new trial under Rule 33 of the Federal Rules of Criminal Procedure. *See generally United States v. Thompson*, 493 F. 2d 305, 310 (9th Cir. 1974), *cert. denied*, 419 U.S. 834 (1975) (defining the burden for establishing grounds for a new trial based on newly discovered evidence under Rule 33).

Second, defendant must demonstrate more effect on the trial than that required by the harmless-error standard. *Agurs*, 427 U.S. at 112. Under that more lenient approach, defendant's burden is only to satisfy the reviewing court that it cannot be certain "that the error did not influence the jury, or have but very slight effect . . . ." *Kotteakos v. United States*, 328 U.S. 750, 764 (1946) (defining the harmless-error standard).

These two standards of materiality, each rejected by *Agurs*, represent the two extremes in the range of standards which could apply to nonrequested, undisclosed evidence. *See* Babcock, *Fair*

Play: Evidence Favorable to an Accused and Effective Assistance of Counsel, 34 Stan. L. Rev. 1133, 1175 (1982). The standard to be applied, unarticulated in *Agurs*, falls somewhere between these two extremes. *Agurs* did, however, provide at least a general description of a rule with which courts may assess the materiality of undisclosed evidence.

> It necessarily follows that if the omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed. This means that the omission must be evaluated in the context of the entire record. If there is no reasonable doubt about guilt whether or not the additional evidence is considered, there is no justification for a new trial. On the other hand, if the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt.

Agurs, 427 U.S. at 112-13 (footnotes omitted). This standard reflects a fluctuating, flexible mode of evaluation. Rather than adopting a precise, rigid standard, the Court elected to provide reviewing courts with a general statement to guide them as they weigh the facts and sift the circumstances of particular cases. Between the obviously opposite poles of "no reasonable doubt about guilt whether or not the additional evidence is considered" and verdicts "already of questionable validity," lies a broad "inevitably imprecise," *id.* at 108, area. *Agurs* responded to the imprecise nature of possible situations by providing an imprecise standard of materiality, *i.e.*, something more than a slight effect on the jury's decision but less than having a determinative effect.

While *Agurs* left open the precise standard which a court in post conviction proceedings should use in assessing the effect of undisclosed evidence, we feel compelled to articulate a standard for trial judges in North Carolina within the bounds permitted by *Agurs*. Little uniformity can be achieved in these matters, either by the initial judgments of trial judges or by appellate review, if no consistent standard exists to govern decisions at both levels.

In establishing this standard, we recognize that *Agurs* refers consistently to the notion of whether the undisclosed evidence creates a reasonable doubt. *Id.* at 112-13. An appropriate standard of materiality should incorporate this notion. If the evidence creates a reasonable doubt as to guilt, then due process requires

that a defendant receive a new trial.[3] *Agurs* recognizes as much. The imprecise area which needs clarification is: How strong must the likelihood be that the undisclosed evidence would have created a reasonable doubt?

The answer lies between the two extremes noted in *Agurs*: that the court on post conviction review believes the evidence probably would have resulted in an acquittal, on one extreme, and, on the other, that the reviewing court does not believe with certainty that the evidence would not have affected the jury. We feel the middle ground between these two extremes can best be articulated by, and therefore we adopt as our standard, this formula: Would the undisclosed evidence likely have created a reasonable doubt on the issue of guilt which did not otherwise exist.[4]

The evaluation of the effect of the nondisclosed evidence and, hence, its materiality, hinges on two factors: (1) The strength of the evidence itself vis-a-vis the issue of guilt[5] and (2) the magni-

3. We are not unmindful of our recent decision which explicated the process involved in establishing constitutional error sufficient to justify granting a motion for appropriate relief. *State v. Bush*, 307 N.C. 152, 297 S.E. 2d 563 (1982). In *Bush*, we noted that our statutes place the initial burden on a defendant to establish that constitutional error was committed. *Id.* at 166-67, 297 S.E. 2d at 572-73. Once constitutional error is established, a defendant is entitled to appropriate relief (usually in the form of a new trial) unless the state persuades the courts the error was harmless beyond a reasonable doubt. *Id.* at 167, 297 S.E. 2d at 573. N.C. Gen. Stat. § 15A-1443(b) (1978). Once a defendant establishes, through the process outlined herein, an *Agurs* violation, he is entitled to a new trial. An *Agurs* violation is, by its very nature, an extraordinary type of constitutional error. Since a defendant must show, as a basis for constitutional error under *Agurs*, that the undisclosed evidence would likely have created a reasonable doubt at his trial, this error cannot be harmless beyond a reasonable doubt. Essentially, in this situation, a defendant establishes both that constitutional error has been committed and that it was not harmless. Indeed, he must establish the latter as a prerequisite to establishing the former.

4. We acknowledge that the standard could be formulated in terms of whether "the evidence would likely have affected the outcome of the trial." We see no distinction between "affected the outcome of the trial" and "created a reasonable doubt." Criminal verdicts are based on the presence or absence of reasonable doubt. We assume, as we must, that a guilty verdict results only when the evidence supports it beyond a reasonable doubt. If the undisclosed evidence, taken in light of the record as a whole, does not alter the nonexistence of reasonable doubt, then it could not have affected the outcome of the trial.

5. For example, evidence tending solely to impeach a nonmaterial government witness would have little or no strength on the issue of guilt, while evidence that

tude of the evidence of guilt which the convicting jury heard. Accordingly, the reviewing court must view the additional evidence in light of the evidence used to convict defendant in determining whether it would likely have created a reasonable doubt as to a defendant's guilt.

B.

We now consider the second problem posed by reviews of nondisclosed evidence. Specifically, we must decide upon whom the effect of the additional evidence must be measured, the trial judge hearing the post-conviction proceeding or the jury. The universal view is that the answer which *Agurs* provides is ambiguous. *See Ostrer v. United States*, 577 F. 2d 782, 788, n. 5 (2d Cir. 1978), *cert. denied*, 439 U.S. 1115 (1979); *Cannon v. State of Alabama*, 558 F. 2d 1211, 1216, n. 11 (5th Cir. 1977), *cert. denied*, 434 U.S. 1087 (1978); Babcock, *supra*, at 1179. While the opinion is not altogether clear, we do not find it completely ambiguous on this issue.

The *Agurs* Court did not explicitly declare upon whose mind the effect of the additional evidence must be measured.[6] Yet we glean some feeling for the Court's judgment from the overall thrust of the majority opinion. The Court clearly expressed concern for the need to find guilt only upon proof "beyond a reasonable doubt." 427 U.S. at 112. It based the requirement that exculpatory evidence, although unrequested, must be disclosed upon the need to preserve a defendant's right to a fair trial under

another person's fingerprints were on the murder weapon would have tremendous bearing on that issue. *See United States v. Agurs*, 427 U.S. 97, 111, n. 18 (1976).

6. The references by the *Agurs* majority that "the trial judge indicated his unqualified opinion that respondent was guilty" and "the trial judge remained convinced of respondent's guilt beyond a reasonable doubt . . ." do not suggest to us that the effect should be measured by the trial judge's judgment rather than the jury's. First, the trial judge in *Agurs* used the jury as the guide. In evaluating the impact of the additional evidence, he expressed "skepticism that [it] would have made any difference in the jury's conclusions." *United States v. Agurs*, 510 F. 2d 1249, 1251 (D.C. Cir. 1975), *reversed*, 427 U.S. 97 (1976). Second, the Supreme Court rejected the circuit court's conclusion that "the jury might have returned a different verdict if the evidence had been received," 427 U.S. at 102, not because of its view of the evidence's effect *on the jury* but because of the standard of materiality through which the Court of Appeals evaluated the evidence, *i.e.*, that the jury verdict *might* have been different. *See id.* at 112 (where the Court rejects the lenient, harmless-error standard). Finally, the trial judge in *Agurs* was the same judge who presided over Agurs' initial trial.

the Due Process Clause of both the Fifth and Fourteenth Amendments. *Id.* at 107. And throughout its analysis, it underscored the central importance of assessing the character of the nondisclosed evidence in judging its effect on a defendant's conviction. *Id.* at 110. All of these factors—burden of proof, need for all exculpatory evidence, and a fair trial—are linked to the factfinder. It is the factfinder who must ultimately hear this material evidence; it is only the factfinder upon whom the material evidence could make a difference.

The crucial question involved in these cases is the effect of the evidence on the outcome of the trial. *United States v. DiFrancesco,* 604 F. 2d 769, 774 (2d Cir. 1979), *rev'd on other grounds,* 449 U.S. 117 (1980). The outcome rests, of course, in the hands of the factfinder. Logically, then, it is the factfinder upon whom the effect of this undisclosed evidence should be measured. Our interpretation of the reasoning in *Agurs* leads us to conclude that the undisclosed evidence must be viewed in terms of its effect on the jury. Since the jury determines guilt or innocence based solely on its evaluation, and its evaluation alone, of the evidence, reviewing courts must assess the undisclosed evidence as it would likely impact upon the jury. We join a number of federal courts of appeals in this conclusion. *See, e.g., United States v. Librach,* 609 F. 2d 919, 921-22 (8th Cir. 1979), *cert. denied,* 444 U.S. 1080 (1980); *Ostrer,* 577 F. 2d at 788; *Cannon,* 558 F. 2d at 1214. Furthermore, we feel this result is particularly appropriate in North Carolina where, unlike the federal system, the judge who considers a post trial motion for appropriate relief is most often not the judge who tried the case.

III.

[3] The proper standard, therefore, which we adopt to determine whether on collateral attack unrequested evidence known but not disclosed by the prosecution is material so that due process requires defendant be given a new trial because of its nondisclosure is this: Would the evidence, had it been disclosed to the jury which convicted defendant, and in light of all other evidence which that jury heard, likely have created in the jury's mind a reasonable doubt which did not otherwise exist as to defendant's guilt?

IV.

The inquiry is essentially a legal one and the answer to the question constitutes a conclusion of law fully reviewable on appeal where the question will be whether the facts found are supported by the evidence and, in turn, support the conclusion. Nevertheless, the conclusion of law must be based on a careful evaluation and assessment of all the facts, both those presented at defendant's trial and the undisclosed facts which are the subject of the motion for post conviction relief. Because the conclusion is based upon such a careful assessment of the facts, and actually constitutes the application of a standard to the facts, we believe it is appropriate to hold that the conclusion should, in the first instance, be made by the trial court which hears the evidence presented on the post conviction motion for appropriate relief.

[4] Judge Collier's order is not supported by appropriate legal conclusions, nor did he apply the standard which we today articulate. It is not enough to conclude as he did that the prosecution's failure to disclose "raise[s] . . . constitutional and due process questions . . . ." The question is whether such a failure deprived defendant of constitutional due process. Neither is it sufficient, or even appropriate, to base an order on a conclusion that a lower federal court might require "a new trial at some distant future date. . . ." State courts are no less obligated to protect and no less capable of protecting a defendant's federal constitutional rights than are federal courts. In performing this obligation a state court should exercise and apply its own independent judgment, treating, of course, decisions of the United States Supreme Court as binding and according to decisions of lower federal courts such persuasiveness as these decisions might reasonably command. In fairness, Judge Collier did not have the legal standard which we articulate today to guide him in his consideration of the case, and it is not reasonable to expect him to have applied it without the benefit of this opinion.

[5] When orders or rulings of the trial court are made under a misapprehension of existing law, this Court may either vacate and remand the case for further proceedings, modify or reverse, "as the rights of the parties and the applicable law may require." *State v. Cornell*, 281 N.C. 20, 30, 187 S.E. 2d 768, 774 (1972) (order

reversed). *Accord, Myers v. Myers*, 270 N.C. 263, 154 S.E. 2d 84 (1967) (order vacated; case remanded for *de novo* hearing); *Burns v. Riddle*, 265 N.C. 705, 144 S.E. 2d 847 (1965) (judgment vacated; remanded for "further hearing"). When findings of fact must be made in light of a prevailing legal standard, a new explication of the standard justifies our remanding the case for reconsideration *de novo* based upon the new explication. *See Morrison v. Burlington Industries*, 301 N.C. 226, 271 S.E. 2d 364 (1980).

We, therefore, vacate Judge Collier's order granting defendant a new trial and we remand the matter for a hearing *de novo* on defendant's motion for appropriate relief to be conducted and determined in a manner not inconsistent with this opinion.

Vacated and remanded.

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

JOE HENRY, ADMINISTRATOR OF THE ESTATE OF ARCHIE LEE HENRY v. FLOYD DEEN, JR., M.D., FLOYD DEEN, JR., M.D., P.A., ANN HALL AND ABDULHAKIM NIAZI-SAI, M.D.

No. 200A83

(Filed 10 January 1984)

1. **Rules of Civil Procedure § 15.1 — refusal to grant amendment to complaint — no abuse of discretion**

The trial court did not abuse its discretion in denying a plaintiff's motion to amend his original complaint to allege a claim for wrongful death against defendant Niazi since plaintiff's original complaint failed to give notice of the transactions or occurrences to be proved to support a claim for relief for wrongful death against Niazi, and plaintiff specifically made allegations which would negate the possibility of any actionable negligence by Niazi. Since the original complaint did not give notice of a claim against Niazi for negligence or of the transactions or occurrences to be proved in support of any such claim, Rule 15(c) of the North Carolina Rules of Civil Procedure prevented the relation back of this amendment to the time the original complaint was filed in that plaintiff filed his attempted amendment more than two years after his cause of action accrued and past the statute of limitations for negligent wrongful death actions pursuant to G.S. 1-53.

2. Damages § 12.1— pleadings for punitive damages sufficient

In a civil action involving claims for wrongful death and civil conspiracy against two physicians and a physician's assistant, the trial court erred in dismissing plaintiff's claim for punitive damages against one of the physicians and the physician's assistant since, pursuant to G.S. 1A-1, Rule 8(a)(1), a statement of a claim is adequate if it gives sufficient notice of events or transactions to allow the adverse party to understand the nature and basis for the claim, to allow him to prepare for trial, and to allow for the application of *res judicata*, and since plaintiff's complaint met the requirements of this rule.

3. Conspiracy § 2.1— civil conspiracy—sufficiency of evidence

In a civil action involving claims for wrongful death and civil conspiracy against two physicians and a physician's assistant, if the trial court on remand allows the plaintiff's motion to amend his complaint to allege injury from the conspiracy, the trial court erred in granting defendants' motions to dismiss the claim for civil conspiracy pursuant to Rule 12(b)(6) where plaintiff alleged that all three of the defendants conspired to impede his investigation of this case by destroying decedent's medical records and by falsifying and fabricating records to cover up the defendants' alleged negligence. Where, as alleged here, a party deliberately destroys, alters or creates a false document to subvert an adverse party's investigation of his right to seek a legal remedy, and injuries are pleaded and proven, a claim for the resulting increased costs of the investigation will lie. G.S. 1A-1, Rule 37(c). The cases cited by defendants in support of their argument that allowing this action for civil conspiracy is tantamount to allowing a civil action for perjury are distinguishable. G.S. 14-209.

Justice MARTIN dissenting in part.

Justice FRYE joins in this dissenting opinion.

ON appeal from a decision of the Court of Appeals, one judge dissenting, 61 N.C. App. 189, 300 S.E. 2d 707 (1983). The Court of Appeals affirmed in part and reversed in part orders and judgments entered December 14, 1981 in Superior Court, ANSON County. Heard in the Supreme Court September 15, 1983.

James, McElroy & Diehl, P.A., by Gary S. Hemric, for plaintiff appellant.

Golding, Crews, Meekins, Gordon & Gray, by John G. Golding, for defendant appellant Niazi-Sai.

Kennedy, Covington, Lobdell & Hickman, by Charles V. Tompkins, Jr. and Fred B. Clayton, for defendant appellee Deen.

No counsel appeared for defendant appellee Hall.

MITCHELL, Justice.

This case involves claims of an administrator of a decedent's estate against two physicians and a physician's assistant for wrongful death and civil conspiracy. The questions addressed in this appeal include (1) whether the plaintiff's motion to amend his complaint should have been allowed; (2) whether the complaint sufficiently stated a claim for punitive damages arising out of the alleged negligence of the defendants; and (3) whether the dismissal of claims against the defendants for civil conspiracy was proper. The Court of Appeals held that the trial court erred in denying the plaintiff's motion to amend his complaint to add allegations set forth in a proposed amended complaint attached to that motion. The Court of Appeals affirmed the trial court's dismissal of claims for punitive damages for wrongful death and affirmed the trial court's dismissal of claims for civil conspiracy against all defendants. We reverse the decision of the Court of Appeals on each issue and remand the case for further proceedings.

In his representative capacity as administrator of his brother Archie Lee Henry's estate, the plaintiff Joe Henry brought this action on June 25, 1981 against two doctors and a physician's assistant for wrongful death and civil conspiracy. The original complaint alleged that the decedent was 35 years old at the time of his death on July 8, 1979. In the latter part of June 1979 Henry began to feel pain and discomfort in his chest which radiated into his shoulders and down both arms. He experienced a burning sensation, nausea and "heartburn" after eating. He also had difficulty breathing and resting comfortably at night.

After experiencing more severe chest pain and other ailments on Saturday, June 30 and Sunday, July 1, Henry went to the hospital emergency room facility at Anson County Hospital. At the hospital an emergency room physician examined Henry and took a medical history from him. The physician prepared a report on the examination and history and placed it in Henry's medical file. While at the hospital Henry was x-rayed. A radiologist interpreted his chest x-ray, prepared a written report of his findings, and placed the report in Henry's record. The emergency room physician diagnosed Henry as having a pneumonia condition. The physician prescribed medicine for him and

instructed him to see the defendant Deen if he had any more problems. Deen is a licensed physician in the general practice of medicine in Anson County whose office was adjacent to the hospital. After discharging Henry that day, the emergency room physician and the radiologist reviewed the x-ray report. The report indicated possible serious cardiac deterioration. In the report the radiologist urged a complete medical evaluation of Henry's chest and his symptoms. Late Sunday evening the emergency room physician called Henry at his home and specifically instructed him to see the defendant Deen on Tuesday, July 3.

The plaintiff's complaint alleged that Henry visited Deen's office on the morning of July 3, 1979, and that at that time his symptoms had not changed. Henry told a medical technician about his symptoms, and they were recorded on a medical chart prepared in Deen's office. Henry also told the technician that his father had died of heart disease and that Henry had been treated in 1977 for high blood pressure. That information also was written on the medical record. The plaintiff alleged that this record and the substance of the records from the hospital were available to and known to Deen and Physician's Assistant Hall on July 3. Hall was employed by Deen at the time. The plaintiff claims that despite Henry's request for help and treatment, the defendants Deen and Hall conducted only a cursory examination of him, and without further tests urged him to continue taking the medicine prescribed for a pneumonia condition.

Deen and Hall advised Henry to return for a follow-up appointment on Friday, July 6, 1979. Henry returned on that day, his condition unchanged. He again related his symptoms to a medical technician, and they were written on his medical chart. Because Deen was not in his office on July 6, Henry was seen by Physician's Assistant Hall. The plaintiff alleged that Hall conducted no tests on Henry but instead advised him to continue taking the medication prescribed for him on July 1 by the emergency room physician. She also prescribed additional medication unrelated to a heart condition. In his original complaint the plaintiff alleged that Hall did not consult with any physician concerning Henry's condition on July 6.

The plaintiff alleged that Henry suffered from arteriosclerosis, coronary atheromatosis and coronary thrombosis, the

combination of which, if undiagnosed and untreated, leads inevitably to the death of heart tissue and possible cardiac arrest. He alleged that Henry's symptoms as disclosed to Hall and Deen made a medical diagnosis of heart disease compelling and obvious.

Henry died on July 8, 1979 of massive myocardial infarction as a result of heart disease. He did not die of pneumonia, nor did any pneumonia condition contribute to his death, according to the plaintiff's complaint.

The plaintiff claimed that after Henry's death the defendants Deen, Hall and Niazi, a licensed physician, initiated a conspiracy to alter medical records and to prevent the plaintiff from discovering the negligent acts of the defendants Deen and Hall. The defendants allegedly destroyed medical records concerning medical treatment of Henry and fabricated a record of a July 6, 1979 consultation between the defendants.

In summary the plaintiff's original complaint set forth the following counts: (1) Henry's death was proximately caused by Deen's negligence; (2) Henry's death was proximately caused by Hall's negligence; (3) Hall's negligence was imputed to Deen under a theory of *respondeat superior*; (4) the gross, wanton, intentional and reckless conduct of Hall and Deen entitled the plaintiff to recover punitive damages; (5) the conspiracy between Deen and Hall to falsify medical records constituted civil conspiracy giving rise to punitive damages; (6) the conspiracy between Hall, Deen and Niazi to create a record of non-existent consultation constituted civil conspiracy giving rise to punitive damages. The complaint sought actual damages for wrongful death from Deen and Hall and punitive damages for wrongful death and civil conspiracy from Deen and Hall. From Niazi the complaint sought only punitive damages for civil conspiracy.

After the defendants made motions to dismiss the original complaint, the plaintiff, on November 30, 1981, filed a motion to amend and attached a proposed amended complaint. The amended complaint repeated the original claim that Hall never consulted with a physician on July 6, 1979 but alleged in the alternative that a consultation did occur between Hall and Niazi on that day. The amended complaint alleged that Physician's Assistant Hall called Niazi on July 6, 1979 for a consultation as a result of an arrangement between Niazi and Deen by which Niazi treated

Deen's patients in Deen's absence. The plaintiff claimed that Niazi advised Hall to have Henry admitted to a hospital and to have an electrocardiogram test. The plaintiff also claimed that Niazi failed to examine Henry personally and failed to examine the chest x-rays even though he was aware that Hall was only a physician's assistant and not a licensed physician. Instead, Niazi attempted to diagnose Henry and advise treatment over the telephone. The amended complaint added a claim against Niazi for actual and punitive damages for wrongful death as well as adding a claim against Deen, Hall and Niazi for actual damages resulting from the civil conspiracies.

On December 14, 1981 the trial court dismissed the civil conspiracy claims, and the claims for punitive damages for wrongful death against Deen, Hall and Niazi. The trial court also denied the plaintiff's motion to amend his complaint and dismissed the claim for wrongful death against Niazi. The Court of Appeals upheld the trial court's dismissal of claims against Hall and Deen for punitive damages for wrongful death and claims against all the defendants under a theory of civil conspiracy, and reversed the trial court's denial of certain of the plaintiff's proposed amendments.

I.

[1] The defendant Niazi assigns as error the holding of the Court of Appeals that the trial court abused its discretion by denying the plaintiff's motion to amend his complaint. This assignment is meritorious as to those portions of the amended complaint which relate to the alleged wrongful death of Henry resulting from the negligence of Niazi. Since the original complaint did not give notice of a claim against Niazi for negligence or of the transactions or occurrences to be proved in support of any such claim, Rule 15(c) of the North Carolina Rules of Civil Procedure prevents the relation back of this amendment to the time the original complaint was filed. As the motion to amend and attached amended complaint were filed after the running of the applicable statute of limitations, the claim for relief for wrongful death against Niazi set forth in the amended complaint is barred. Therefore, the trial court did not abuse its discretion in denying an amendment adding that claim.

The plaintiff's original complaint sought recovery for wrongful death and civil conspiracy. The complaint set out in considerable detail allegations of negligence on the part of Deen and Hall and civil conspiracy on the part of Deen, Hall and Niazi. The only reference in the original complaint to any negligence by Niazi was as follows:

> 6. This is an action for money damages sought by Plaintiff on account of the wrongful death of Henry as the proximate result of *certain negligent and willful, wanton conduct on the part of Deen, Hall and Niazi, acting jointly and severally.* The amount in controversy, exclusive of interest and costs, exceeds $5,000.00.

(Emphasis added.) The complaint went on, however, to state that: "Specifically, Hall did not, at any time on July 6, 1979, or thereafter, consult with Niazi concerning Henry, nor did she at any time receive any medical advice or information from Niazi concerning Henry or the treatment of his illness."

The complaint then continued to state at length and with great specificity the manner in which the plaintiff contended that Deen, Hall and Niazi conspired to falsify medical records in order to indicate that Niazi had consulted with Hall concerning Henry's condition when, in fact, Niazi had not been involved in any way in the diagnosis or treatment of Henry. This allegation was frequently repeated throughout the complaint and is fairly represented by the following:

> 38. Plaintiff is informed, believes and therefore alleges that Deen and Hall further agreed and conspired with Niazi to create a false and misleading medical record to the effect that Hall had consulted with Niazi on July 6, 1979, concerning Henry's condition, *when in fact she had not done so.* In furtherance of that conspiracy and with the knowledge, consent and cooperation of Deen and Niazi, Hall prepared a fictitious medical record detailing the *non-existent consultation with Niazi* and Niazi agreed to furnish this fraudulent document to anyone who inquired into his participation of the treatment of Henry.

(Emphasis added.)

Further, in the portion of the complaint entitled "PRAYER FOR RELIEF" the plaintiff sought as his sole relief against Niazi:

> 3. That he have and recover of Defendant Niazi the sum of $5,000,000.00 as punitive damages on account of the unlawful civil conspiracy engaged in by Niazi, as more particularly alleged in the Sixth Count of this Complaint;

That part of the Complaint entitled "SIXTH COUNT" included paragraphs 53 and 54 which relate only to the alleged conspiracy between the defendants to make representations concerning the "non-existent consultation by Niazi on July 6, 1979."

The plaintiff filed his motion to amend his original complaint and the attached proposed amended complaint on November 30, 1981, more than two years after Henry's death on July 8, 1979. This motion was denied by the trial court on December 14, 1981. The plaintiff sought by his attempted amendment to allege alternatively that Hall did call Niazi on July 6, 1979 concerning Henry's condition, such call having been made pursuant to an arrangement between Deen and Niazi by which Niazi cared for Deen's patients in Deen's absence. The amended complaint alleged that Niazi attempted to diagnose Henry over the telephone without an examination of him even though he knew that Hall was not a physician.

A motion to amend is addressed to the discretion of the trial court. Its decision will not be disturbed on appeal absent a showing of abuse of discretion. *Smith v. McRary,* 306 N.C. 664, 295 S.E. 2d 444 (1982). Although the spirit of the North Carolina Rules of Civil Procedure is to permit parties to proceed on the merits without the strict and technical pleadings rules of the past, the rules still provide some protection for parties who may be prejudiced by liberal amendment. *See e.g. Kinnard v. Mecklenburg Fair,* 46 N.C. App. 725, 266 S.E. 2d 14, *aff'd per curiam,* 301 N.C. 522, 271 S.E. 2d 909 (1980).

The statute of limitations within which an action for negligent wrongful death must be brought is two years. G.S. 1-53. Since Henry died on July 8, 1979 the statute of limitations would bar any actions originated more than two years later. The plaintiff's original complaint was filed within the statute of limitations but the motion and amended complaint were not. Unless the

amendment related back to the time of filing of the original complaint, the plaintiff's action was not brought prior to the running of the statute of limitations.

The rule governing the relation back of amendments to original pleadings is Rule 15(c) which states the following:

> *Relation back of amendments.*—A claim asserted in an amended pleading is deemed to have been interposed at the time the claim in the original pleading was interposed, *unless the original pleading does not give notice of the transactions, occurrences, or series of transactions or occurrences to be proved pursuant to the amended pleading.*

G.S. 1A-1, Rule 15(c) (emphasis added). Therefore, whether an amendment relates back to the time of filing of an original pleading no longer depends, as was the case prior to the adoption of Rule 15, on an analysis of whether the amendment states a new cause of action. As we have previously stated:

> The amended pleading will therefore relate back if the new pleading merely amplifies the old cause of action, or now even if the new pleading constitutes a new cause of action, provided that the defending party had originally been placed on notice of the events involved.

Burcl v. Hospital, 306 N.C. 214, 224, 293 S.E. 2d 85, 91 (1982), *quoting with approval*, Wachtell, *New York Practice under the CPLR* 141 (1963).

As Justice Sharp (later Chief Justice) perceptively stated for this Court in a related context: "Since the sufficiency of a statement will vary with the circumstances of each case, generalizations by the court are of little more help to a pleader than the rules themselves. As usual, enlightenment comes from observing and understanding what the courts do." *Sutton v. Duke*, 277 N.C. 94, 103, 176 S.E. 2d 161, 166 (1970). For this reason, we do not undertake to render any generalizations concerning the meanings of the terms used in Rule 15(c) and, instead, allow them to speak for themselves. An amendment to an original pleading does not relate back to the time the original pleading was interposed if the original pleading "does not give notice of the transactions, occurrences, or series of transactions or occurrences, to be proved pursuant to the amended pleading." G.S. 1A-1, Rule 15(c).

We turn now to the case before us. Not only did the plaintiff fail in his original complaint to give notice of the transactions or occurrences to be proved to support a claim for relief for wrongful death against Niazi, he specifically made allegations which would negate the possibility of any actionable negligence by Niazi. The original complaint specifically stated repeatedly and in great detail that Hall never consulted Niazi concerning the now deceased patient Henry and that Niazi never undertook to give advice concerning Henry. The plaintiff's prayer for relief specifically referred to portions of the complaint making identical allegations and sought recovery from Niazi only for his participation in an unlawful civil conspiracy. Therefore, the original complaint in the present case failed entirely to "give notice of the transactions, occurrences, or series of transactions, to be proved" pursuant to the plaintiff's proposed amendment. To allow an amendment to state such a new claim for relief for wrongful death after the defendant had been led by the original complaint into believing that he was to be called to answer only for a civil conspiracy and after the statute of limitations had run would tend to allow the defendant to be "ambushed." We have discouraged such results in other cases and do so here. *See e.g., Shugar v. Guill*, 304 N.C. 332, 338, 283 S.E. 2d 507, 510 (1981).

We hold that the trial court did not abuse its discretion in denying the plaintiff's motion to amend the original complaint to allege a claim for wrongful death against Niazi. The Court of Appeals erred in holding that the trial court abused its discretion in this regard and is reversed on this issue.

II.

[2] The plaintiff-appellant next assigns as error the Court of Appeals' ruling that the trial court was correct in dismissing his claim for punitive damages for wrongful death against the defendants Deen and Hall. The Court of Appeals decided that the complaint sufficiently notified the defendants of a claim for medical malpractice but that it failed to allege aggravating circumstances which would give rise to punitive damages. We find merit in this assignment of error.

As we have stated in *Shugar v. Guill*, 304 N.C. 332, 283 S.E. 2d 507 (1981), with the adoption of G.S. 1A-1, the "new" rules of civil procedure, the legislature adopted a form of notice pleading.

As a result our prior cases requiring the setting forth of detailed and specific facts giving rise to punitive damages are no longer applicable. *Shugar v. Guill*, 304 N.C. 332, 283 S.E. 2d 507 (1981). Instead, a statement of a claim is adequate under Rule 8(a)(1) if it gives sufficient notice of events or transactions to allow the adverse party to understand the nature and basis for the claim, to allow him to prepare for trial, and to allow for the application of *res judicata*. *Sutton v. Duke*, 277 N.C. 94, 102, 176 S.E. 2d 161, 165 (1970). In *Shugar*, an assault case, the plaintiff alleged that the defendant without cause "did willfully and maliciously assault and batter the plaintiff," and asked for punitive damages in his prayer for damages. This Court found that pleading was sufficient to state a claim for punitive damages.

In the case at hand, the plaintiff set forth in detail allegations of negligence on the part of Hall and Deen in his original complaint. The plaintiff then pleaded the issue of punitive damages as follows:

FOURTH COUNT

48. The negligent acts and omissions of Deen and Hall committed during the course of their professional treatment of Henry were gross and wanton, evidencing a reckless disregard for the rights and safety of their patient Henry.

49. The gross, wanton negligence of Deen and Hall was the direct, proximate cause of the wrongful death of Henry.

50. Because of the intentional or reckless, wanton conduct of Deen and Hall towards Henry, particularly within the context of the physician-patient relationship in which Henry relied upon the professional competence and integrity of those Defendants, Deen and Hall are liable to Plaintiff for substantial punitive damages.

In his prayer for damages, the plaintiff asked punitive damages of five million dollars. He amended as a matter of right asking instead for "a sum in excess of $10,000.00" for "the gross, wanton negligence incidental to the wrongful death of Henry and for the unlawful civil conspiracy."

We hold that under our ruling in *Shugar*, the complaint in the present case gave sufficient notice of a claim against Deen

and Hall for punitive damages for wrongful death to survive a motion for dismissal. We reverse the decision of the Court of Appeals to the contrary on this issue.

III.

[3] The plaintiff next assigns as error the determination by the Court of Appeals majority that the trial court correctly dismissed the plaintiff's claims under a theory of civil conspiracy. The plaintiff alleged that all three of the defendants conspired to impede his investigation of this case by destroying Henry's medical records and by falsifying and fabricating records to cover up the defendants' alleged negligence. The trial court granted the defendants' motions to dismiss the claim under Rule 12(b)(6) for failure to state a claim upon which relief can be granted. G.S. 1A-1, Rule 12(b)(6).

The Court of Appeals majority affirmed giving as its reason that to allow such a claim would be to allow a civil action for perjury, or subornation of perjury. The Court of Appeals relied upon this Court's opinions in *Gillikin v. Springle*, 254 N.C. 240, 118 S.E. 2d 611 (1961) and *Gillikin v. Bell*, 254 N.C. 244, 118 S.E. 2d 609 (1961) for the rule that civil actions for perjury or subornation of perjury will not lie. We hold that the Court of Appeals majority erred in affirming the trial court on the basis of this reasoning. As discussed more fully later in this opinion, *if the trial court on remand allows the plaintiff's motion to amend to allege injury* from the conspiracy, the plaintiff's pleadings state a claim for civil conspiracy upon which relief can be granted. The Court of Appeals is reversed on this issue.

In deciding whether a complaint adequately states a claim upon which relief can be granted within the meaning of Rule 12(b)(6), the courts must take the facts as they appear in the plaintiff's pleadings as true and consider the legal sufficiency of the complaint. Resolution of evidentiary conflicts is not within the scope of the rule. *White v. White*, 296 N.C. 661, 252 S.E. 2d 698 (1979). Examined in such manner the complaint and proposed amendment in this case state a legally sufficient claim for civil conspiracy.

In civil actions for recovery for injury caused by acts committed pursuant to a conspiracy, this Court has stated that the com-

bination or conspiracy charged does no more than associate the defendants together and perhaps liberalize the rules of evidence to the extent that under the proper circumstances the acts of one may be admissible against all. *Shope v. Boyer*, 268 N.C. 401, 150 S.E. 2d 771 (1966); *Muse v. Morrison*, 234 N.C. 195, 66 S.E. 2d 783 (1951). The gravamen of the action is the resultant injury, and not the conspiracy itself. *Shope v. Boyer*, 268 N.C. 401, 150 S.E. 2d 771 (1966). To create civil liability for conspiracy there must have been a wrongful act resulting in injury to another committed by one or more of the conspirators pursuant to the common scheme and in furtherance of the objective. *Muse v. Morrison*, 234 N.C. 195, 66 S.E. 2d 783 (1951). In *Muse* this Court held that the complaint sufficiently stated a claim for civil conspiracy where it alleged a conspiracy, wrongful acts done by certain of the alleged conspirators, and injury.

In this action the original complaint alleged that the defendants Hall and Deen agreed to create and did create false and misleading entries in Henry's medical chart. The complaint further alleged that the defendants obliterated another entry in the chart concerning the true facts of the diagnosis and treatment of Henry. It was also alleged that Deen and Hall conspired with Niazi to destroy or conceal the actual medical record on Henry and to create a false medical record to the effect that Hall consulted with Niazi on July 6, 1979. The original complaint additionally alleged that Hall created the false document and that Niazi agreed to produce the document to anyone who inquired about Niazi's participation in Henry's treatment. Such acts by the defendants, if found to have occurred, would be acts which obstruct, impede or hinder public or legal justice and would amount to the common law offense of obstructing public justice. *See generally, In Re Kivett*, 309 N.C. 635, 309 S.E. 2d 442 (1983). Therefore, the original complaint adequately alleged a conspiracy among the defendants and wrongful acts by the defendants in furtherance thereof. The amended complaint, *if allowed*, adds the required allegation of injury.

That this State has a policy against parties deliberately frustrating and causing undue expense to adverse parties gathering information about their claims is manifest in G.S. 1A-1, Rule 37 which sets out the consequences for parties who refuse to

allow discovery. Specifically, when a party refuses to make an admission of fact or fails to make an admission concerning the genuineness of a document as requested under Rule 36, and that fact or genuineness is later proved, a trial court may award to the party who requested the admission the costs of proving the fact. G.S. 1A-1, Rule 37(c). Where, as alleged here, a party deliberately destroys, alters or creates a false document to subvert an adverse party's investigation of his right to seek a legal remedy, and injuries are pleaded and proven, a claim for the resulting increased costs of the investigation will lie.

The defendants and the majority in the Court of Appeals reason that to allow an action for civil conspiracy in this case is tantamount to allowing a civil action for perjury, an action which this Court has refused to recognize in prior cases. *See e.g. Gillikin v. Springle*, 254 N.C. 240, 118 S.E. 2d 611 (1961); *Gillikin v. Bell*, 254 N.C. 244, 118 S.E. 2d 609 (1961); *Brewer v. Carolina Coach*, 253 N.C. 257, 116 S.E. 2d 725 (1960). We find those cases distinguishable from the case at hand.

Each of the cited cases involved an attempt by a party who had lost a case at trial to recover damages in a later proceeding from a party or witness who was alleged to have committed perjury or suborned perjury at the trial and caused the moving party to lose that earlier action. In the cited *Gillikin* cases the plaintiff sought damages from defendants who were alleged to have conspired to present and to have in fact presented false testimony and evidence at trial preventing the plaintiff from winning a wrongful death action. In *Gillikin v. Springle*, 254 N.C. 240, 118 S.E. 2d 611 (1961), the Court reasoned that criminal sanctions for perjury are available, and therefore no tort recovery for perjury is allowable. In *Godette v. Gaskill*, 151 N.C. 52, 65 S.E. 612 (1909), this Court denied the right to recover for damages resulting from perjury in an earlier trial. The Court based its holding on the lack of precedent for such an action, the policy favoring final judgments, and the danger of a multiplicity of suits by parties dissatisfied by the outcome of trials. The *Godette* opinion expressed concern that witnesses might be intimidated from testifying if they feared they would be subjected to subsequent lawsuits for false testimony. Other jurisdictions have also adopted rules which for similar reasons preclude civil actions for perjury. *See*

Annot., Actionability of Conspiracy to Give or To Procure False Testimony or Other Evidence, 31 A.L.R. 3d 1423 (1970).

At least one commentator has urged the recognition of a tort action for perjury. *See*, Note, Civil Remedies for Perjury: A Proposal for a Tort Action, 19 Ariz. L. Rev. 349 (1977). The author traces the common law roots of the rule against civil actions for perjury and proposes a tort with a stringent burden of proof for the plaintiff. The author notes that courts have long been creative in allowing damages for perjury under the guise of other names, such as abuse of process. He urges the legislative enactment of a statutory cause of action, and notes that Maine has had such a statute for a number of years. Me. Rev. Stat. tit. 14, § 870 (1964). He argues that sparse case law under the Maine statute should give comfort to those fearing a multiplicity of lawsuits arising from a civil action for perjury.

We need not consider here the continuing vitality of the rule forbidding civil actions for perjury because we find that this case does not come within the purview of the cases which preclude private claims for perjury. Perjury is defined by statute and case law as a false statement knowingly made in a proceeding in a court of competent jurisdiction or concerning a matter wherein an affiant is required by law to be sworn as to some matter material to the issue or point in question. G.S. 14-209; *State v. Arthur*, 244 N.C. 582, 94 S.E. 2d 646 (1956). The complaint in this case makes no allegation that the defendants have perjured themselves by making false sworn statements. The complaint alleging conspiracy was apparently filed before any discovery in which sworn statements were made. The complaint sets no precise time at which the alleged conspiracy and wrongful acts occurred other than alleging that they occurred after the investigation of Henry's death began.

The policy considerations often cited in support of the rule barring civil suits for perjury are inapplicable to this case. Unlike the defendants in the *Gillikin* cases and their predecessors, at the time this action was brought the defendants were not subject to criminal sanctions for perjury. From the pleadings it appears that at the time of the alleged conspiracy no court had jurisdiction and the defendants had not been required to give sworn statements. The policy favoring final judgments, a factor in the cases re-

jecting civil actions for perjury, is not pertinent to this case, since this case had not been fully adjudicated on the issues when the trial court dismissed the plaintiff's civil conspiracy claims. The plaintiff seeks to try his civil conspiracy claims and his other claims in one trial. If the plaintiff is allowed to pursue his claims for civil conspiracy in this case, the jury will be able to consider all issues in the same trial. There will be no opportunity to collaterally attack any judgment on the wrongful death claims since judgment will be entered in the same action on the conspiracy claims and will bar subsequent conspiracy claims. Because subsequent suits adjudicating the same issues will be barred, there is no danger of a multiplicity of lawsuits arising out of one lawsuit.

The prohibition against private perjury actions also is based in part on concerns that witnesses will be intimidated and will hesitate to testify because of fears of subsequent actions against them. Even so, we think it is reasonable to expect potential parties to lawsuits to refrain from falsification or concealment of evidence in seeking to avoid litigation or liability.

The original and amended complaints in combination set forth a claim in which the plaintiff alleged a conspiracy, wrongful acts and injuries resulting from those acts. The claim, therefore, is legally sufficient to withstand a motion for dismissal pursuant to Rule 12(b)(6), *if the amendment to allege injury is allowed* by the trial court acting in its discretion.

IV.

Even though the original complaint contained a prayer for punitive damages for civil conspiracy, it failed to allege any particular injury resulting from the conspiracy and failed to pray actual damages. By filing his motion and proposed amended complaint, the plaintiff sought to add allegations of injury and a prayer for resulting actual damages.

The majority in the Court of Appeals found that, even when the original and amended complaints were considered together, the plaintiff had alleged no injury in this case, since the $3,000 in investigative expenses that the plaintiff claimed to have spent to uncover information about Henry's actual treatment was not unique. The Court of Appeals reasoned that the plaintiff cannot recover for injury arising from the civil conspiracy when his

failure to recover on the wrongful death claim has not yet resulted in injury by a judgment unfavorable to him. We disagree and hold that, if allowed, the amended complaint offered by the plaintiff adequately alleges injury resulting from the alleged civil conspiracy to support a claim for relief.

In the context of this case it is readily apparent that the trial court did not deny the amendment alleging injury and resulting actual damages as a result of the exercise of its discretion. Instead, like the Court of Appeals, the trial court felt that, as a matter of law, a claim for civil conspiracy would not lie in this case even if the amendment was allowed. As a result, the trial court proceeded on the premise that it was required to deny the amendment and required to allow the defendants' motions to dismiss for failure to state a claim. The trial court's actions in denying the amendment to allege injury and actual damages and dismissing the civil conspiracy claims must be reversed, and these issues must be remanded to the trial court in order that it may rule upon them in light of this opinion. *See Byrd v. Mortenson*, 308 N.C. 536, 302 S.E. 2d 809 (1983).

Since the original complaint gave the defendants full notice of the nature of the civil conspiracy claim and the matters to be proved pursuant to that claim, we believe that, upon remand to the trial court, the trial court in its discretion properly may allow the plaintiff's amendment to allege injury and actual damages resulting from the alleged civil conspiracy. Upon remand of this case to the trial court, that court in its discretion must determine whether to allow the plaintiff to amend to allege such injury and actual damages. If the trial court allows that amendment, it must then deny the defendants' motions to dismiss for failure to state a claim.

In remanding, we note that the North Carolina Rules of Civil Procedure contemplate a liberality of pleadings. Rule 15(a) specifically states that, after the period passes during which a party may amend as a matter of course, the trial court shall freely give leave to amend when "justice so requires." G.S. 1A-1, Rule 15(a).

The decision of the Court of Appeals is reversed, and the case is remanded to the Court of Appeals for its remand to the

Superior Court, Anson County, for further proceedings not inconsistent with this opinion.

Reversed and remanded.

Justice MARTIN dissenting in part.

I dissent from the majority's holding in part I of its opinion. I find that plaintiff has complied with Rule 15(c) with respect to the amended complaint against defendant Niazi. Paragraph 6 of the original complaint places Niazi on notice of the transactions to be proved pursuant to the amended pleading. It alleges plaintiff is entitled to damages for the wrongful death of Henry caused by the negligence of defendants Deen, Hall, and *Niazi*, acting jointly and severally. The original pleading gives defendant Niazi notice of the events involved. *Burcl v. Hospital*, 306 N.C. 214, 293 S.E. 2d 85 (1982). The notice obtained from the original complaint is not vitiated by the failure to specify in the prayer for relief that plaintiff sought damages for wrongful death. The prayer for relief is not an essential part of the complaint and may be disregarded as immaterial. *Board of Education v. Board of Education*, 259 N.C. 280, 130 S.E. 2d 408 (1963). The nature of plaintiff's cause of action is to be determined from the pleadings, not the prayer for relief. *Highway Commission v. Thornton*, 271 N.C. 227, 156 S.E. 2d 248 (1967).

The present rules of civil procedure adopt a form of notice pleading. *Shugar v. Guill*, 304 N.C. 332, 283 S.E. 2d 507 (1981). They should be liberally construed, with the goal of justice always kept in mind. While the original complaint may not be sufficient to sustain a verdict based on wrongful death, *Sutton v. Duke*, 277 N.C. 94, 176 S.E. 2d 161 (1970), it is sufficient notice to allow the proposed amendment to relate back to the time the original complaint was filed. Even though a new cause of action is alleged in the amendment, relation back will not be defeated. *Burcl v. Hospital, supra*, 306 N.C. 214, 293 S.E. 2d 85; *Clary v. Nivens*, 12 N.C. App. 690, 184 S.E. 2d 374 (1971). My view of the law is buttressed by decisions from the state of New York based on section 203(e) of the New York Civil Practice Law and Rules, a counterpart to our Rule 15(c). *Tobias v. Kesseler*, 18 A.D. 2d 1094, 239 N.Y.S. 2d 554 (1963) (allowing malpractice amendment to relate back to original complaint alleging assault and trespass);

Berlin v. Goldberg, 48 Misc. 2d 1073, 266 N.Y.S. 2d 475 (1966) (allowing relation back of wrongful death amendment when plaintiff died after institution of action for personal injuries). Likewise, the federal decisions support this conclusion. *Bradbury v. Dennis*, 368 F. 2d 905 (10th Cir. 1966); *Newman v. Freeman*, 262 F. Supp. 106 (E.D. Pa. 1966) (adding parent's claim to minor's injury action).

The Court of Appeals correctly held that the trial court should have allowed the amendment. Except as above stated, I concur in the majority opinion.

Justice FRYE joins in this dissent.

COLONIAL PIPELINE COMPANY v. H. MICHAEL WEAVER AND WIFE, SONJA R. WEAVER

No. 211A83

(Filed 10 January 1984)

1. **Eminent Domain § 6.9— purchase price of property—failure to show arm's length transaction—impeachment purpose satisfied**

In an action to condemn a pipeline easement, cross-examination of the landowner as to the purchase price he paid his former business partner for a one-half undivided interest in the property eight years earlier upon dissolution of their development corporation was not competent for the purpose of determining the market value of the property at the time of the taking since petitioner failed to show that the prior sale was an arm's length transaction in the open market. Furthermore, when the landowner on two occasions testified that he did not recall the prior purchase price, the impeachment purpose of the cross-examination was satisfied with respect to that transaction, and further cross-examination concerning the prior purchase price was properly excluded for impeachment purposes.

2. **Eminent Domain § 6.9— cross-examination of value witness—knowledge of existing easements—court's remark not prejudicial—prior temporary construction easements**

While cross-examination of respondents' expert value witness concerning his knowledge of previously existing rights-of-way on respondents' property was relevant to a determination of the market value of the property prior to the taking, petitioner was not prejudiced by the trial judge's remark during such cross-examination that he didn't "believe that is relevant" where the remark can be construed as referring only to the witness's knowledge of the exact dimensions of the existing rights-of-way rather than to the entire line of questioning. Furthermore, the trial judge properly excluded a question con-

cerning the prior existence of temporary construction easements on the property since such easements would not be relevant in determining the market value of the property before the present taking.

3. **Eminent Domain § 7.8— condemnation of pipeline easement—instructions on effect of temporary construction easements**

In an action to condemn a permanent pipeline easement and temporary construction easements, the trial court erred in failing properly to instruct the jury as to the nature of the temporary construction easements and what consideration should be given to them in determining the issue of damages.

APPEAL by respondents from the decision of the Court of Appeals, reported at 61 N.C. App. 200, 300 S.E. 2d 464 (1983), ordering a new trial. Judgment entered on 16 October 1981 by *Wood, J.*, in Superior Court, GUILFORD County. Heard in the Supreme Court 14 September 1983.

This is a condemnation proceeding instituted by Colonial Pipeline Company on 21 February 1979. Petitioner, a Delaware corporation lawfully domesticated in North Carolina, transports petroleum products and other fluid substances into and through this state as a common carrier. When it became necessary to construct an additional pipeline running from Colonial Pipeline Company's Greensboro, North Carolina, station northeasterly to its Richmond, Virginia, station, petitioner sought to acquire a permanent right-of-way across a tract of land owned by the respondents, H. Michael Weaver and his wife, Sonja R. Weaver. The land in question contains approximately 348 acres located in Friendship Township, Guilford County, North Carolina. The permanent right-of-way condemned contains 3.615 acres. It consists of a strip of land thirty feet in width through the southern portion of respondents' property and fifty feet in width through the northern portion of respondents' property. In addition, petitioner sought the condemnation of temporary construction easements, containing 5.131 acres, running parallel to and adjacent to the permanent right-of-way.

Commissioners were appointed pursuant to statute and assessed respondents damages in the sum of $51,245. Both parties filed exceptions to this report and appealed from the order of confirmation to the superior court.

In October 1981 a jury trial was had upon the single issue of the amount of just compensation respondents were entitled to for

the taking of the right-of-way and the rights described in the petition. The jury returned a verdict in the amount of $80,000. Petitioner's motions to set the verdict aside and to grant a new trial were denied.

Adams, Kleemeier, Hagan, Hannah & Fouts, by Joseph W. Moss and Larry I. Moore III for petitioner appellee.

Brooks, Pierce, McLendon, Humphrey & Leonard, by James T. Williams, Jr. and S. Leigh Rodenbough IV for respondent appellants.

MARTIN, Justice.

The Court of Appeals remanded this case for a new trial based upon three errors in evidentiary rulings by the trial court having to do with the petitioner's cross-examination of respondent Weaver and his expert witness, James E. Flynt, Jr., regarding the value of the property in question. Pursuant to Rules 14, 16, and 28 of the North Carolina Rules of Appellate Procedure, the petitioner included in its brief to this Court additional questions for review. Upon careful consideration of all the issues, we modify and affirm the decision of the Court of Appeals.

[1] Petitioner's first assignment of error relates to the trial court's exclusion of evidence of the previous purchase price respondent Weaver allegedly paid for a one-half undivided interest in the subject property. On direct examination, Mr. Weaver testified that in his opinion the value of his property immediately before the taking by Colonial Pipeline was $4,500,000. On cross-examination, Weaver was then questioned at length about his acquisition of the subject property. The relevant portion of this cross-examination follows:

CROSS EXAMINATION—Mr. Moss:

Q. Mr. Weaver, I believe you testified that you, and I understood you to say, "I acquired the property in 1962," is that correct?

A. Yes, sir.

Q. You didn't acquire it in your own name, did you?

A. No, sir, I acquired it through a corporation, W. T. Development Company.

. . . .

Q. And you and Mr. Taylor bought this property together under the name of W. T. Corporation, is that what it was?

A. Yes.

Q. At some time later than that, I believe you bought Mr. Taylor's interest from him, did you not?

A. I did.

Q. That was in 1971, wasn't it, Mr. Weaver?

A. Correct.

. . . .

Q. Mr. Weaver, on September 21, 1971, did not W. T. Development Company, Incorporated, convey to John R. Taylor and H. Michael Weaver the property in question by deed recorded in Deed Book 2560, Page 294?

A. I would say so.

Q. And then on September 3, 1971, did not John R. Taylor and wife, Betsy D. Taylor, convey to H. Michael Weaver the same property, one-half undivided interest, by deed recorded in Book 2560 at Page 175?

A. Yes.

Q. And did you or did you not pay Mr. Taylor for his one-half interest in the property, Mr. Weaver?

A. I did pay him.

Q. And did you pay him full value for his one-half interest in the property?

A. Yes.

Q. And did you pay him—do you recall how much you paid him?

A. No, I do not.

Q. Would the tax stamps which were placed on that particular deed have reflected the actual purchase price which was paid for that property, Mr. Weaver?

A. I would think so—at least that much, maybe more.

Q. Did I ask you if you recalled how much you paid for the land?

A. You did ask me, and I don't remember. And, of course, I don't remember—I must have bought the land from him but we dissolved W. T., and I acquired his interest, basically a simultaneous transaction.

Q. Mr. Weaver, I hand you a copy of a document and ask you if you can identify that particular document, please, sir?

. . .

A. Yes, I do.

Q. And does that particular document reflect a certain amount—does that document contain a Guilford County or State of North Carolina tax stamp on it, Mr. Weaver?

A. Yes, it does.

THE COURT: What is the document?

MR. MOSS:

Q. What is the document, Mr. Weaver?

A. The document is a deed dated September 3, 1971, from John R. Taylor and wife, Betsy D. Taylor, to H. Michael Weaver.

. . . .

Q. Can you ascertain from looking at that tax stamp what it says?

A. No, I cannot. It is not clear.

Q. Didn't you pay Mr. Taylor $160,000.00 for his half interest in—

MR. WILLIAMS: Objection.

THE COURT: Sustained.

MR. WILLIAMS: We move to strike the question.

THE COURT: Ladies and gentlemen of the jury, you strike what the attorney said and the question that he just phrased

from your mind. Do not consider that. Whatever was paid for this property in 1971 would not be relevant in this case.

Petitioner argues that the evidence of the 1971 purchase price was admissible for two purposes: (1) as substantive evidence of the fair market value at the time the property was taken; (2) for impeachment purposes to challenge the accuracy of Mr. Weaver's opinion of the fair market value of the property, as well as to rebut previously submitted evidence concerning the sales price of right-of-way interests in the property conveyed in 1963 and 1964.

The Court of Appeals upheld the trial court's exclusion of the evidence for substantive purposes but held that the evidence was nevertheless competent for purposes of impeachment to test the accuracy of Mr. Weaver's opinion as to the value of the property. We disagree with this second conclusion. Evidence of the purchase price in this particular 1971 transaction was improper for impeachment as well as valuation purposes.

First, we discuss the competency of the testimony as substantive evidence. In a case such as this, where only a part of a tract is taken, the measure of damages for said taking is the difference between the fair market value of the entire tract immediately prior to said taking and the fair market value of the remainder immediately after said taking. *Gallimore v. Highway Comm.*, 241 N.C. 350, 85 S.E. 2d 392 (1955).

> The market value of property is the yardstick by which compensation for the taking of land or any interest therein is to be measured and market value of property is the price which it will bring when it is offered for sale by one who desires, but is not obliged to sell it, and is bought by one who is under no necessity of having it. In estimating its value all of the capabilities of the property, and all of the uses to which it may be applied, or for which it is adapted, which affect its value in the market are to be considered, and not merely the condition it is in at the time and the use to which it is then applied by the owner.

Light Co. v. Moss, 220 N.C. 200, 205, 17 S.E. 2d 10, 13 (1941). The same factors are to be considered as in the sale of property in the open market between private parties where both the seller and

buyer bargain for the sale and purchase of the property. *Id.* at 212, 17 S.E. 2d at 18 (Clarkson, J., concurring).

It follows that the basis for a fair market value determination is an arm's length transaction, negotiated between parties, each acting in his or her own self interest. We find this crucial concept to be determinative of the questions concerning respondents' testimony above.

In determining the admissibility of evidence of the purchase price of property, the following is applicable:

> " 'It is accepted law that when land is taken in the exercise of eminent domain, it is competent as evidence of market value to show the price at which it was bought if the sale was voluntary and not too remote in point of time.' *Palmer v. Highway Commission*, 195 N.C. 1, 141 S.E. 338. When land is taken by condemnation evidence of its value within a reasonable time before the taking is competent on the question of its value at the time of the taking. But such evidence must relate to its value sufficiently near the time of taking as to have a reasonable tendency to show its value at the time of its taking. The reasonableness of the time is dependent upon the nature of the property, its location, and the surrounding circumstances, the criterion being whether the evidence fairly points to the value of the property at the time in question. *Highway Commission v. Hartley*, 218 N.C. 438, 11 S.E. 2d 314."
>
> In determining whether such evidence is admissible, the inquiry is whether, under all the circumstances, the purchase price fairly points to the value of the property at the time of the taking.

Shopping Center v. Highway Commission, 265 N.C. 209, 211-12, 143 S.E. 2d 244, 245-46 (1965) (citations omitted).

Thus, in cases involving questions of the admissibility of the purchase price of the same or similar property, the law's insistence on an arm's length transaction as the initial basis for any determination of relevance is and has been clear.

Respondent Weaver was asked on cross-examination about his purchase of the remaining one-half undivided interest in the

subject property from his former business partner in 1971. It is true that the expiration of eight years from the time of the acquisition of the property until the present condemnation is significant: Respondent presented evidence tending to demonstrate changes in the northwest Greensboro vicinity of the property which might have affected its value and in addition testified that during his term of ownership he had made noteworthy improvements to the property by thinning, treating, and planting trees. This Court, however, need not proceed as far as this second requirement to determine whether evidence of the purchase price was relevant to an inquiry as to the property's market value at the time it was condemned. The determinative factor on this issue is the more basic initial requirement that the prior sale be an arm's length transaction on the open market. This, of course, goes to the nature of the sale as a "voluntary" transaction. Upon the objection being lodged, plaintiff failed to make a showing that the prior sale was an arm's length transaction in the open market. To the contrary, the evidence indicated that the prior sale was only one of several considerations between Weaver and Taylor upon the dissolution of their corporation. While specific details of the negotiations between the respondent and Mr. Taylor are not in the record, we do have respondent's account of the purchase: "[W]e dissolved W. T., and I acquired his interest, basically a simultaneous transaction."

The evidence was not competent for substantive purposes.

The record fails to disclose that petitioner offered the challenged evidence solely for the purpose of impeachment. The issue was raised for the first time in the Court of Appeals. Respondents made a general objection to the testimony. "[W]here a general objection is sustained, it seems to be sufficient, if there is any purpose for which the evidence would be inadmissible." 1 Brandis on North Carolina Evidence § 27 (1982). *See Freeman v. Ponder*, 234 N.C. 294, 67 S.E. 2d 292 (1951) (rule apparently approved, although unnecessary to decide the case). *See also* 4 C.J.S. *Appeal and Error* § 291 (1957). We note, therefore, that petitioner's impeachment argument was not properly before the Court of Appeals. Nevertheless, given our decision to remand this case for further proceedings, we briefly address the issue.

The Court of Appeals in holding that the evidence was competent for impeachment purposes relied upon *Palmer v. Highway*

Commission, 195 N.C. 1, 141 S.E. 338 (1928). In *Palmer*, evidence of a prior sales price was admitted for both substantive and impeachment purposes. The Court did not discuss, nor does the evidence disclose, the nature of the prior sale—whether it was an arm's length transaction in the open market. In addition to the preceding discussion on the lack of a proper foundation concerning the prior sale, we find the reasoning in *Power Co. v. Winebarger*, 300 N.C. 57, 265 S.E. 2d 227 (1980), to be applicable under the facts of the present case:

> (3) Where a witness has been offered to testify to the value of the property directly in issue, the scope of that witness' *knowledge* of the values and sales prices of dissimilar properties in the area may be cross-examined for the limited purposes of impeachment to test his credibility and expertise. . . .
>
> (4) Under these limited impeachment circumstances, however, it is improper for the cross-examiner to refer to specific values or prices of noncomparable properties in his questions to the witness. . . . *Moreover, if the witness responds that he does not know or remember the value or price of the property asked about, the impeachment purpose of the cross-examination is satisfied and the inquiry as to that property is exhausted.* . . . If, on the other hand, the witness asserts his knowledge on cross-examination of a particular value or sales price of noncomparable property, he may be asked to state that value or price only when the trial judge determines in his discretion that the impeachment value of a specific answer outweighs the possibility of confusing the jury with collateral issues. In such a rare case, however, the cross-examiner must be prepared to take the witness' answer as given.

300 N.C. at 66, 265 S.E. 2d at 232-33 (citations omitted) (emphasis added).

Respondent Weaver on two occasions testified that he did not recall the 1971 purchase price. He also stated that he could not determine it from the tax stamps on the deed. At that point the impeachment purpose of the cross-examination was satisfied with respect to that transaction under the rule in *Winebarger*.

The trial court properly excluded the testimony for impeachment purposes.

[2] In a related assignment of error, petitioner contends that its cross-examination of respondents' sole expert value witness, Mr. Flynt, concerning his knowledge of previously existing rights-of-way on respondents' property was prejudicially limited by the trial court. The relevant portion of trial testimony follows:

> Q. Do you know the width of the Colonial Pipeline right-of-way that was in existence there prior to February 21, 1979?
>
> A. It is approximately fifty feet.
>
> Q. Approximately? You don't know the dimensions of the right-of-way?
>
> THE COURT: Are you talking about Colonial?
>
> MR. MOSS: The original Colonial, the 1963 Colonial right-of-way that was in existence at the time he made his appraisal.
>
> THE COURT: I don't believe that is relevant.
>
> Q. Did you know or did you note at that time the width of the Plantation Pipeline right-of-way across the property?
>
> A. Approximately.
>
> Q. You don't know exactly?
>
> A. Fifty feet, give or take five feet. It has the same effect on the property.
>
> Q. Do you know whether or not Colonial Pipeline Company and/or Plantation Pipeline Company acquired a temporary working easement at the time they acquired their rights to the pipeline rights-of-way which were in existence for 1963 and 1964?
>
> MR. WILLIAMS: Objection, your Honor.
>
> THE COURT: Sustained.

Petitioner claimed, and the Court of Appeals so found, that the trial court committed prejudicial error by precluding cross-examination of this witness's knowledge of previously existing rights-of-way and their effect on the property. Secondly, and

perhaps more damaging to petitioner, it argues, were the trial court's interruption of the cross-examination and subsequent comment, "I don't believe that is relevant." Petitioner argues that this remark was a direct expression of opinion by the trial court as to the weight and importance of the evidence. We do not agree.

It is axiomatic, of course, that it is the lawful right of every litigant to expect utter impartiality and neutrality in the judge who tries his case and to have as well an equally unbiased and properly instructed jury. This right can neither be denied nor abridged. *Upchurch v. Funeral Home*, 263 N.C. 560, 140 S.E. 2d 17 (1965). *See* N.C.R. Civ. P. 51(a). Any remark of the presiding judge made in the presence of the jury which has a tendency to prejudice the jury against the unsuccessful party may be grounds for a new trial. *Homes, Inc. v. Holt*, 266 N.C. 467, 146 S.E. 2d 434 (1966). *See* 12 Strong's N.C. Index 3d *Trial* § 10 (1978).

However, remarks made by the trial court in the jury's presence do not always constitute prejudicial error. Judges are not merely mute observers of the legal drama before them. They are the most important participants in the search for truth through trial by jury. 1 Brandis on North Carolina Evidence § 37 (1982). *See also* 75 Am. Jur. 2d *Trial* § 87 (1974). Because the trial judge occupies an exalted station, jurors entertain great respect for his opinion and can be easily influenced by a suggestion coming from him. In cases such as this, therefore, where it must be determined whether a party's right to a fair trial has been impaired by remarks made by the trial judge, the probable effect upon the jury and not the motive of the judge, is determinative. *State v. Smith*, 240 N.C. 99, 81 S.E. 2d 263 (1954). In applying this test, the remark of the judge must be considered in the light of the circumstances under which it was made. *State v. Carter*, 233 N.C. 581, 65 S.E. 2d 9 (1951). This is so because "a word is not a crystal, transparent and unchanged; it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used." *Towne v. Eisner*, 245 U.S. 418, 425, 62 L.Ed. 372, 376 (1918). It is incumbent upon the appellant to show that the trial court's expression of opinion was in fact prejudicial. *Kanoy v. Hinshaw*, 273 N.C. 418, 160 S.E. 2d 296 (1968).

We do not disagree with the Court of Appeals holding that the line of questioning on cross-examination regarding the nature of the two prior easements was relevant to a determination of the market value of the property prior to the taking. However, petitioner has failed to show actual prejudice by the statement or ruling of the trial judge. Only one objection was made by respondents. The trial court properly sustained this objection because the question referred to the prior existence of *temporary* construction easements in 1963 and 1964. As these construction easements were temporary, they would not be relevant in determining the fair market value of the subject property immediately before the present condemnation.

All other questions asked by petitioner's counsel in this regard were answered. If there was a failure to further develop this cross-examination, it cannot be ascribed to the court's actions. There was ample evidence by respondents and the witness Flynt concerning the preexisting rights-of-way.

We further note, with regard to the comment itself, that the respondents' interpretation of the judge's words is quite plausible: "Viewed in context, the trial court's remark was not one directed to the entire line of questioning, but only to the relevancy of Mr. Flynt's knowledge of the exact, as opposed to the approximate, dimensions of the existing rights-of-way across the Respondent's property." More than a bare possibility of prejudice from a remark of the judge is required to overturn a verdict or a judgment. *State v. Carter, supra,* 233 N.C. 581, 65 S.E. 2d 9. Where a construction can properly and reasonably be given to a remark which will render it unobjectionable, it will not be regarded as prejudicial. *See* 88 C.J.S. *Trial* § 49 (1955). Petitioner has failed to show prejudice from the remark by the trial judge.

[3] We find no prejudicial error in the evidentiary rulings of the trial court. We do find, however, that the failure of the trial court to properly instruct the jury concerning the nature of the temporary construction easements requires a new trial.

The trial court initially charged the jury:

> In this case, the measure of damages for the taking of an easement or right-of-way for a petroleum pipeline is the difference between the fair market value of the tract as a

whole—that is, the tract of 348 plus or minus acres as described in the deed as stipulated to by the parties—as a whole before the easement or right-of-way was taken and its impaired value directly resulting to the land from its use and the manner and to the extent and in the respect to the uses for which the easement was acquired. In other words, it is the difference between the fair market value of the property free of the easement and the fair market value of the property subject to the easement in this case on February 21, 1979, the date of the taking.

The record shows that at the conclusion of its charge and outside of the hearing of the jury, when the trial court gave counsel for both parties an opportunity to object to any portion of the charge or an omission therefrom, the following exchange took place:

MR. WILLIAMS: Just one matter, nothing was said in the charge at all about the temporary work space.

THE COURT: If you want to take an exception to that—I don't remember ever saying anything about the temporary work space. I didn't go into the facts of the case.

MR. WILLIAMS: But in the petition there is something of five point acres for a temporary taking.

MR. LEONARD: I don't feel that it is at all clear to the jury when he is talking about completed taking.

THE COURT: It is still the difference in value.

MR. LEONARD: But what I'm concerned about is whether the jury understands that they have a right to consider in that the temporary work space and what was done in connection with the temporary work space. And that was definitely part of it.

THE COURT: That all comes back to this, and you all have contended strongly about the cutting of the trees in the temporary work space and the value of that, and it all comes back down to the difference in value before the taking and after the taking.

MR. LEONARD: I agree with you about that but—

THE COURT: If you will submit an instruction on that, I will give it or I will consider it.

MR. WILLIAMS: I think the instructions that I gave you applied equally to the permanent and temporary taking in the case.

THE COURT: I applied it to all the taking immediately prior and immediately after, and they are to consider everything. If there is no objection, I will just remind them that these instructions apply.

MR. MOSS: I will object to that. You told them under the Pattern Jury Instructions that they are entitled to consider it in the completed state. In my opinion you would be committing error to point that out as a separate item of damage, separate and apart.

The court then instructed the jury over petitioner's objection: "Now, members of the jury, when the Court referred to the right-of-way or easement, I was referring to both the temporary and permanent rights-of-way or easement when I used those terms."

Petitioner argues that this supplemental instruction of the trial court brought the temporary construction easements to the jury's attention, erroneously equated them with the permanent easement, and was therefore tantamount to a command to the jurors to compensate respondents for the temporary easements on the same basis as it would compensate respondents for the permanent easement. Petitioner further maintains that the supplemental instruction, taken with the initial charge to the jury, conveys the false impression that 5.131 acres of the respondents' land was still encumbered by the temporary easements, so that the landowners' use of these acres continued to be restricted.

Respondents contend that the petitioner's attorney had emphasized to the jury in cross-examining Mr. Flynt that the easements taken for temporary work space terminated at the completion of construction and all property taken for that purpose then reverted back to respondents. The jurors, therefore, "must have understood" that the damages they awarded the respondents for the temporary work spaces were limited to the actual damages to respondents' property occurring during and oc-

casioned by the course of construction. Furthermore, argue respondents, the trial court could have "assumed" the jurors would use the "clearly distinguishable and commonly understood" meanings of the words "permanent" and "temporary" in complying with the judge's instructions.

The trial court erred in failing to properly instruct the jury as to the nature of the temporary construction easements and what consideration should be given to them in determining the issue of damages. Where it is necessary for a condemnor to acquire a temporary construction easement in connection with a condemnation proceeding, the jury should be instructed substantially as follows:

> This temporary construction easement is necessary for use by the condemnor in constructing the [*pipeline*]. After the construction is completed, the area within this easement will revert to the landowner and this easement will terminate, so you will not consider this area as a permanent taking by the condemnor in determining your verdict, but you will consider any damages to the landowner caused by the condemnor's use of the construction easement. These *may* include:
>
> a. Cost of removal of landowner's improvements from the construction easement that are paid by landowner;
>
> b. Fair rental value of easement area for time used by condemnor;
>
> c. Cost of constructing alternate entrance to property;
>
> d. Changes made in area resulting from use of easement that affect value of area in easement or value of the remaining property of landowner;
>
> e. Removal of trees, crops, improvements from area in easement by condemnor;
>
> f. Length of time easement used by condemnor.
>
> Whatever you determine this to be will be included in your verdict in the case.

The evidence may support additional elements of damages flowing from the use of the temporary construction easements. The

court should only instruct the jury on the elements of damages that are supported by the evidence, and the jury should be instructed that the burden of proof is upon the landowner.

For the failure of the trial judge to properly instruct the jury with respect to the temporary construction easements, a substantive part of the charge, there must be a new trial.

The decision of the Court of Appeals is

Modified and affirmed.

STATE OF NORTH CAROLINA v. JOE FORNOCKER SMITH

No. 151A83

(Filed 10 January 1984)

1. **Criminal Law § 91.6— denial of continuance—alleged insufficient time to obtain psychiatric evaluation—no abuse of discretion**

Defendant failed to show that the trial court's denial of his motion for continuance was an abuse of discretion where more than five weeks elapsed between the date defendant's motion for a psychiatrist was allowed and the trial date and when defendant's motion for a psychiatrist was allowed, it was made clear by the trial court that defendant should promptly secure the psychiatrist, if at all, so as not to jeopardize the trial date. Further, defendant failed to show that the time allotted him to obtain the services of a private psychiatrist was unreasonable; therefore, he failed to show denial of the process.

2. **Criminal Law § 50— opinion as to whether defendant was "competent to stand trial"—legal conclusion—objection properly sustained**

There was no error in the trial court's refusal to admit Mrs. Smith's opinion as to whether her husband was "competent to stand trial" since whether a criminally accused is "competent to stand trial" or, more appropriately, lacks the mental capacity to proceed is a legal conclusion to be drawn by the trial judge upon appropriate findings of fact. G.S. 15A-1001(a).

3. **Criminal Law § 5.1— objection to testimony concerning defendant's sanity—even if improperly sustained no reasonable possibility different result would have been reached**

Assuming arguendo that an objection to certain testimony concerning a statement defendant made to a psychologist during her initial examination of defendant was improperly sustained, there was no reasonable possibility that a different result could have been reached at trial on the issue of defendant's insanity had the court overruled the state's objection; therefore, the ruling sus-

taining the objection was harmless error. G.S. 15A-1443(a). The jury heard the evidence; there was no motion to strike; the jury was not instructed to disregard the testimony; and there was other evidence of defendant's bizarre actions about which the psychologist testified without objection.

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 G. Criston Windham, Assistant Attorney General, for the state.

Adam Stein, Appellate Defender, by Marc D. Towler, Assistant Appellate Defender, for defendant appellant.

EXUM, Justice.

Through this appeal, defendant seeks review of his convictions for two sexual assaults, a burglary and a robbery. He contends that there was error in the denial of his motion for continuance and in certain evidentiary rulings by the trial judge during a hearing on the question of his capacity to proceed and during trial before the jury. We conclude defendant had a fair trial free from reversible error.

On 2 June 1982, the victim of these crimes, a 63-year-old retired schoolteacher, 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 face down 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. Specifically, the indictments charge that defendant aided and abetted one Louie Carlos Ysaguire, alias Louis Garcia, in committing these offenses. Ysaguire was charged and tried separately. *See State v. Ysaguire*, 309 N.C. 780, 309 S.E. 2d 436 (1983).

Immediately after defendant's arrest, his court-appointed attorney moved for a determination of defendant's capacity to stand trial. Pursuant to court order, defendant was examined by Dr. Susan C. Arnold, a psychologist and certified forensic screening examiner. After her observation, questioning, and examination of defendant, she recommended that he undergo further evaluation at Dorothea Dix Hospital. Defendant was subsequently committed to this hospital for evaluation by order of Judge Bowen.

On 21 October 1982 Judge Gordon Battle conducted a hearing on defendant's capacity to stand trial. Dr. Arnold and Dr. Bob Rollins, a forensic psychiatrist who had examined defendant at Dorothea Dix, testified, and their reports were introduced into evidence. Dr. Rollins testified that defendant was aware of his legal situation and capable of communicating with and assisting his counsel at trial. Judge Battle concluded defendant had the capacity to proceed to trial. Upon motion by defense counsel, Judge Battle ordered that defendant be permitted to employ a private psychiatrist at state expense.

More than five weeks later on the day of trial, 29 November 1982, before Judge Bowen, defendant moved for another hearing on his capacity to proceed and for a continuance to be able to employ a private psychiatrist. Judge Bowen denied the motion to continue. He did conduct a second hearing on defendant's capacity to proceed.

At this second capacity hearing, the reports of Drs. Arnold and Rollins were introduced along with a transcript of Dr. Rollins' testimony at the first capacity hearing. Defendant offered his own testimony and that of his wife, Brenda Smith. Judge Bowen found no material change in defendant's capacity since the initial hearing and concluded that defendant had the capacity to proceed to trial.

At trial, the victim of the crimes identified defendant as one of her assailants. Defendant relied primarily on the defenses of insanity and duress. Defendant testified that his companion, Ysaguire, on the night in question had given him a pill for a headache. The pill had an unusual effect on him and made him dizzy. The two arrived at Johnson's Motor Lodge. Defendant's companion pulled a knife on him and forced defendant to go into the motel room. Defendant's companion told him "we're in this together" when defendant asked what was going on. Defendant recalled seeing his companion and the victim lying on the floor and his companion was behind her on his knees doing something he "had no business [doing]." Defendant's companion kept threatening him with a knife. Otherwise defendant's recollection of what happened in the motel room was vague. Defendant said he intended to report the incident to the police but when he got to the police he "couldn't get out what I was trying to tell them and one of the officers told me . . . to get in the car and sit down." Defendant denied any wrongdoing on his part.

Defendant also offered the testimony of Dr. Arnold and Dr. Rollins and some of his family members on the issue of his insanity. Dr. Rollins said defendant was suffering from a mild degree of paranoid schizophrenia. On cross-examination Dr. Rollins testified that in his opinion defendant knew right from wrong on the day of the incident. Defendant had been discharged from the military because of mental illness.

The jury returned guilty verdicts on all four counts. Defendant was sentenced to two life terms and two fourteen-year terms, each to run consecutively. Each sentence constituted either a mandatory or presumptive sentence for the respective offense.

I.

[1] Initially, defendant assigns error to the trial judge's denial on the day of trial of his motion for a continuance. Defendant argued in support of the motion that he needed more time to obtain a privately employed psychiatrist at state expense, which the court, by order on 21 October 1982, had allowed him to do.

A motion for a continuance is ordinarily addressed to the sound discretion of the trial court. Therefore, the ruling is not reversible on appeal absent an abuse of discretion. *State v.*

Baldwin, 276 N.C. 690, 697, 174 S.E. 2d 526, 531 (1970). If, however, a motion to continue is based on a constitutional right, then the motion presents a question of law which is fully reviewable on appeal. *Id.* at 698, 174 S.E. 2d at 531. Every defendant possesses a due process right to a reasonable time and opportunity to investigate his case and produce competent evidence in his defense. *Id. See also State v. Utley*, 223 N.C. 39, 25 S.E. 2d 195 (1943); *State v. Whitfield*, 206 N.C. 696, 175 S.E. 93 (1934). *See generally Powell v. Alabama*, 287 U.S. 45 (1932).

More than five weeks elapsed between the date defendant's motion for a psychiatrist was allowed (21 October 1982) and the trial date (29 November 1982). In the course of allowing the motion, the trial date at that time having already been set, Judge Battle warned defendant, "I am not inclined to delay the trial in any way for this, and it's something you're just going to have to take care of very promptly if it's going to be done." Counsel for defendant said, thereafter, "I will make every effort to find a psychiatrist . . . as soon as possible and as expediently as possible." Thereafter, Judge Battle again warned, "Once again, we're not going to delay the trial for this, no reason you can't get it accomplished in about a couple of weeks." Defendant's counsel replied, "Okay, Your Honor." It was thus made clear to defendant when his motion for a psychiatrist was allowed that he should promptly secure the psychiatrist, if at all, so as not to jeopardize the trial date.

In support of his motion to continue, defendant's counsel stated to the court that he had "made every attempt to get a private psychiatrist" but that he had "not been able to locate one." Defendant's counsel said, "I have made various telephone calls to psychiatrists and I have been unable to get one and Dr. Lowenbach said he would assist me, but I was unable to get him here today." Counsel said further, "I made various calls myself to doctors and [defendant's wife] has also done the same thing, and the question is still in air, Your Honor." Defendant's wife, Brenda Smith, testified that she had contacted three different psychiatrists but had been unsuccessful in getting any of these to examine defendant.

On the face of it, we conclude that five weeks is a reasonable time within which to secure the services of a private psychiatrist

and have the psychiatrist make at least a preliminary examination of defendant. If more time is then reasonably needed by the psychiatrist, the psychiatrist will be in a position to say so and to say why.

Here, through counsel, defendant, knowing when his motion for a psychiatrist was allowed on 21 October that his trial was scheduled to begin on 29 November, acknowledged the necessity for and agreed to use prompt action in obtaining a psychiatrist's services so as not to delay the trial. He made no motion to continue at that time. Tacitly at least, defendant acknowledged the reasonableness of the time given. Yet on the day of trial, more than five weeks later, he apparently had not even secured a psychiatrist's services. At the very least, he had not secured these services in time for the psychiatrist to make even a preliminary examination of him. Other than a vague reference to Dr. Lowenbach's saying "he would assist me," defendant made no credible showing that he would be able to secure a psychiatrist's services even if given more time to do so.

We conclude, therefore, that defendant has failed to show that the time allotted him to obtain the services of a private psychiatrist was unreasonable; therefore there has been no denial of due process. Neither has he shown that the trial court's denial of his motion for continuance, under the circumstances here, was an abuse of discretion. Accordingly, defendant's assignment of error based on this denial is without merit.

II.

[2] Defendant next assigns error to the trial judge's evidentiary rulings during Brenda Smith's testimony regarding his capacity to stand trial at the 29 November 1982 capacity hearing. Mrs. Smith was asked several questions, objections to which were sustained. Only one of her answers is included in the record. Therefore, we can review only the propriety of the exclusion of this one answer. *State v. Shaw*, 293 N.C. 616, 628, 239 S.E. 2d 439, 446-47 (1977). In this incident, the following transpired at trial:

> Q. Do you have an opinion as to whether or not he's competent in your ownself as to whether or not he's competent to stand trial, Mrs. Smith?

MR. LOCK: Objection.

COURT: Sustained.

MR. FLOORS: Your Honor, I would like to have her answer placed in the record, please.

Q. Do you have an opinion as to whether or not Joe Smith, your husband, is competent to stand trial at this time?

A. No, I don't think he's competent.

Q. You don't think he's competent?

(Witness shaking head.)

A lay witness who has observed, conversed, or dealt with another person and who has had a reasonable opportunity to form an opinion satisfactory to the witness as to that person's mental condition may testify as to the witness's opinion. *State v. Brower*, 289 N.C. 644, 663, 224 S.E. 2d 551, 564 (1976); 1 *Brandis on North Carolina Evidence* § 127, at pp. 486-87 (1982).

But no witness, lay or expert, may testify to a legal conclusion. *See* 1 Brandis, *supra*, § 130, pp. 501-02. Whether a criminally accused is "competent to stand trial" or, more appropriately, lacks the mental capacity to proceed, *see* N.C. Gen. Stat. § 15A-1001, is a legal conclusion to be drawn by the trial judge upon appropriate findings of fact. Section 15A-1001 provides:

> (a) No person may be tried, convicted, sentenced, or punished for a crime when by reason of mental illness or defect 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. The condition is hereinafter referred to as 'incapacity to proceed.'

Under the statute a criminally accused lacks the capacity to proceed if "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." *Id.* In essence, the statute has codified these factual descriptions of an accused's incapacity to proceed from similar descriptions in our earlier cases. *See State*

v. Taylor, 290 N.C. 220, 227, 226 S.E. 2d 23, 30 (1976). In *Taylor* the Court properly described whether a defendant had the capacity to proceed within the meaning of section 15A-1001 as a legal conclusion. Witnesses, both lay and expert, must testify in terms of the factual descriptions set out in the statute. They may, if a proper foundation is laid, give opinions as to whether a defendant, for example, is able to understand the nature and object of the proceedings against him, or to comprehend his own situation in reference to the proceedings, or to assist in his defense in a rational way. They may not give an opinion on the legal question of whether defendant lacks or possesses the capacity to proceed. There was, therefore, no error in the trial court's refusal to admit Mrs. Smith's opinion as to whether her husband was "competent to stand trial."

III.

[3] Finally, defendant assigns error to the trial court's sustaining an objection to Dr. Arnold's testimony concerning a statement defendant made to her during her initial examination of defendant on 4 June 1982 soon after defendant's arrest. Dr. Arnold, describing defendant's statement, said:

> He stated that he had—before he was—in trying to determine whether he understood the charges against him, I asked him what he had been doing prior to the moment that he had been arrested and he stated that he had been in Fort Benning, Georgia in jump school.

Thereafter, the state objected to this testimony and the court sustained the objection. No motion to strike the answer was made and the trial judge did not instruct the jury to disregard the answer. Earlier at a pretrial hearing on defendant's capacity to proceed, Dr. Arnold testified defendant told her he had been arrested "three minutes ago at Fort Benning, Georgia."

When considered in context of other evidence at the trial, it is clear that defendant did not offer Dr. Arnold's testimony to prove that defendant was in fact at Fort Benning, Georgia, immediately before his arrest on these charges. Rather, the testimony was offered either to prove that defendant was uttering strange, nonsensical statements and was out of touch with reality, *i.e.*, to show his unsound state of mind, or to show the

basis for Dr. Arnold's opinion as to defendant's mental state at the time she examined him, *i.e.*, that she was unable to determine whether defendant understood the charges against him and could rationally participate in his defense. *See State v. Wade*, 296 N.C. 454, 251 S.E. 2d 407 (1979).

We do not decide whether the testimony was admissible for either purpose. We note only that there are limitations on the admissibility of a defendant's declarations offered to show his state of mind made after the commission of the crime. *See id.* at 466, 251 S.E. 2d at 414. We note, further, that ordinarily it is not error for a trial judge to sustain a general objection if the evidence is inadmissible for any purpose. *State ex rel. Freeman v. Ponder*, 234 N.C. 294, 67 S.E. 2d 292 (1951); 1 Brandis, *supra*, § 27, at p. 104.

Assuming arguendo that the evidence was admissible for either or both purposes, we are satisfied that there is no reasonable possibility that a different result would have been reached at trial on the issue of defendant's insanity had the court overruled the state's objection; therefore, the ruling sustaining the objection was harmless error. N.C. Gen. Stat. § 15A-1443(a). The jury heard the evidence; there was no motion to strike; and the jury was not instructed to disregard this testimony. More importantly, there was other evidence of defendant's bizarre actions about which Dr. Arnold testified without objection. She testified:

> Q. Did he do anything in your presence, that caught your attention, physically to himself?
>
> A. Well, he did several things that were out of the ordinary, I suppose. I observed him coming into the building and he stopped, he was handcuffed and he stopped and picked some flowers out of the planters in front of the center on the way in. And then when he entered the room, he, as I mentioned before, he did not initially answer my questions but more or less stared into space. Finally he did begin to answer my questions, but often his answers did not coincide particularly well with the questions that I was asking him. He stated that he had—before he was—in trying to determine whether he understood the charges against him, I asked him what he had been doing prior to the mo-

ment that he had been arrested and he stated that he had been in Fort Benning, Georgia in jump school.

MR. TWISDALE: Objection to the conversation.

COURT: Sustained.

Q. Did he make any gestures with his head while he was in your presence?

A. Toward the end of the examination, after I was unable to obtain any information from him regarding his ability to cooperate with his attorney, or knowledge of the charges against him, I stated that I was going to recommend that he go to Dorothea Dix Hospital for further evaluation and, but at that point he asked me if he could call his wife to come and get him, which I told him he would have to talk to the, you know, the jailers about that, and I told him that if he was afraid to leave, that the deputy would take him back, and I stood up to leave the room and he remained seated, and I called his name and he did not respond, and then the deputy stood up and called his name and at that point he tensed, he appeared to be tense in his muscles. He had his fists very tightly clenched and he banged his head on the table three times.

She also testified defendant appeared before her for examination with a rag tied around his head from which broken cups were suspended that covered his ears. There was likewise other evidence of a similar vein from other witnesses on the issue of defendant's insanity. Defendant claimed that he heard voices and hallucinated. Defendant's brother testified that a few days before 2 June 1982 defendant had "straight-wired" his father's truck, drove off and returned, walking. When asked where the truck was, defendant replied he did not know. In addition to this kind of evidence, Dr. Rollins testified that defendant suffered from mild paranoid schizophrenia, resulting in a disorganization of thinking and overreaction to stress.

In light of this other evidence and the jury's having in fact heard the testimony to which objection was made without being instructed to disregard it, we are satisfied the court's ruling had no effect whatever on the jury's decision on the insanity issue.

See State v. Sanders, 276 N.C. 598, 616, 174 S.E. 2d 487, 499 (1970).

In defendant's trial we find

No error.

STATE OF NORTH CAROLINA v. WALTER D. BOYKIN, JR.

No. 145A83

(Filed 10 January 1984)

1. **Assault and Battery § 16— failure to instruct on simple assault in felonious assault case proper**

The trial court properly failed to instruct on simple assault in a felonious assault case where there was no evidence to support the lesser offense and where the evidence tended to show that defendant shot a man with a .22 caliber pistol, a deadly weapon *per se*, thereby inflicting serious injury on the victim.

2. **Homicide § 28— failure to instruct on law of perfect and imperfect self-defense—proper**

In a murder prosecution, the trial court properly failed to instruct on the law of perfect and imperfect self-defense where the evidence did not show that defendant formed a belief that it was necessary to kill the decedent in order to protect himself from death or great bodily harm, and where there was an absence of any evidence tending to show that if such a belief were formed by defendant, it was reasonable.

3. **Homicide § 24.3— instructions concerning State's burden of proving absence of heat of passion—no prejudicial error**

The trial court's instructions to the jury, although somewhat confusing in one portion, when viewed contextually, correctly placed the burden of proof on the State to satisfy the jury beyond a reasonable doubt that defendant did not act in the heat of passion upon adequate provocation when he killed decedent.

APPEAL by defendant from the judgments and sentences entered by the *Honorable Herbert Small, Judge Presiding*, at the 29 November 1982 Session of Superior Court, SAMPSON County.

Defendant was charged in indictments, proper in form, with the murder of James Ray "Pap" Lamb (Case No. 80CRS14717) and assault with a deadly weapon with intent to kill inflicting serious injury upon Azariah Fennell (Case No. 81CRS3725). Both cases

were consolidated for trial. A jury found the defendant guilty of murder in the second degree and assault with a deadly weapon inflicting serious injury. Judge Small sentenced the defendant to a term of life imprisonment for his murder conviction and to a concurrent term of ten years for his assault conviction.

Pursuant to G.S. § 7A-27(a) (1981), defendant appeals his conviction of murder in the second degree and the sentence imposed thereon, as a matter of right. This Court allowed defendant's motion to bypass the Court of Appeals in Case No. 81CRS3725 on 23 March 1983, in order to consolidate for review all of defendant's convictions in this case.

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

John R. Parker, for the defendant-appellant.

FRYE, Justice.

Defendant seeks a new trial because of three alleged errors committed by the trial court. The defendant contends that the trial court erred in refusing to submit and instruct the jury on simple assault in the felonious assault case; that the trial court erred in refusing to instruct the jury on the defenses of perfect and imperfect self-defense; and, that the trial court erred in its instruction to the jury concerning voluntary manslaughter. For the reasons stated in this opinion, we find no error in the trial proceedings leading to defendant's convictions of the crimes charged.

I.

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

On the evening of 25 December 1980, a large crowd of people had gathered at Raz Seller's Place [hereinafter Raz's Place], a local night club in Sampson County. During the course of the evening, the defendant's brother, Willie James Boykin, and the decedent, James Lamb, began to argue beside a pool table in the club. The argument led to a fist fight which resulted in both men scuffling on the floor. While Willie Boykin was on top of the decedent, he began to hit the decedent about the head with a cue ball which he had taken from the pool table. Willie Boykin also began to choke the decedent.

At this point, some members of the decedent's family and another patron of the club attempted to break up the fight. The defendant then became involved in the affair and physically restrained one of the decedent's sons from interfering with the fight.

Apparently, after both men were separated from each other, defendant and his brother left Raz's Place and went outside. Shortly thereafter, Willie Boykin returned to Raz's Place and fired a number of gun shots in the club. Tommy Fennell and James Lamb were each hit by at least one of those shots. Numerous witnesses testified that they saw James Lamb slump over and stagger toward the front door of the club after the shots had been fired. Shortly after the shooting had occurred in Raz's Place, the defendant was seen walking toward the club with a rifle in his right hand. Defendant shot the rifle a number of times in the direction of James Lamb, who was standing near the front door of Raz's Place. One of those shots mortally wounded James Lamb.

In an attempt to prevent the defendant from shooting the rifle anymore, Azariah Fennell attempted to take the rifle from the defendant. During the ensuing struggle over the rifle, Azariah Fennell was shot three times in his left side with a .22 caliber pistol. Azariah Fennell testified that he did not actually see the pistol and that he did not hear any shots during the struggle over the rifle. However, he stated that he felt the pistol against his side, and shortly after being shot, he experienced shortness of breath.

Defendant surrendered himself to a deputy sheriff of Sampson County, on the outside of Raz's Place, shortly after both shooting incidents had occurred. The deputy sheriff removed a .22 caliber pistol from the hand of the defendant.

The medical examiner testified that the decedent died from massive bleeding resulting from a gunshot wound to the abdomen which penetrated the aorta, the main blood vessel from the heart. The bullet removed from the abdomen of the decedent by the medical examiner was not fired from the .22 caliber pistol which defendant had in his possession at the time he surrendered to the deputy sheriff. This bullet was identified by a senior technical

agent for firearms and tool marks identification as having been fired from a rifle manufactured by the Marlin Firearms Company.

The defendant did not present any evidence at trial.

II.

[1] Defendant assigns as error the trial court's refusal to submit and instruct the jury concerning the lesser included offense of simple assault in the felonious assault case. Defendant contends that since Azariah Fennell did not feel the shots when they were inflicted, did not see the gun, and did not hear any gunshots, an inference arises from these facts that defendant, at most, committed a simple assault on Fennell. He further contends that the shots which struck Fennell could have been fired by someone else.

The law is well settled that the trial court must submit and instruct the jury on a lesser included offense when, and only when, there is evidence from which the jury could find that defendant committed the lesser included offense. *State v. Summitt*, 301 N.C. 591, 273 S.E. 2d 425, *cert. denied*, 451 U.S. 970, 101 S.Ct. 2048, 68 L.Ed. 2d 349 (1981). However, when the State's evidence is positive as to every element of the crime charged and there is no conflicting evidence relating to any element of the crime charged, the trial court is not required to submit and instruct the jury on any lesser included offense. *State v. Snead*, 295 N.C. 615, 247 S.E. 2d 893 (1978). The determining factor is the presence of evidence to support a conviction of the lesser included offense. *Summitt*, 301 N.C. at 596, 273 S.E. 2d at 427, *cert. denied*, 451 U.S. 970, 101 S.Ct. 2048, 68 L.Ed. 2d 349 (1981); *See State v. Harris*, 290 N.C. 681, 228 S.E. 2d 437 (1976). Additionally, a defendant is not entitled to an instruction on simple assault where the uncontradicted evidence shows that defendant used a firearm. *See State v. Springs*, 33 N.C. App. 61, 234 S.E. 2d 193, *cert. denied*, 293 N.C. 163, 236 S.E. 2d 707 (1977). *See also State v. Thacker*, 281 N.C. 447, 189 S.E. 2d 145 (1972) (defendant not entitled to an instruction on simple assault when the uncontradicted evidence shows that defendant used a deadly weapon).

The uncontradicted evidence of the State tended to show that defendant shot Azariah Fennell with a .22 caliber pistol, a deadly weapon per se, thereby inflicting serious injury on the vic-

tim. This evidence is sufficient to convict defendant of felonious assault pursuant to G.S. § 14-32(b) (1981). There is absolutely no evidence in this case showing only the commission of simple assault by the defendant. The defendant's mere speculation and conjecture concerning the possibility that someone else shot the victim does not refute the victim's testimony that he was shot by the defendant. Nor does it warrant or justify submission of the lesser included offense of simple assault to the jury. This assignment of error is without merit.

III.

Defendant's remaining assignments of error relate to that portion of the trial concerning the charge of murder against the defendant.

[2] Defendant next assigns as error the trial court's refusal to instruct the jury on the law of perfect and imperfect self-defense. Defendant contends that when the evidence is viewed in the light most favorable to him, it creates a right to have the jury instructed on the law of perfect and imperfect self-defense. We disagree.

The following general rules govern whether an instruction on self-defense is required to be given to the jury in any given case. If there is any evidence in the record from which it can be determined that it was necessary or reasonably appeared necessary for defendant to kill his adversary in order to protect himself from death or great bodily harm, then the defendant is entitled to an instruction on self-defense. *State v. Bush*, 307 N.C. 152, 297 S.E. 2d 563 (1982); *State v. Spaulding*, 298 N.C. 149, 257 S.E. 2d 391 (1979). On the other hand, if there is no evidence from which the jury reasonably could find that the defendant in fact believed that it was necessary to kill his adversary to protect himself from death or great bodily harm, then the defendant is not entitled to have the jury instructed on self-defense. *Bush*, 307 N.C. at 160, 297 S.E. 2d at 569; *State v. Rawley*, 237 N.C. 233, 74 S.E. 2d 620 (1953). As this Court, speaking through Justice Mitchell, stated in *Bush*:

> 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.

Bush, 307 N.C. at 160-61, 297 S.E. 2d at 569. The above questions are equally applicable to a determination of when the defendant will be entitled to the benefit of either perfect or imperfect self-defense. *Id.* at 159, 297 S.E. 2d at 568.

After carefully reviewing the evidence in the light most favorable to the defendant, we find that the evidence does not show that defendant formed a belief that it was necessary to kill the decedent, James Lamb, in order to protect himself from death or great bodily harm. There is also an absence of any evidence tending to show that if such a belief were formed by the defendant, that it was reasonable. Therefore, defendant was not entitled to any instruction on self-defense.

A brief summary of the State's evidence will substantiate our conclusion. The evidence shows that the fight which preceded the shooting incidents did not involve the defendant, but instead was between the defendant's brother, Willie Boykin, and the decedent, James Lamb. After the defendant's brother and the decedent had been separated and the fight apparently ended, the defendant and his brother departed Raz's Place. As they left the building, they were not pursued by the decedent or anyone else. Shortly after his departure from Raz's Place, the defendant was seen walking toward the club shooting a rifle in the direction of the decedent, who was standing near the entrance to Raz's Place. The evidence showed that one of the shots fired by the defendant mortally wounded the decedent. There was no evidence that the defendant and the decedent had had any harsh words on the evening in question or at any time prior to this occasion.

One witness did identify the pistol that was taken from the defendant as belonging to the decedent. Additionally, there was evidence that the decedent usually carried a pistol on his person. However, there was no evidence adduced at trial that the decedent was armed on the night in question. Furthermore, there was

no evidence which tended to show that the defendant knew that the decedent was dangerous or that he usually carried a pistol on his person. Therefore, the evidence, which tended to show that the decedent was usually armed, was irrelevant in determining whether the defendant formed a belief that it was necessary to kill the decedent to protect himself from death or great bodily harm. *See State v. Cook*, 306 N.C. 117, 291 S.E. 2d 649 (1982).

The State's evidence tends to show that the defendant did not form any belief or any reasonable belief that it was necessary for him to kill the decedent to protect himself from death or great bodily harm. Therefore, the trial court was correct in refusing to instruct the jury on the law concerning perfect or imperfect self-defense. Defendant's assignment of error is overruled.

IV.

[3] Defendant's final assignment of error relates to the trial court's instructions to the jury concerning the State's burden of proving beyond a reasonable doubt that the defendant did not act in the heat of passion when he killed the decedent, James Ray Lamb. The trial court instructed the jury as follows:

> As to this possible verdict, I instruct you that if you find from the evidence beyond a reasonable doubt that on or about December 25, 1980, Walter D. Boykin, Jr. intentionally or someone with whom Walter D. Boyking [sic], Jr. was acting in concert shot James Ray Lamb with a .22 caliber firearm and thereby proximately caused the death of James Ray Lamb, but the State has failed to satisfy you beyond a reasonable doubt that the defendant did not act in the heat of passion upon adequate provocation, it would be your duty to return a verdict of guilty of voluntary manslaughter.

Defendant contends that the above instruction to the jury violated the mandate of *Mullaney v. Wilbur*, 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed. 2d 508 (1975), which requires that "the prosecution prove beyond a reasonable doubt the absence of heat of passion or sudden provocation when the issue is properly presented in a homicide case." *Id.* at 704, 95 S.Ct. at 1892, 44 L.Ed. 2d at 522. Additionally, defendant contends that the jury charge lowered the State's burden of proof, and that it is confusing and almost impossible to understand.

We note that throughout the jury charge, the trial court instructed the jury that the State had to prove defendant's guilt beyond a reasonable doubt. Also, prior to the trial court's instructions on that portion of the jury charge to which the defendant objected, the trial court had instructed the jury as follows:

> The burden is on the State to prove beyond a reasonable doubt that the Defendant did not act in the heat of passion upon adequate provocation, but rather that he acted with malice. If the State fails to meet this burden, the Defendant then can be guilty of no more than voluntary manslaughter.

This statement of the law is correct, and it accurately and completely explains the State's burden of proof in this case.

On numerous occasions, this Court has stated that the trial court's charge to the jury must be construed contextually and isolated portions of it will not be held prejudicial error when the charge as a whole is correct. *State v. Rogers*, 299 N.C. 597, 264 S.E. 2d 89 (1980); *State v. Jones*, 294 N.C. 642, 243 S.E. 2d 118 (1978). "Where the charge as a whole presents the law fairly and clearly to the jury, the fact that isolated expressions, standing alone, might be considered erroneous affords no grounds for reversal." *Jones*, 294 N.C. at 653, 243 S.E. 2d at 125.

Applying the foregoing principles to the instant case, we hold that, although the portion of the jury charge to which defendant objected was somewhat confusing, when the entire jury charge is viewed contextually, the charge correctly placed the burden of proof on the State to satisfy the jury beyond a reasonable doubt that defendant did not act in the heat of passion upon adequate provocation when he killed James Lamb. We are convinced that the jury was not misled by the instructions as given by the trial court. Therefore, we hold that the trial court's instruction on the State's burden of proof, when considered contextually, fully complied with the mandate of *Mullaney v. Wilbur*, 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed. 2d 508 (1975) and *State v. Hankerson*, 288 N.C. 632, 220 S.E. 2d 575 (1975), *rev'd on other grounds*, 432 U.S. 233, 97 S.Ct. 2339, 53 L.Ed. 2d 306 (1977). Thus, defendant's final assignment of error is overruled.

After a careful review of the record in this case, we find that defendant received a fair trial free from prejudicial error.

Case No. 81CRS3725—Assault with a deadly weapon inflicting serious injury—

No error.

Case No. 80CRS14717—Murder in the second degree—

No error.

STATE OF NORTH CAROLINA v. RODERICK MAURICE FORNEY

No. 25A83

(Filed 10 January 1984)

1. **Burglary and Unlawful Breakings § 5.2— first degree burglary—offense during nighttime—insufficient evidence**

The State's evidence was insufficient to show that the breaking and entering of the victim's home occurred during the nighttime so as to support conviction of defendant for first degree burglary where it tended to show only that the victim's body was seen by two school children who reported what they had seen to the school principal sometime after 7:30 in the morning; the victim was wearing pajamas and was barefooted; and nonexpert witnesses who examined the body from mid to late morning thought the victim had been dead for several hours.

2. **Criminal Law § 75.7— question not "interrogation"—incriminating response admissible**

Where the sheriff and defendant passed by a cell in which two persons were being held as the sheriff accompanied defendant out of the jail on the day of defendant's preliminary hearing, the sheriff's question to defendant as to whether he knew "these two fellows" did not constitute "interrogation" of defendant, and defendant's incriminating response, "Yes, they're the two that was with me when we broke into Miss Newsome's house," was admissible in evidence.

3. **Criminal Law § 102.6— improper argument of facts not in evidence**

In a prosecution for burglary, murder and rape, the district attorney's argument of facts not in the record was so grossly improper as to have called for corrective action by the trial court *ex mero motu* where the State offered virtually no evidence as to what happened on the day that the victim met her

death, but the district attorney told the jury that defendant and three others, acting in concert, decided to break into the victim's home in order to steal; that all four men entered the home in the still of the night and found the victim asleep in her bed; that they dragged her out of bed and out of the house; that the victim attempted to beat off her attackers with a rake; that she was raped; and that she prayed for death because of the brutal attack on her.

4. **Homicide § 21.6— felony murder—insufficient evidence of underlying felony**

Where defendant was tried for first degree murder under the felony murder rule, and the evidence was insufficient to sustain a conviction of the underlying felony of burglary, the judgment of conviction of first degree murder must also be reversed.

5. **Rape and Allied Offenses § 5— insufficient evidence of defendant's participation in rape**

While the evidence established that defendant was present and had knowledge of a sexual assault by others, the evidence was insufficient to establish that defendant participated in any sexual assault or that he aided or abetted or was acting in concert with the others in committing the assault so as to support defendant's conviction of rape where it tended to show only that defendant made the statement that the others threw him on top of the victim but "he didn't do nothin'."

BEFORE *Thornburg, J.*, at the 18 October 1982 Criminal Session of Superior Court, RUTHERFORD County, defendant was convicted of first degree murder, first degree burglary, and second degree sexual offense. From a sentence of life imprisonment for first degree murder, defendant appeals pursuant to G.S. § 7A-27(a). Defendant's motion to bypass the Court of Appeals on the burglary and sex offense convictions, for which he received sentences of fifteen and twelve years respectively, was allowed 17 August 1983. Heard in the Supreme Court on 13 December 1983.

Defendant's convictions arose out of the 8 January 1982 murder of eighty-eight year old Nannie Newsome, a retired schoolteacher and long-time resident of Union Mills. For the reasons set forth below, we find insufficient evidence to support these convictions.

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

Ann B. Petersen, Assistant Appellate Defender, Office of the Appellate Defender; and James R. Glover, University of North Carolina School of Law; Attorneys for defendant-appellant.

MEYER, Justice.

Defendant contends that the evidence at trial was insufficient to permit a rational trier of fact to find the defendant guilty of any of the offenses charged. At the close of the State's evidence, the defendant moved to dismiss the charges against him. His motion was denied. We must therefore consider whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser included offense, and (2) of defendant's being the perpetrator of such offense. The test of whether the evidence is sufficient to withstand a motion to dismiss is whether a reasonable inference of defendant's guilt can be drawn from the evidence. The evidence may be circumstantial or direct, and 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. Lowery*, 309 N.C. 763, 309 S.E. 2d 232 (1983).

In order to make our determination, it is necessary to review, in some detail, the testimony of every witness at trial.

Regan Clark, principal at Union Mills Elementary School, testified that "sometime after 7:30 on the morning of 8 January," he responded to a report from two students who had seen someone lying beside a building on property adjacent to the schoolyard. There he discovered the body of Nannie Newsome. He testified that he "reached down and touched her and she felt like she had probably been dead for several hours." The body was lying beside a building located approximately 150 feet northwest of Miss Newsome's home. Miss Newsome was wearing pajamas. The witness noticed blood stains on the pajamas and blood on the victim's feet, knees, face and hands. Her body was lying face down on top of a small garden rake.

Woodrow Fountain testified that he had known the victim since 1936 and was a close friend. He described the victim as active for her age. She had never been married and she lived alone. Mr. Fountain last saw Nannie Newsome three days prior to the murder when Miss Newsome had driven over to his house for a visit.

Horton Landreth, the Rutherford County coroner, testified that he examined Miss Newsome's body at noon on 8 January.

"The body was cold." He checked for vital signs and found none. He observed "numerous abrasions about the toes, knees, arms, hands and there was a bruise or contusion on the right side of her neck." Mr. Landreth entered the Newsome residence where he noted that the screen on the porch was torn and pushed out and the kitchen door had been broken. Debris from the lock on the door and parts of the door were scattered about the kitchen floor.

Gary White, a member of the Rutherford County Emergency Medical Service, also examined the body at the scene. When asked if he checked for vital signs, he stated that she "evidently had been in this condition quite a few hours, so there were no vital signs."

The investigating officer, Thomas Johnson, testified as to the condition and location of the body and as to the evidence of a break-in through the porch and kitchen doors of Miss Newsome's home.

Guy Thompson, a resident of Union Mills, testified that he had known the victim since the 1920's. Miss Newsome was a retired schoolteacher and house mother. Mr. Thompson testified that the defendant and his brother lived approximately a quarter of a mile from Nannie Newsome's house; and that Chris Hunt, Lester Flack and Richard Flack, also implicated in the murder, all lived within approximately a mile from the victim's home. Mr. Thompson also described the condition of Miss Newsome's body and observed that the door to her kitchen had been "busted in."

The State introduced into evidence the testimony of Dr. Mary Christine Steuterman, the Assistant Chief Medical Examiner for the State of North Carolina, which testimony was given during the trial of Chris Hunt. Dr. Steuterman's examination of the victim's body on 9 January revealed evidence of manual strangulation, superficial lacerations and abrasions on the face, torso, arms, legs and feet, broken bones and evidence of sexual assault "with tears in the vaginal canal and bruises in the vaginal area." In the witness's opinion "there was penetration of the vaginal canal prior to death." Dr. Steuterman testified that in her opinion Miss Newsome had died of a heart attack "during manual strangulation and rape." On cross-examination Dr. Steuterman testified that the autopsy examination did not reveal the presence of sperm. She agreed that in the absence of sperm,

penetration could have been by some object other than a human organ.

Roosevelt Davis shared a cell with the defendant at the Rutherford County jail. He testified that he heard the defendant tell a group of white prisoners that he "was in there for killing a bitch." When Davis cautioned the defendant to be quiet, defendant answered "I don't give a damn, I'll do my time." Defendant told Davis that Lester Flack had strangled Miss Newsome; that Chris Hunt, Lester and Richard Flack had raped Miss Newsome; and that Lester Flack had taken something from Miss Newsome's house, but the defendant didn't know what it was. Defendant stated that Chris, Lester and Richard had thrown him down on top of Miss Newsome but he "didn't do nothin'." In corroboration, Gary Church was called to testify that he had witnessed a statement made by Roosevelt Davis. The statement recited essentially the same facts to which Davis testified at trial.

Finally, Damon Huskey, the Sheriff of Rutherford County, testified that as he accompanied defendant out of the jail on the day of defendant's preliminary hearing, they passed by the cell in which Lester and Richard Flack were being held. Sheriff Huskey asked the defendant "Do you know these two fellows?" Defendant replied, "Yes, they're the two that was with me when we broke into Miss Newsome's house."

The defendant presented no evidence.

[1] It is clear from the record that the State has failed to establish an essential element of first degree burglary—that the breaking and entering into Miss Nannie Newsome's house took place during the nighttime hours. Assuming that Miss Newsome's death occurred during the course of the break-in, there is no evidence as to the time of death. Taking the evidence in the light most favorable to the State, it can be assumed only that the crimes occurred sometime after the victim was seen by Mr. Fountain three days earlier and before the body was seen by two school children on the morning of 8 January. The fact that she was found clothed in pajamas and barefooted leaves the time of the entry of the home and the time of her death entirely in the realm of speculation and conjecture. Witnesses who examined the body from mid to late morning testified that the body was "cold." It had "evidently . . . been in this condition quite a few hours,"

and it "felt like [Miss Newsome] had probably been dead for several hours." This evidence, from nonexperts, was insufficient to establish that the crimes, including Miss Newsome's death, occurred during the nighttime hours. When the State fails to produce substantial evidence that the offense occurred during the nighttime, a defendant is entitled to have charges of burglary against him dismissed. *State v. Smith*, 307 N.C. 516, 299 S.E. 2d 431 (1983). We therefore reverse defendant's conviction on the burglary charge.

[2] Our decision in this case is not intended to preclude the district attorney from seeking an indictment against the defendant on a charge of felonious breaking or entering. In reaching our decision herein we reject defendant's contention that his statement to Sheriff Huskey, implicating the defendant in the break-in of Miss Newsome's house, was inadmissible. The trial judge, following a voir dire on the admissibility of the statement, concluded that the sheriff's question "Do you know these two fellows?" did not constitute "interrogation." "[T]he definition of interrogation can extend only to words or actions on the part of police officers that they *should have known* were reasonably likely to elicit an incriminating response." *Rhode Island v. Innis*, 446 U.S. 291, 302, 64 L.Ed. 2d 297, 308 (1980). We agree with the trial judge that the question propounded by Sheriff Huskey here was not an "interrogation." The circumstances surrounding this statement were as follows: Sheriff Huskey was taking the defendant from the jail to the county courthouse for a preliminary hearing. On their way through the jail they passed by the holding cell which was located across from the door leading from the jail. As the sheriff and the defendant approached the door, they were facing Richard and Lester Flack who were standing at the bars "right at us." As they passed, the sheriff said "Do you know these two fellows?" and the defendant answered as set forth above. No other conversation took place as they passed and they "walked right on out." It is unreasonable to conclude that this casual question to the defendant under these circumstances was knowingly designed to elicit an incriminating response.

Because all of the elements of felonious breaking and entering are present, and absent other error requiring a new trial, we could and would ordinarily remand for resentencing on that offense. *State v. Freeman*, 307 N.C. 445, 298 S.E. 2d 376 (1983);

State v. Dawkins, 305 N.C. 289, 287 S.E. 2d 885 (1982). However, here there is other error which mandates a new trial.

[3] It is clear to this Court that in his closing argument the district attorney argued facts not in the record of the evidence before the jury. It may be that some of the facts argued by the district attorney were brought out by him in earlier trials of the other individuals charged in this same crime. Nevertheless, they were not in evidence before the jury in the present case. For the most part, these errors in the district attorney's argument were not objected to at the trial. However, we find them so grossly improper as to have called for corrective action by the trial court *ex mero motu*. *See State v. Oliver*, 309 N.C. 326, 307 S.E. 2d 304 (1983); *State v. Morgan*, 299 N.C. 191, 261 S.E. 2d 827, *cert. denied*, 446 U.S. 986 (1980).

The State offered virtually no evidence as to what happened on the day that Miss Newsome met her death, yet the district attorney argued a full and detailed account of what happened. He told the jury, in effect, that the defendant, the Flack brothers and Chris Hunt, acting in concert, decided to break into Miss Newsome's home in order to steal; that all four men entered the house in the still of the night and found Miss Newsome asleep in her bed; that they dragged her out of bed and out of the house; that Miss Newsome attempted to beat off her attackers with a rake; that she was raped and that she prayed for death because of the brutal attack on her. These "facts" simply were not in evidence and were nothing more than mere speculation. In fact, in light of our holding today, the only facts "in evidence" of several essential elements necessary to support defendant's conviction for the offenses charged were those supplied by the solicitor in his argument to the jury. While we afford prosecutors great latitude in argument to the jury, it was improper, and in this case prejudicial, to argue facts not in the record of evidence before the jury. *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).

[4] Defendant was tried for first degree murder under the felony murder rule, the underlying felony being first degree burglary. The jury was instructed that, in order to find the defendant guilty of first degree murder, the State was required to prove that Nannie Newsome was killed in the course of the perpetration

or attempted perpetration of the offense of burglary. As we have held that the evidence was insufficient to sustain a conviction of burglary, the judgment of conviction of first degree murder must also be reversed.

With respect to defendant's conviction for second degree sexual offense, we first note that defendant was, in fact, indicted for first degree rape. However, the trial judge instructed as follows:

> The defendant has also been accused of second degree sexual offense. In order for you to find the defendant guilty of second degree sexual offense, the State must prove three things beyond a reasonable doubt.
>
> First, that the defendant engaged in a sexual act with Nanney Newsome.
>
> Second, that the defendant used or threatened to use sufficient force to overcome any resistance that Nanney Newsome might make.
>
> Third, that Nanney Newsome did not consent and it was against her will.
>
> So as to this crime, the Court instructs you that if you find from the evidence and beyond a reasonable doubt, the burden being upon the State of North Carolina to so satisfy you that on or about the 8th day of January, 1982, the defendant, Maurice Forney, acting either by himself or acting together with the Flack brothers and Hunt, engaged in a sexual act with Nanney Newsome by way of penetrating her vaginal area with the penis and that he did so by force or threat of force and that this was sufficient to overcome any resistance which Nanney Newsome might make and that Nanney Newsome did not consent and it was against her will, then it would be your duty to return a verdict of guilty of second degree sexual offense, as charged. However, if you do not so find or have a reasonable doubt as to one or more of these things, it would be your duty to return a verdict of not guilty under the Bill of Indictment charging the offense of second degree sexual offense.

Thus, it is clear that although purporting to charge on second degree sexual offense, the trial judge described to the jury the

elements necessary to prove rape. However, because of our disposition of this offense on other grounds, we find it unnecessary to address the technical error in the instructions.

[5] The evidence at trial was sufficient to establish the elements of rape. Dr. Steuterman testified that there was evidence of vaginal penetration. Defendant allegedly told Roosevelt Davis that Chris Hunt and the Flack brothers had "raped" Miss Newsome. There is insufficient evidence, however, to establish that the defendant participated in any sexual assault or that he aided and abetted or was acting in concert with Hunt and the Flack brothers in committing the assault. In fact, the only evidence before the jury on this question was the defendant's statement to Roosevelt Davis that Hunt and the Flack brothers threw him on top of Miss Newsome but "he didn't do nothin'." This evidence establishes that defendant was present and had knowledge of the sexual assault. While it is true that it is not necessary for a defendant to do any particular act constituting a part of the crime in order to be convicted of that crime under the principle of acting in concert, so long as he is present at the scene, it is nevertheless necessary that there be sufficient evidence to show he is acting together with another or others pursuant to a common plan or purpose to commit the crime. *State v. Joyner*, 297 N.C. 349, 255 S.E. 2d 390 (1979). The evidence here is insufficient to permit a reasonable inference that the defendant, Hunt and the Flack brothers were *acting together in pursuance of a common plan* to rape or commit a sexual assault on Miss Newsome. In the absence of other evidence, defendant's statement that he was "thrown" on the victim but "didn't do nothin'," tends to be exculpatory with respect to his willingness to participate in or even his knowledge or acquiescence in consummating this offense. Defendant's conviction for second degree sexual offense must be reversed and the judgment thereon vacated.

Counsel have not argued or briefed the question of whether defendant may now be tried on a charge of murder in the second degree, therefore, we do not express any opinion on this issue.

Case No. 82CRS0409—First Degree Burglary—reversed.

Case No. 82CRS0410—Rape—reversed.

Case No. 82CRS0411—First Degree Murder—reversed.

STATE OF NORTH CAROLINA v. LAWRENCE LEE HEFLER

No. 138PA83

(Filed 10 January 1984)

1. **Automobiles and Other Vehicles § 113.1— involuntary manslaughter—sufficiency of evidence**

The evidence was sufficient to be submitted to the jury on the charge of involuntary manslaughter where the evidence tended to show that defendant was driving after drinking and taking drugs; that he had a thoughtless disregard of the consequences of his acts and indifference to others; that defendant did not stop after hitting a parked automobile; that defendant fled the scene after striking a pedestrian and after striking another automobile; that defendant crossed to the left side of the roadway to strike the pedestrian, who was on his proper side of the road as a pedestrian; that defendant was going 30-35 miles per hour on a roadway in an apartment area where "speed bumps" were located and did not reduce his speed to avoid colliding with either the pedestrian or the second automobile.

2. **Homicide § 6.1— "year and a day" rule—not applied to involuntary manslaughter cases**

The "year and a day" rule does not apply to involuntary manslaughter cases since, in balancing the interest of the defendant against those of the State, society's interest in the prosecution of persons charged with involuntary manslaughter outweigh the hardship imposed upon a defendant in not being charged for a crime. North Carolina does not have a statute of limitations for the prosecution of involuntary manslaughter, a felony.

ON discretionary review of the decision of the Court of Appeals, 60 N.C. App. 466, 299 S.E. 2d 456 (1983), finding no error in the judgment entered by *Snepp, J.*, at the 21 September 1981 Criminal Session of MECKLENBURG Superior Court. Heard in the Supreme Court 4 October 1983.

Defendant was tried on the charge of involuntary manslaughter upon the following bill of indictment:

THE JURORS FOR THE STATE UPON THEIR OATH PRESENT, That Lawrence Lee Hefler, late of the County of Mecklen-

burg on the 18th day of January, 1980, with force and arms, at and in the County aforesaid, did, unlawfully, wilfully and feloniously kill and slay one James Edward Stevens contrary to the statute in such case made and provided and against the peace and dignity of the State.

Defendant waived arraignment and entered a plea of not guilty.

The evidence, in summary, showed: On the evening of 18 January 1980, defendant and the witness Herbert Gerald Horton, Jr. were at Horton's apartment in the city of Charlotte drinking beer and taking quaaludes. Defendant admitted that he consumed three or four beers and smoked two "joints" of marijuana. They drove to Sun Valley Apartments, where they visited a friend for about half an hour. When they left the apartment, defendant drove his Chevrolet automobile, and as he backed out, he struck a parked Volkswagen car and barely missed a large trash dumpster. He left the scene of this collision, driving out of the apartment area toward Arrowood Road at a speed of 30 to 35 m.p.h. On the roadway leading to Arrowood Road, there were two "speed bumps" which were not painted. The area was lighted by street lights.

James Stevens was jogging on the left side of the roadway, facing oncoming traffic. He was wearing dark shorts, a light-colored jersey, and large fluorescent gloves. James Sledge was driving into the apartment area on the road. He saw the jogger about one hundred yards away, approaching his car. Sledge then saw defendant's car swerve to its left behind Stevens and strike him from the rear. Defendant's car knocked Stevens to his left, and then it collided with Sledge's automobile. Defendant said he was going "to blow this place" and ran from the scene of the collision. He was arrested three days later.

Stevens was given emergency treatment at the scene and taken to the hospital. He was unconscious and never regained consciousness before he was declared dead fourteen months later, on 16 March 1981. The collision caused a subdural hematoma with damage to Stevens's brain. Dr. Brawley, a neurosurgeon, testified that Stevens died from the swelling of the brain caused by being struck by defendant's car. Stevens's brain was forced into his spinal column by the intracranial pressure resulting from the contusion of the brain. A craniotomy was performed, and Stevens's

brain was observed to be "peppered with hematoma." Dr. Brawley testified that in fast-developing cases of intracranial injury and hemorrhage, it may be impossible to save the patient if surgery is delayed for more than an hour after the injury. Dr. Woods, the medical examiner, testified that the immediate cause of death was broncho-pneumonia as a complication of the severe head injury.

The case was submitted to the jury with possible verdicts of involuntary manslaughter, death by vehicle, or not guilty. The jury found defendant guilty of involuntary manslaughter. From judgment of imprisonment, defendant appealed to the Court of Appeals, and this Court granted discretionary review.

Rufus L. Edmisten, Attorney General, by Fred R. Gamin, Assistant Attorney General, for the state.

Eben T. Rawls, for defendant appellant.

MARTIN, Justice.

Defendant brings one issue for our consideration. He argues that the trial court should have dismissed the case at the close of the state's evidence. The defendant did not present evidence. Defendant bases his assignment upon two contentions.

[1] First, defendant contends that there was insufficient evidence to submit the case to the jury on the charge of involuntary manslaughter.

> Involuntary manslaughter is the unlawful killing of a human being unintentionally and without malice but proximately resulting from the commission of an unlawful act not amounting to a felony, or some act done in an unlawful or culpably negligent manner . . . and where fatal consequences of the negligent act were not improbable under all the facts existent at the time. . . . "Culpable negligence under the criminal law is such recklessness or carelessness, resulting in injury or death, as imports a thoughtless disregard of consequences or a heedless indifference to the safety and rights of others."

State v. Williams, 231 N.C. 214, 215-16, 56 S.E. 2d 574, 574-75 (1949) (citations omitted). The trial court charged the jury on four unlawful acts: driving without due caution and circumspection and

at a speed or in a manner as to be likely to endanger any person, N.C.G.S. 20-140(b); driving at a speed greater than is reasonable and prudent under the conditions then existing, N.C.G.S. 20-141(a); failing to decrease speed to avoid colliding with any person, N.C.G.S. 20-141(m); and failing to drive on the right side of the highway, N.C.G.S. 20-146. The court further instructed the jury that there was no evidence that defendant intentionally violated any of these safety statutes but the jury could find culpable negligence in the unintentional violation of a statute accompanied by recklessness of probable consequences of a dangerous nature, when tested by the rule of reasonable foresight, amounting altogether to a thoughtless disregard of the consequences or a heedless indifference to the safety of others.

When the evidence is considered in the light most favorable to the state, as we must do, *State v. Witherspoon*, 293 N.C. 321, 237 S.E. 2d 822 (1977), it was sufficient to deny defendant's motion to dismiss. There is ample evidence to support findings that defendant was driving after drinking and taking drugs and that he had a thoughtless disregard of the consequences of his acts and indifference to others. He did not stop after hitting the parked Volkswagen and fled the scene after striking Sledge's car. He crossed to the left side of the roadway to strike Stevens, who was on his proper side of the road as a pedestrian. He was doing 30 to 35 m.p.h. on a roadway in an apartment area where "speed bumps" were located and did not reduce his speed to avoid colliding with Stevens or Sledge. He did not drive with due caution and circumspection and as a result killed Stevens. Defendant's argument is without merit.

[2] Defendant's contention that the "year and a day" rule should be applied to the charge of involuntary manslaughter is more intriguing. A brief review of the history of the rule is helpful. The ancient statute, upon which the rule is based, reads in pertinent part:

> An Appeal of Murther. . . . (4) It is provided also, that no Appeal shall be abated so soon as they have been heretofore; but if the Appellor declare the Deed, the Year, the Day, the Hour, the Time of the King, and the Town where the Deed was done, the Appeal shall stand in Effect, (5) and shall

> not be abated for Default of fresh Suit, if the Party shall sue within the Year and the Day after the Deed done.

Statutes of Gloucester, 6 Edw. I, c. IX (1278); 1 Statutes at Large 67 (1763). The "Appeal" referred to in the statute was not from a trial court to an appellate court. Rather, an "appeal of death" was one of the remedies at common law for murder. It was a criminal prosecution by a private person against another for this heinous crime demanding punishment on account of the injury suffered, rather than for the offense against the public. Originally, the appellor could recover damages (a sort of criminal wrongful death proceeding) but the proceeding later evolved into the infliction of punishment on the wrongdoer. 4 W. Blackstone, Commentaries *313. Appeals of death were abolished in England in 1819.

When adopted, the year and a day rule was a statute of limitations with respect to the commencement of an appeal of death action. *Id.* at *315. Through transition, and perhaps misinterpretation, the rule as we know it today came to be applied to murder cases. *See generally* Note, *The Abolition of the Year and a Day Rule: Commonwealth v. Ladd*, 65 Dick. L. Rev. 166 (1961). Such was the state of the law when this Court wrote in *State v. Orrell*, 12 N.C. 139, 141 (1826): "[I]f death did not take place within a year and a day of the time of receiving the wound, the law draws the conclusion that it was not the cause of death; and neither the court nor jury can draw a contrary one." In the same case, Chief Justice Taylor wrote: "For if the death happened beyond that time, the law would presume that it proceeded from some other cause than the wound." *Id.* at 141.

This Court has mentioned the rule in six cases: *State v. Orrell, supra; State v. Shepherd*, 30 N.C. 195 (1847); *State v. Baker*, 46 N.C. 267 (1854); *State v. Haney*, 67 N.C. 467 (1872); *State v. Morgan*, 85 N.C. 581 (1881); *State v. Pate*, 121 N.C. 659, 28 S.E. 354 (1897). All six cases are murder cases with sentences of death. In only two of the cases, *Orrell* and *Haney*, was there a challenge based upon the rule. The other four cases involved motions based upon other defects in the indictments or variances in the evidence in which the rule is only incidentally involved and not controlling of the outcome. Only in *Orrell* did the Court hold that the rule required that the judgment be arrested. This Court has never applied the rule to an involuntary manslaughter case. Defendant

contends that the rule should be extended to bar prosecutions for involuntary manslaughter. We are not so persuaded and decline the invitation to so extend the rule.

The apparent reason for applying the rule to murder prosecutions was the uncertainty of medical science in determining the cause of death because of the long lapse of time between the injury and death. The reasoning was that in cases where the defendant's life was at stake, the rule of law ought to be certain. 3 Coke, Institutes 53 (1817); *The King v. Dyson*, 2 K.B. 454 (1908).

We take judicial notice of the rapid development and proliferation of the art and science of medicine and crime detection. Sophisticated medical tests, analyses, and diagnoses allow positive evidence to be presented to a jury on questions of causation in criminal prosecutions. For the courts to remain judicially oblivious of these advances when considering whether to extend an ancient common law rule would be folly. We must let the light of scientific development illuminate the legal issues of today. It would be incongruous indeed that medical science has developed to the point that it may prolong human life for long periods if that same development be utilized to bar conviction of a killer by prolonging the life of his victim.

In resolving this dilemma, the question of what constitutes the death of a human being may become pertinent. Although it is not necessary in the resolution of this appeal to apply the definition of death as set out in N.C.G.S. 90-323, such application may be entirely appropriate in cases where the rule is invoked. Even so, the evidence in this case would support a finding that Stevens died, as defined in the statute, well before the expiration of a year and a day following his injury. The statute in relevant part reads: "Brain death, defined as irreversible cessation of total brain function, may be used as a sole basis for the determination that a person has died, particularly when brain death occurs in the presence of artificially maintained respiratory and circulatory functions." Dr. Robert Brawley, an expert medical witness specializing in neurosurgery, was one of the physicians attending Stevens from the time he was admitted to the emergency room until he was declared dead on 16 March 1981. He testified, in part, as follows: When Stevens was first examined, he was comatose, unconscious, responding to pain, and decerebrate on the left

side. He only had reflex movement on his left side; his right side moved in a semi-purposeful manner. A CT scan revealed that there was bruising and a hematoma on the right side of the brain. About thirty-six hours later, his condition deteriorated suddenly. He became totally unresponsive, even to pain, and his right eye dilated, indicating that his brain was herniating, exuding from the skull into the spinal column. A craniotomy was immediately performed on Stevens. There was no significant change in his condition. Although intensive efforts were applied to Stevens for a month, it became apparent that he was not going to make a satisfactory recovery. Two additional neurosurgeons examined Stevens and agreed with this prognosis. After a conference with Stevens's family, it was agreed to cease the intensive efforts, and thereafter he was only fed. His temperature was uncontrollable because the part of his brain that controlled it was destroyed. "It was one of a vegetated state until he died."

This evidence would support a finding that while Stevens was receiving artificially maintained respiratory functions and other intensive treatment and support, his brain irreversibly and totally ceased functioning within the meaning of the statute approximately thirty-six hours after he was admitted to the hospital.

Bearing in mind that we are not faced with the issue of whether the rule should continue to be applied in murder cases, upon which we express no opinion, we do not hesitate to refuse to extend the rule for the first time to involuntary manslaughter cases. *See Commonwealth v. Evaul*, 5 Pa. D. & C. 105 (1924) (the Pennsylvania court refusing to extend the rule to involuntary manslaughter cases). Pennsylvania later abolished the rule entirely. *Commonwealth v. Ladd*, 402 Pa. 164, 166 A. 2d 501 (1960). We recognize there is authority to the contrary. *Elliott v. Mills*, 335 P. 2d 1104 (Okla. Crim. App. 1959) (the Oklahoma court applying the rule while recognizing that it had "run the limit of its logic"). However, we find the better reasoned rule to be consistent with our decision. *See generally* Annot., 60 A.L.R. 3d 1323 (1974). Indeed, as early as 1908, the merit of the rule was doubted in England itself. *The King v. Dyson, supra*, 2 K.B. 454.

We also recognize, but are not convinced by, the argument that not applying the rule may allow the Damocles sword of

prosecution to remain above the head of a defendant for an additional period of time. Such delays, of course, cause problems for the defendant as well as the state. North Carolina does not have a statute of limitations for the prosecution of involuntary manslaughter, a felony. *State v. Johnson*, 275 N.C. 264, 167 S.E. 2d 274 (1969). Our reports contain many cases that were tried years after the crime was committed. *E.g., State v. Wingler*, 184 N.C. 747, 115 S.E. 59 (1922) (murder committed in 1893, trial in 1922). In balancing the interests of the defendant against those of the state in this respect, we find that society's interests in the prosecution of persons charged with involuntary manslaughter outweigh the hardship imposed upon the defendant.

The decision of the Court of Appeals is

Affirmed.

STATE OF NORTH CAROLINA v. W. C. EDWARDS

No. 400A83

(Filed 10 January 1984)

1. **Burglary and Unlawful Breakings § 4; Criminal Law § 26.5— acquittal of larceny—evidence of larceny in breaking and entering case**

Where the jury found defendant not guilty of larceny but was unable to reach a verdict as to breaking or entering with the intent to commit larceny, the State was not precluded by collateral estoppel double jeopardy from reprosecuting defendant for breaking or entering with intent to commit larceny or from presenting evidence at defendant's retrial of his participation in the larceny, since the issue of defendant's intent to commit larceny was not passed upon by the first jury when it acquitted defendant of the larceny charge.

2. **Criminal Law § 138— pecuniary gain—taking property of great monetary value—improper aggravating factors**

In imposing a sentence for breaking or entering, the trial court erred in finding as an aggravating factor that the offense was committed for pecuniary gain where there was no evidence that defendant was paid or hired to commit the offense.

3. **Criminal Law § 138— failure to give perjured testimony—improper mitigating circumstance**

The trial court erred in finding as a mitigating circumstance in sentencing that defendant did not testify and relate to the court any perjured testimony.

State v. Edwards

APPEAL by the State from a decision of the Court of Appeals, 63 N.C. App. 92, 304 S.E. 2d 245 (1983), one judge dissenting, granting the defendant a new trial upon defendant's conviction of felonious breaking or entering; judgment entered by *Ferrell, J.* at the 22 March 1982 Schedule "B" Criminal Session of Superior Court, MECKLENBURG County.

The primary issue on this appeal is whether the Court of Appeals erred in concluding, under a double jeopardy rationale, that the State improperly presented evidence of defendant's participation in the larceny of a jewelry store in a prosecution for breaking or entering with intent to commit larceny, when defendant had previously been acquitted of the charge of larceny. We hold that the Court of Appeals erred. However, defendant is entitled to a new sentencing hearing for error in finding as aggravating factors that the offense was committed for pecuniary gain, and that the offense involved the actual or attempted taking of property of great monetary value.

Pertinent facts include the following: Field's Jewelry Store in Charlotte, North Carolina, was broken into sometime after midnight on 22 September 1981. Entry was accomplished by breaking the glass out of the front door. In response to a burglary alarm originating from the store, Officer Zincom arrived at the scene in time to see a black male, whom he identified as the defendant, run down the street and enter an alley. Defendant was subsequently apprehended. Following a search of the general area in which defendant was observed running, officers recovered two ring display cases and a few rings. Defendant was taken to a local hospital where he was treated for a cut on his hand and glass particles were removed from defendant's clothing. Tests revealed that some of the particles of glass were indistinguishable from those taken from the broken glass at the jewelry store, while other particles were not similar.

James Edward Moore testified that he and another man, whom he could only identify as David, had broken into Field's Jewelry Store on 22 September. He had been apprehended by police while fleeing from the store. He was, at the time, carrying a grocery bag filled with jewelry and other items. He testified that he is now serving a six year prison sentence for his participation

in the offense. Moore stated that the defendant "wasn't involved." In fact Moore maintained until trial that he acted alone.

Defendant was originally tried on charges of breaking or entering and larceny. He was found not guilty of larceny. A mistrial was declared on the charge of felonious breaking or entering. Defendant was retried on the charge of breaking or entering with the intent to commit larceny. During his second trial the State introduced evidence, over defendant's objection, concerning his alleged participation in the larceny of the jewelry store.

In an opinion authored by Judge Phillips, the Court of Appeals concluded that the evidence of defendant's alleged participation in the Field's Jewelry Store larceny was inadmissible. The court reasoned as follows:

> The issue of defendant's participation in the Field's theft was tried and forever set at rest in the first trial. Having safely run that "gantlet" the defendant had a constitutional right not to again be jeopardized by that evidence. Though the crime that defendant was tried for this time, breaking and entering, is not the same crime that he was acquitted of by the first trial, larceny, defendant's former jeopardy rights were nonetheless violated to the prejudice of his liberty, since the *truth* of the larceny evidence was again put in issue against him and no doubt contributed greatly to his conviction.

63 N.C. App. at 94, 304 S.E. 2d at 246 (1983).

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

Attorney General Rufus L. Edmisten, by Special Deputy Attorney General Ann Reed, for the State.

Assistant Appellate Defender Lorinzo L. Joyner, for the defendant.

COPELAND, Justice.

[1] The issue presented is whether defendant's reprosecution for felonious breaking or entering with intent to commit larceny is barred by his earlier acquittal of the charge of larceny.

Defendant does not contend that he is barred from prosecution because he is being placed in jeopardy for the same offense. Rather, defendant contends that his acquittal on the larceny charge in the first trial determined matters of fact in his favor so as to collaterally estop the State from now proving him guilty of breaking or entering with the intent to commit larceny.

The doctrine of collateral estoppel was held to be a part of the constitutional guarantee against double jeopardy in *Ashe v. Swenson*, 397 U.S. 436, 25 L.Ed. 2d 469 (1970). Under the doctrine of collateral estoppel, an *issue* of ultimate fact, once determined by a valid and final judgment, cannot again be litigated between the same parties in any future lawsuit. Subsequent prosecution is barred only if the jury could not rationally have based its verdict on an *issue* other than the one the defendant seeks to foreclose. *United States v. Smith*, 470 F. 2d 1299 (5th Cir. 1973), *cert. denied*, 411 U.S. 952. When a "fact is not *necessarily* determined in the former trial, the possibility that it may have been does not prevent re-examination of that issue." *Adams v. United States*, 287 F. 2d 701, 705 (5th Cir. 1961). *See United States v. Ballard*, 586 F. 2d 1060 (5th Cir. 1978); *Johnson v. Estelle*, 506 F. 2d 347 (5th Cir. 1975), *cert. den.*, 422 U.S. 1024; *United States v. Griggs*, 498 F. Supp. 277 (M.D. Fla. 1980). Thus, in determining whether this aspect of double jeopardy acts to bar a subsequent prosecution, "unrealistic and artificial speculation about some far-fetched theory upon which the jury might have based its verdict of acquittal" is foreclosed; rather, a realistic inquiry is required into how a rational jury would consider the evidence presented in a particular case. *United States v. Sousley*, 453 F. Supp. 754, 762 (W.D. Mo. 1978). In advancing a collateral estoppel double jeopardy defense, the defendant has the burden of persuasion. *United States v. Hewitt*, 663 F. 2d 1381 (11th Cir. 1981).

Finally, and of particular importance to our decision in this case, we must emphasize that the "same evidence" test is not the measure of collateral estoppel in effect here. The determinative factor is not the introduction of the same evidence (in this case, evidence of defendant's participation in the larceny), but rather whether it is absolutely necessary to defendant's conviction for breaking or entering with the intent to commit larceny that the second jury find against defendant on an *issue* upon which the first jury found in his favor. As noted in *United States ex rel.*

Triano v. Superior Court of New Jersey, 393 F. Supp. 1061, 1070, n. 8 (D.N.J. 1975), *aff'd without opinion*, 523 F. 2d 1052 (3d Cir. 1975), *cert. den.*, 423 U.S. 1056, "[t]he 'same evidence' could, in an appropriate case, conceivably be introduced at the second trial for an entirely different purpose than that which it served at the earlier trial."

With these principles in mind, we turn now to the facts in the case *sub judice*. The issue at defendant's first trial was whether he did, in fact, commit the crime of larceny. The elements of that crime are: 1) the wrongful taking and carrying away; 2) of the personal property of another; 3) without his consent; 4) with the intent to deprive permanently the owner thereof. *State v. McCrary*, 263 N.C. 490, 139 S.E. 2d 739 (1965). In acquitting the defendant, the jury found only that there was insufficient evidence of one or more of the elements of larceny. *Intent* to commit the crime of larceny is not an element of the crime of larceny.

The elements of the offense of breaking or entering are: 1) the breaking or entering of any storehouse, shop or other building where any merchandise, chattel, money, valuable security or other personal property shall be; 2) with the intent to commit a felony (larceny in the case *sub judice*). N.C. Gen. Stat. § 14-54. Thus, to prove a defendant guilty of felonious breaking or entering, it is not necessary to prove that he was also guilty of larceny. Rather it is only necessary to prove that the defendant *intended* to commit a felony, to wit, larceny. The issue of defendant's intent to commit larceny was not raised, considered or passed upon by the first jury when it acquitted defendant of the larceny charge.

Certainly the State was not precluded, on reprosecution for felonious breaking or entering, from introducing evidence of defendant's alleged participation in the actual break-in of Field's Jewelry Store. That aspect of the offense was not at issue in and was not an element of the larceny charge. Furthermore, as discussed above, the State was not precluded from introducing evidence, albeit the "same evidence," tending to implicate defendant in the larceny of the store where the sole purpose of the evidence was to prove defendant's intent to commit the crime of larceny, an issue which was neither raised nor resolved by his acquittal of the larceny charge.

In 1907 our Supreme Court, in an opinion authored by Chief Justice Clark, addressed this issue. We believe the reasoning of

the Court was then sound and remains so. The Court held that defendant's acquittal of the charge of larceny protected him from being tried again for the same offense, "but it was competent, in order to show the intent to steal, to prove that the defendant took the articles . . . [I]t is not an estoppel on the State to show the same facts if, in connection with other facts, they are part of the proof of another and distinct offense." *State v. Hooker*, 145 N.C. 581, 582-83, 59 S.E. 866, 866 (1907). The Court then noted the following principle, "stated in all the authorities" that:

> '[t]hough the same act may be necessary to be shown in the trial of each indictment, if each offense requires proof of an additional fact which the other does not, an acquittal or conviction for one offense is not a bar to a trial for the other.' One cannot be put twice in jeopardy for the *same offense.* When some indispensable element in one charge is not required to be shown in the other, they are not the same offense. [Emphasis added.]

Id. at 584, 59 S.E. at 867.

[2] In sentencing the defendant to the maximum term of ten years' imprisonment for this offense, the trial judge found as factors in aggravation that the offense was committed for hire or pecuniary gain. There is no evidence of record that the defendant was hired or paid to commit the offense. The trial judge improperly relied on this factor. *State v. Abdullah*, 309 N.C. 63, 306 S.E. 2d 100 (1983).

As an additional finding in aggravation, the trial judge found that the offense involved the actual or attempted taking of property of great monetary value. This, too, was error. There is no evidence to support this aggravating factor. *State v. Thompson*, 309 N.C. 421, 307 S.E. 2d 156 (1983).

[3] We note that the trial judge, upon defense counsel's urging, found the following non-statutory mitigating factor: "That the defendant did not testify in this case and relate to the court any perjured testimony." Upon resentencing, the court shall not consider this fact in mitigation. N.C. Gen. Stat. § 15A-1340.4(a)(1) states that "[t]he judge may not consider as an aggravating factor the fact that the defendant exercised his right to a jury trial." Implicit in this requirement is that a defendant not be penalized for

electing to plead not guilty. It would be incongruous, therefore, to permit a trial judge to consider as a mitigating factor that the defendant elected not to testify so as to avoid giving perjured testimony.

The decision of the Court of Appeals is reversed and the case remanded to that Court for further remand to Superior Court, Mecklenburg County, for reinstatement of the judgment of defendant's guilt of felonious breaking or entering. Defendant is entitled to a new sentencing hearing.

Reversed and remanded.

JOHNNY E. PINKSTON v. JAMES EDWARD CONNOR

No. 491A83

(Filed 10 January 1984)

DEFENDANT appeals pursuant to N.C. Gen. Stat. § 7A-30 from the decision of the Court of Appeals (*Judges Hill* and *Becton* concurring, *Judge Webb* dissenting), reported in 63 N.C. App. 628, 306 S.E. 2d 132 (1983), which affirmed the judgment entered by *Mills, Judge,* at the 7 December 1981 Session of Superior Court, IREDELL County.

Kluttz, Hamlin, Reamer, Blankenship and Kluttz by Richard R. Reamer, for defendant-appellant.

Pope and Brawley by William R. Pope, for defendant-appellee, Town of Mooresville.

Wardlow, Knox, Knox, Freeman & Scofield by Charles E. Knox and John S. Freeman, for plaintiff-appellee.

PER CURIAM.

Plaintiff, a city maintenance worker, sought damages for personal injuries resulting from defendant's negligent operation of his motor vehicle. The trial court refused to submit to the jury the issues of plaintiff's contributory negligence and the Town of Mooresville's concurring negligence.

The Court of Appeals determined that the trial court properly declined to submit the issue of plaintiff's contributory negligence since defendant failed to present sufficient evidence to support even an inference of that defense. Accordingly, the only basis upon which the Town could be held liable was through the acts or omissions of the plaintiff; thus, the decision favoring the plaintiff precludes any action against the Town.

The opinion of the Court of Appeals affirming the judgment for the plaintiff is affirmed.

Affirmed.

MIDDLESEX CONSTRUCTION CORPORATION, PLAINTIFF-PETITIONER	)	
v.	)	ORDER
THE STATE OF NORTH CAROLINA EX REL. STATE ART MUSEUM BUILDING COMMISSION, RESPONDENT-DEFENDANT	)	

No. 575PA82

(Filed 10 January 1984)

THIS matter is before the Court upon the petition for rehearing filed herein by the plaintiff. The opinion of this Court is reported in 307 N.C. 569 and was filed 8 February 1983.

Upon consideration of the petition for rehearing and the response to petition filed in this Court by the plaintiff and the defendant, the following order is hereby entered:

It appearing to the Court that the Department of Administration has taken final agency action on the plaintiff's claims, the petition for rehearing is denied without prejudice to the plaintiff's right to institute an action in the Superior Court, Wake County.

By order of the Court in Conference, this 10th day of January, 1984.

FRYE, J.
For the Court

IN RE JASON ADAM LINN) ORDER

No. 14P84

(Filed 18 January 1984)

THE petition of the Guilford County Department of Social Services and its Director for a Writ of Supersedeas is allowed. The order of *Foster, District Court Judge*, dated 16 December 1983, holding that the Interstate Compact for the Placement of Children does not pertain because the mother was physically present in the courtroom and relieving the Guilford County Department of Social Services of the legal and physical custody of James Adam Linn and restoring custody of said child to his mother, Beverly Linn, is hereby vacated. The cause is remanded to the North Carolina Court of Appeals for further remand to the District Court, Guilford County, for further proceedings in accordance with Article 4A, Chapter 110, North Carolina General Statutes—Interstate Compact on the Placement of Children.

By order of the Court in Conference this 18th day of January, 1984.

FRYE, J.
For the Court

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

ALLEN v. DUVALL

No. 437PA83.

Case below: 63 N.C. App. 342.

Petition by plaintiffs for discretionary review under G.S. 7A-31 allowed 10 January 1984 for the sole purpose of addressing the question of the sufficiency of the description of the easement in defendants' chain of title.

BOARD OF EDUCATION v. CONSTRUCTION CORP.

No. 517P83.

Case below: 64 N.C. App. 158.

Petition by defendant Heating Company for discretionary review under G.S. 7A-31 denied 10 January 1984.

CURL v. KEY

No. 533PA83.

Case below: 64 N.C. App. 139.

Petition by plaintiffs for discretionary review under G.S. 7A-31 allowed 10 January 1984.

DAIL PLUMBING v. ROGER BAKER & ASSOC.

No. 579P83.

Case below: 64 N.C. App. 682.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 10 January 1984.

HILTON v. HOWINGTON

No. 506P83.

Case below: 63 N.C. App. 717.

Petition by defendant for discretionary review under G.S. 7A-31 denied 10 January 1984.

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

IN RE HOUSE OF RAEFORD FARMS v. BROOKS

No. 408P83.

Case below: 63 N.C. App. 106.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 10 January 1984. Motion by defendant to dismiss appeal for lack of substantial constitutional question allowed 10 January 1984.

IN THE MATTER OF SELLERS v. NATIONAL SPINNING CO.

No. 574P83.

Case below: 64 N.C. App. 567.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 10 January 1984.

JONES v. GWYNNE

No. 531A83.

Case below: 64 N.C. App. 51.

Petition by plaintiff for discretionary review under G.S. 7A-31 allowed 10 January 1984.

KIRKS v. KIRKS

No. 521P83.

Case below: 64 N.C. App. 620.

Petition by defendant for discretionary review under G.S. 7A-31 denied 10 January 1984.

LADD v. ESTATE OF KELLENBERGER

No. 572PA83.

Case below: 64 N.C. App. 471.

Petition by plaintiffs for discretionary review under G.S. 7A-31 allowed 10 January 1984.

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

OSBORNE v. HATCHER PICKUP

No. 544P83.

Case below: 64 N.C. App. 418.

Petition by defendants for discretionary review under G.S. 7A-31 denied 10 January 1984.

PURIFOY v. WILLIAMSON

No. 580P83.

Case below: 63 N.C. App. 789.

Petition by plaintiff for writ of certiorari to North Carolina Court of Appeals denied 10 January 1984.

SHAVER v. MONROE CONSTRUCTION CO.

No. 496P83.

Case below: 63 N.C. App. 605.

Petition by defendants and cross-petition by plaintiff for discretionary review under G.S. 7A-31 denied 10 January 1984.

STAR VARIFOAM CORP. v. BUFFALO REINSURANCE CO.

No. 547P83.

Case below: 64 N.C. App. 306.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 10 January 1984.

STATE v. BLANKENSHIP

No. 560P83.

Case below: 64 N.C. App. 620.

Petition by defendant for discretionary review under G.S. 7A-31 allowed 10 January 1984 for the sole purpose of remanding the case in order that defendant may be resentenced under the Fair Sentencing Act.

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

STATE v. BROWN

No. 573P83.

Case below: 59 N.C. App. 411.

Petition by defendant for writ of certiorari to North Carolina Court of Appeals denied 10 January 1984.

STATE v. CAMPBELL

No. 458P83.

Case below: 63 N.C. App. 566.

Petition by defendant for discretionary review under G.S. 7A-31 denied 10 January 1984.

STATE v. CHISHOLM

No. 556P83.

Case below: 64 N.C. App. 621.

Petition by defendant for discretionary review under G.S. 7A-31 denied 10 January 1984.

STATE v. NEALY

No. 603P83.

Case below: 64 N.C. App. 663.

Petition by defendant Smith for writ of certiorari to North Carolina Court of Appeals denied 10 January 1984.

STATE v. PORTER

No. 630P83.

Case below: 65 N.C. App. 13.

Petition by defendant for discretionary review under G.S. 7A-31 denied 10 January 1984. Motion by Attorney General to dismiss appeal for lack of substantial constitutional question allowed 10 January 1984.

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

STATE v. STANLEY

No. 562P83.

Case below: 64 N.C. App. 622.

Petition by defendant for discretionary review under G.S. 7A-31 denied 10 January 1984.

STATE v. THOMPSON

No. 516P83.

Case below: 64 N.C. App. 418.

Petition by Attorney General for discretionary review under G.S. 7A-31 denied 10 January 1984.

TAR LANDING VILLAS v. TOWN OF ATLANTIC BEACH

No. 578P83.

Case below: 64 N.C. App. 239.

Petition by plaintiffs for discretionary review under G.S. 7A-31 denied 10 January 1984.

WILLIAMS v. HYDRO PRINT

No. 582P83.

Case below: 65 N.C. App. 1.

Petition by defendants for discretionary review under G.S. 7A-31 denied 10 January 1984.

WOLFE v. WOLFE

No. 542P83.

Case below: 64 N.C. App. 249.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 10 January 1984.

STATE OF NORTH CAROLINA v. LESLY JEAN

No. 112A83

(Filed 2 February 1984)

1. **Criminal Law § 66.4— photographic and lineup identifications—defendant only person in both—no impermissible suggestiveness**

Pretrial photographic and live lineup identification procedures were not impermissibly suggestive because defendant was the only person who appeared in both photograph and live lineups where a rape victim could make no positive identification at the first photographic procedure but made a tentative identification of defendant as her assailant upon viewing the photographs a second time; the victim testified that her reluctance to make a more positive identification at that time was due to the fact that she realized the seriousness of the offenses charged and that there were certain identifying features not visible in the photograph; and the victim testified that she based her identification of defendant at the live lineup on the fact that she saw freckles on defendant's face which did not appear on the photograph and that she also recognized certain distinctive features of defendant's profile.

2. **Criminal Law § 66.4— photographic and lineup identification procedures—hypnosis prior to live lineup—procedures not impermissibly suggestive**

Pretrial photographic and live lineup identification procedures were not impermissibly suggestive because the victim was hypnotized prior to the live lineup to see if she could recall why defendant's photograph had bothered her where the victim, immediately after the assault, had provided law enforcement authorities with a complete, detailed, and reasonably accurate description of her assailant, and where the victim testified that no new information developed as a result of the hypnotic session.

3. **Constitutional Law § 30; Bills of Discovery § 6— statements of witness—no discovery for voir dire hearing**

Defendant was not entitled to discovery of the victim's statement for the purpose of cross-examination at a voir dire hearing on a motion to suppress her identification testimony even though the voir dire hearing took place at trial after the jury had been selected. Rather, defendant's rights were protected when defendant was provided with the victim's statement prior to her cross-examination before the jury.

4. **Criminal Law § 86.5— cross-examination of defendant—viewing of pornographic movie**

In a prosecution for first degree rape and first degree sexual offenses, even if it was error for the trial court to permit, for the purpose of showing prior disparaging conduct, cross-examination of defendant about his viewing a pornographic movie in a motel room with a female companion five days after the crimes charged which depicted the same kind of sex acts with which defendant was charged, such error was harmless when viewed in the context of all the evidence and in light of the substantial evidence of defendant's guilt.

5. **Rape and Allied Offenses § 5— first degree rape and sexual offenses—use of deadly weapon—infliction of serious injury—sufficiency of evidence**

The evidence in a prosecution for first degree rape and first degree sexual offenses was sufficient for the jury to find that defendant employed or displayed a deadly weapon where it tended to show that the victim was threatened with a pair of vise grips, notwithstanding defendant used the grips to feign the presence of a gun, since the victim had every reason to fear that the vise grips could and would be used to harm her. Furthermore, the evidence was sufficient for the jury to find that defendant inflicted serious personal injury on the victim where it tended to show that the victim suffered a bruised and swollen cheek, a cut lip, and two broken teeth.

Justice MARTIN concurring.

Chief Justice BRANCH joins in this concurring opinion.

Justice EXUM dissenting.

Justice FRYE joins in this dissenting opinion.

BEFORE *Phillips, J.*, at the 29 November 1982 Criminal Session of Superior Court, ONSLOW County, defendant was convicted of three counts of first degree sexual offense and one count of first degree rape. He appeals from the imposition of two consecutive life sentences. Heard in the Supreme Court 3 October 1983.

As a basis for his appeal, defendant assigns as error the denial of his motion to suppress the victim's identification testimony; the trial court's refusal to permit defense counsel to view the victim's statements prior to cross-examining her during the voir dire hearing on the motion to suppress; the trial court's permitting the prosecutor to cross-examine the defendant concerning certain acts of misconduct; and the trial court's failure to dismiss the charges where there was insufficient evidence that defendant either employed a deadly weapon or inflicted personal injury on the victim. We find no error.

The facts, briefly stated, are as follows: On 21 July 1982, Mrs. Alice Kathleen Wilson awoke at approximately 3:00 a.m. to find a man standing at the foot of her bed. Over the course of the next hour and fifteen minutes, she endured a nightmare of the most degrading perversion. She was subjected to unnatural sexual acts; she was threatened with a pair of vise grips; she was beaten and she was raped. Mrs. Wilson was twenty-seven years old at the time. She was married, and the mother of three young children,

the youngest of whom remained asleep in the bedroom where the assaults took place. Her husband was at work. We deem it unnecessary to further stain the pages of our reports with the sordid details of this victim's ordeal. *State v. Warren*, 309 N.C. 224, 311 S.E. 2d 266 (1983). Suffice it to say that as a result of the victim's detailed description of her assailant, the defendant was subsequently arrested, charged, and convicted of these crimes. Additional facts necessary to a determination of the issues will be discussed in the opinion.

Rufus L. Edmisten, Attorney General, by Special Deputy Attorney General Ann Reed, for the State.

Marc D. Towler, Assistant Appellate Defender, for defendant-appellant.

MEYER, Justice.

Defendant first contends that the trial court erred in denying his motion to suppress the identification testimony of Mrs. Wilson, arguing that the testimony was the product of a pretrial identification procedure which was so impermissibly suggestive that it created a substantial likelihood of irreparably mistaken identification.

Following a voir dire hearing on defendant's motion to suppress, the trial court made the following findings of fact:

> 2. That Alice Kathleen Wilson retired for bed at approximately one o'clock A.M. on the 21st of July and before retiring for bed she left the lights on in her hallway, living room and kitchen.
>
> 3. That the lights from the kitchen and living room shown in through her bedroom.
>
> 5. That at 3:00 A.M. on July 21st, 1982, Mrs. Wilson awoke from her sleep and observed a black male standing over her. That this person grabbed Mrs. Wilson and forced her to submit to various acts of sexual and oral intercourse within her bedroom. That this intruder was in Mrs. Wilson's bedroom for an hour and 15 minutes and that during this time Mrs. Wilson was within a foot of him for an hour of that time.

6. That these various acts of sexual intercourse and oral intercourse occurred in an area of Mrs. Wilson's bedroom where she could see very clearly who her intruder was because of the light emanating from the kitchen into her bedroom.

8. That Mrs. Wilson described her assailant as being approximately 5 feet 8 inches tall, 160-165 pounds, wearing dark navy blue jogging shorts, dark teeshirt, white high-top Nike tennis shoes with a black swirl on the side of the tennis shoes, almond eyes, high cheek bones, fairly thick lips, and a freckle on the left side of her assailant's face.

9. That her assailant left her house at approximately 4:15 A.M. and Mrs. Wilson thereafter reported the sexual assault to the police. That at this time the Jacksonville Police Department placed the description of Mrs. Wilson's assailant over the radio and this was disseminated to various police officers in Jacksonville.

10. That at approximately 4:40 A.M. Officer Jim Shingleton of the Jacksonville Police Department stopped a person along LeJeune Blvd. in Jacksonville meeting the description of Mrs. Wilson's assailant. That Officer Shingleton frisked this person and was in this person's presence for a period of about 2 minutes. That thereafter this person ran from Officer Shingleton into the woods along Lejeune Blvd. and was not to be found on that particular morning.

11. That on July 26th, 1982 Officer Shingleton saw the defendant at Dunkin' Donuts in Jacksonville located 2 houses away from 104 Sherwood Rd. and at that time seized the defendant and took him to the police station in Jacksonville. At that time the defendant granted permission to Detective Steve Smith of the Jacksonville Police Department to search his wall locker. That Officer Smith after executing said search returned Lesly Jean to the police department where Lesly Jean consented to the taking of his photograph. Lesly Jean was then released at 2:30 on the 27th of July, 1982.

12. That on July 27th, 1982, Detective Smith made up a photographic lineup containing 6 black males including the defendant. That these photographs depicted persons in their

early 20's from the waist up including their head. That these pictures were all similar in physical description.

13. That these photographs were displayed to Alice Kathleen Wilson on July 27, 1982 at the Jacksonville Police Department. That these photographs were displayed in a folder. That these photographs were displayed in a non-suggestive manner. That Detective Smith never told Alice Kathleen Wilson which person or persons he suspected of this crime. That Alice Kathleen Wilson was unable at that time to select a photograph of her assailant.

14. That on July 28th, 1982, Alice Kathleen Wilson asked to see the photographic lineup again. That at 6:30 on July 28, 1982, she viewed the same photographs displayed to her on the 27th of July, 1982. That again these photographs were displayed in a non-suggestive manner by Detective Steve Smith and he did not tell her at any time which of those photographs, if any, were suspects in the rape case. That after viewing this photographic lineup, Mrs. Wilson told Detective Smith that photograph number 5 appeared as if he was looking at her and stated 'That's the one who makes me feel sick.' That photograph number 5 is the defendant Lesly Jean.

15. That on August 3rd, 1982, Detective Steve Smith asked Lesly Jean if he would consent to reading various sentences into a tape recorder for the purpose of recording his voice. That Lesly Jean consented to doing this and did so. That Detective Smith also asked 4 other persons to do the same thing. That the voices were recorded onto a tape recording. That the voices are all fairly similar in sound.

16. That on August 4th, 1982, this tape recording was played for Mrs. Wilson and she selected voice number 3, that of Lesly Jean, as her assailant by stating the words 'Number 3 sounds like the one that was in my bedroom the other night.' That this voice identification procedure was conducted in a non-suggestive manner. That Detective Smith never told Mrs. Wilson which of the voices if any were suspected of being her assailant.

17. That the investigation of this case continued until the 17th of September, 1982, whereupon Lesly Jean came to the police department of his own volition. That at this time Lesly Jean was not under arrest and was appearing at the police station voluntarily, of his own will and accord. That Lesly Jean agreed to participate in a live lineup which occurred at the police station. That this lineup consisted of, in addition to Lesly Jean, two other black males who were similar in physical size and description to Lesly Jean. That Lesly Jean was given a chance to select which position of the lineup he would stand and he selected to stand in between the two other black males. That Mrs. Wilson viewed these persons from behind a glass window wherein she only saw the person from the waist up including their head. That these persons had their shirts off at this time and Mrs. Wilson could see the bare chest of each person and his face. That these lineup procedures were conducted in a totally non-suggestive manner and Mrs. Wilson was never told by anyone who, if any, of the persons were suspected of being her assailant. That after viewing these persons for a few moments Mrs. Wilson selected person number 2, that of Lesly Jean, as being her assailant. That the defendant, before participating in the lineup, was told that he had a right to counsel and he voluntarily waived a right to counsel before participating in the lineup. That at this time Mrs. Wilson indicated that she was positive that Lesly Jean was in fact her assailant. That at the time of this viewing Mrs. Wilson noted a freckle on the left cheek of the defendant, the same freckle she recalled seeing the morning of her assault. At the time of this lineup procedure, no adversary judicial criminal proceedings had been initiated against the defendant.

18. That after Mrs. Wilson was attacked her description to the Jacksonville Police Department included her assailant's height, weight, complexion, distinguishing facial features, build, and voice. That this description was extremely detailed and more than ordinarily thorough. That she expressed no doubt what-so-ever that the defendant was the person who raped her.

19. That Mrs. Wilson's identification of the defendant in the courtroom is based on her observation of him in her

house on the morning of July 21, 1982 and is not tainted by any pretrial identification procedures.

20. That the Court has had an opportunity [to] observe Mrs. Wilson's testimony in court during the Voir Dire and notes that the witness had over one hour and 15 minutes in the presence of the defendant. That during this time she was within extremely close proximity of the defendant for an hour out of this hour and 15 minutes. That during this time her degree of attention was directed towards the defendant at all times. That the accuracy of Mrs. Wilson's prior description of her assailant conforms with the way the defendant appears in court today and Mrs. Wilson is absolutely positive that the defendant is her assailant.

Based on the above findings of fact, the trial court concluded:

1. That the photographic lineup procedure was not impermissibly suggestive and was proper in all respects.

2. That the totality of the circumstances does not reveal a pretrial procedure so unnecessarily suggestive and conducive to irreparable mistaken identification as to offend fundamental standards of decency, fairness and justice.

3. That the photographic lineup procedure does not give rise to any likelihood of irreparable misidentification.

4. That the voice identification procedures were not impermissibly or unduly suggestive and were proper in all respects.

5. That the totality of the circumstances does not reveal a pretrial procedure so unnecessarily suggestive and conducive to irreparable misidentification as to offend fundamental standards of decency, fairness and justice.

6. That the voice identification procedure does not give rise to any likelihood of irreparable misidentification.

7. That the live lineup which occurred on September 17, 1982 was not impermissibly or unduly suggestive and was perfectly proper in all respects.

8. That the defendant did not have a constitutional right to the presence [of] counsel at the live lineup because no adversary judicial criminal proceeding had been initiated against the defendant prior to this confrontation.

9. That this identification procedure did not give rise to any likelihood of irreparable misidentification and was not so suggestive as to deprive the defendant of due process of law.

Sometime after viewing the photographic lineup, in late July or early August, Mrs. Wilson was hypnotized for purposes of determining further details concerning her description of the defendant. Mrs. Wilson stated that nothing new developed as a result of the hypnosis.

In support of his contention that the pretrial identification procedure was impermissibly suggestive, defendant points to the following:

[1] (1) Defendant was the only person who appeared in both photographic and live lineups, therefore a possibility exists that Mrs. Wilson may have identified the defendant in the live lineup because he was the only man she had seen in the two previous photographic arrays. The record suggests otherwise.

After viewing the first photographic array, the victim could make no positive identification. She testified that she became physically ill that evening after viewing the photographs because one of them bothered her. She asked to view the same lineup the next day at which time she stated that the photograph of the defendant was the one that made her feel sick. At this point, then, the victim had made a tentative identification of the defendant as her assailant. She testified that her reluctance to make a more positive identification at that time was due to the fact that she realized the seriousness of the offenses charged and that there were certain identifying features not visible in the photograph. It was, nevertheless, a tentative identification which a live lineup merely served to reinforce once the victim was afforded an opportunity to observe certain details of her assailant's appearance not observable in the photograph. As she viewed the live lineup, the victim asked to view defendant's profile. She then became emotionally upset and identified the defendant as her assailant. She testified that she based her identification of the

defendant at the live lineup on the fact that she saw freckles on the defendant's face which she observed on her assailant. She did not see the freckles on the front view photograph of the defendant which appeared in the photographic lineup. She also recognized certain distinctive features of the defendant's profile.

[2] (2) Mrs. Wilson was hypnotized prior to viewing the live lineup in order to see if she could recall why defendant's photograph had bothered her. This fact, according to defendant, "greatly enhanced the possibility of an unconscious transference causing her to mistakenly relate to her recollection of defendant's photograph rather than to the features of the assailant she actually observed on the night of the crime." We reject defendant's argument based on two significant facts which emerge from this record. First, the victim, immediately after the assault, had provided law enforcement authorities with a complete, detailed, and, under the circumstances of the trauma she experienced, a reasonably accurate description of her assailant.[1] Second, the victim testified that no new information developed as a result of the hypnotic session.

We conclude that because the victim's initial description of her assailant was sufficiently detailed to result in a composite drawing upon which defendant's subsequent apprehension was based, and because the articulated basis for the victim's positive identification was independent of any possible suggestiveness in the procedure, the pretrial identification procedure cannot be said to be so impermissibly suggestive as to create a substantial likelihood of irreparable mistaken identification. The trial court's findings of fact support its conclusions of law and defendant's motion to suppress the identification testimony was properly denied. *See State v. Chatman*, 308 N.C. 169, 301 S.E. 2d 71 (1983).

[3] Defendant next contends that he was denied due process when the trial judge refused to permit defense counsel to view the victim's statement prior to cross-examining her during the voir dire hearing on the motion to suppress her identification

1. In his brief defendant argues that the original description given by Mrs. Wilson did not include the fact that the assailant's white shoes were tied with black shoelaces or that his jogging shorts had white stripes as did the shorts seized from defendant, hence the description "failed to include anything which would set the man apart from hundreds of joggers." The argument is specious.

testimony. Defendant argues that because the trial court denied his request without conducting an *in camera* hearing to determine whether the statement contained inconsistencies useful for impeachment purposes, reversible error was thereby committed. He cites to *State v. Hardy*, 293 N.C. 105, 235 S.E. 2d 828 (1977), which held that G.S. § 15A-904(a) does not bar discovery of prosecution witnesses' statements *at trial* and that the appropriate procedure for disclosure once a request has been made is for the trial judge to order an *in camera* inspection of the statement to determine its relevance for, as an example, impeachment purposes. In the instant case the voir dire hearing took place after the jury had been selected. Thus, argues defendant, although defense counsel requested the statement for purposes of cross-examination at the voir dire hearing on the motion as opposed to cross-examination before the jury, the voir dire hearing took place *at trial*. Therefore the trial judge was required to follow the *in camera* procedure outlined in *Hardy* once defense counsel requested the statement.

We addressed this issue in *State v. Williams*, 308 N.C. 357, 302 S.E. 2d 438 (1983). In *Williams* the defendant, too, argued that the victim's statements were critical to defense counsel's cross-examination of the prosecuting witness at a voir dire hearing on a motion to suppress identification testimony. The jury had, however, not yet been empaneled in *Williams*. There we declined to extend the rule enunicated in *Hardy* to permit discovery of a prosecuting witness's statements for the purpose of cross-examination at the voir dire. We adhere to our holding in *Williams* and reject defendant's argument that the technical distinction of whether a jury has or has not been empaneled is of some consequence in determining whether the statements may be discoverable *at trial*. Rather, the issue is whether the statements are made available to the defendant *during trial before a jury* after direct examination of the witness.[2] As we stated in *Williams*,

2. The Legislature has spoken to this issue by amending G.S. § 15A-903, effective for trials held after 14 July 1983. That section now reads: "(f) Statements of State's Witnesses. (1) In any criminal prosecution brought by the State, no statement or report in the possession of the State that was made by a State witness or prospective State witness, other than the defendant, shall be the subject of subpoena, discovery, or inspection until that witness has testified on direct examination in the trial of the case. (2) After a witness called by the State has testified on direct examination, the court shall, on motion of the defendant, order the State to

"[w]hatever impeachment value there [is] in the victim's statements [goes] to the weight of the victim's identification of the defendant rather than to its admissibility." *Id.* at 361, 302 S.E. 2d at 441.

In the case *sub judice* defendant was provided with the victim's statement prior to cross-examination before the jury. At that time the alleged "inconsistency" between the statement and her trial testimony was fully explored by defense counsel. That is, she testified that although she had not mentioned, as part of her initial description of her assailant, that he had a freckle or mole on the side of his face, she did tell the officer who compiled the composite drawing about the freckle. This fact was corroborated by the officer who prepared the composite. The assignment of error is without merit.

---

produce any statement of the witness in the possession of the State that relates to the subject matter as to which the witness has testified. If the entire contents of that statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use. (3) If the State claims that any statement ordered to be produced under this section contains matter that does not relate to the subject matter of the testimony of the witness, the court shall order the State to deliver that statement for the inspection of the court *in camera*. Upon delivery the court shall excise the portions of the statement that do not relate to the subject matter of the testimony of the witness. With that material excised, the court shall then direct delivery of the statement to the defendant for his use. If, pursuant to this procedure, any portion of the statement is withheld from the defendant and the defendant objects to the withholding, and if the trial results in the conviction of the defendant, the entire text of the statement shall be preserved by the State and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this subsection, the court, upon application of the defendant, may recess proceedings in the trial for a period of time that it determines is reasonably required for the examination of the statement by the defendant and his preparation for its use in the trial. (4) If the State elects not to comply with an order of the court under subdivision (2) or (3) to deliver a statement to the defendant, the court shall strike from the record the testimony of the witness, and direct the jury to disregard the testimony, and the trial shall proceed unless the court determines that the interests of justice require that a mistrial be declared. (5) The term 'statement', as used in subdivision (2), (3), and (4) in relation to any witness called by the State means a. a written statement made by the witness and signed or otherwise adopted or approved by him; b. a stenographic, mechanical, electrical, or other recording or a transcription thereof, that is a substantially verbatim recital or an oral statement made by the witness and recorded contemporaneously with the making of the oral statements." 1983 N.C. Sess. Laws, chapter 759.

[4] Defendant's third assignment of error concerns a matter brought out on cross-examination of the defendant which he contends was error because it was irrelevant to the issue being tried in the case, "highly inflammatory" and "extremely prejudicial."

At trial the defendant took the stand and testified on his own behalf. He testified on direct examination that on the night of 26 July he had been at the Deluxe Hotel with a "young lady" and from there went to Dunkin' Donuts where he was first apprehended. On cross-examination he was questioned further concerning what transpired at the Deluxe Hotel prior to his arrest. He admitted that he and the unidentified young woman were in the hotel room viewing pornographic movies depicting acts of sexually deviant behavior. The acts depicted were the same type of sexual acts that had been forced upon the victim five days earlier. Defendant argues that the conduct in question was not necessarily wrongful and therefore not admissible as a specific act of degrading conduct. The defendant further argues that even if this evidence is relevant, it should be excluded because its probative force is comparatively weak and the likelihood of its playing upon the passions and prejudices of the jury is great.

The State contends that this conduct related to defendant's character, or lack thereof, and was a proper subject for cross-examination. 1 Brandis on North Carolina Evidence § 43 (1982). *State v. Lynch*, 300 N.C. 534, 268 S.E. 2d 161 (1980). The State argues that this evidence of prior disparaging conduct by a defendant is properly admissible upon cross-examination of that defendant, not as substantive evidence of guilt, but rather for purposes of character impeachment. *State v. McKenna*, 289 N.C. 668, 224 S.E. 2d 537, *death penalty vacated*, 429 U.S. 912, 50 L.Ed. 2d 278 (1976); 1 Brandis on North Carolina Evidence § 80.

The cases and authorities which tend to support the State's position are: *State v. Sparks*, 307 N.C. 71, 296 S.E. 2d 451 (1982) (Exum, J., citing the general rule that a criminal defendant who testifies may be cross-examined for purposes of impeachment concerning any prior specific acts of criminal and degrading conduct, but error here where prosecutor's query, in a first degree sexual offense case, concerning sexual improprieties failed to identify a *specific act* of misconduct); *State v. Small*, 301 N.C. 407, 272 S.E. 2d 128 (1980) (Exum, J., holding no error in admissibility of evi-

dence regarding defendant's sexual relations with other women and other forms of misconduct brought out on cross-examination of defendant himself); *State v. Lynch*, 300 N.C. 534, 268 S.E. 2d 161 (Copeland, J., holding that district attorney could properly ask defendant on cross-examination if he had called the district attorney a "punk" and had mouthed the word "mother" to him); *State v. Lester*, 289 N.C. 239, 221 S.E. 2d 268 (1976) (Exum, J., holding that an accused person who testifies as a witness may be cross-examined regarding prior acts of misconduct, in this case circumstances of defendant's undesirable discharge from military service); *State v. Gurley*, 283 N.C. 541, 196 S.E. 2d 725 (1973) (Lake, J., holding defendant properly cross-examined about his possession of, familiarity with, and interest in pornographic magazines); and 1 Brandis on North Carolina Evidence § 111 and cases cited thereunder.

We find it unnecessary to address the question of the admissibility of this evidence on cross-examination concerning defendant's conduct in watching these movies in the motel room with the young woman to show prior disparaging conduct. Assuming *arguendo* that it should not have been admitted, we find the error harmless. Taken in the context of all the evidence and in view of the substantial evidence of defendant's guilt, it is completely unreasonable to assume that this item of evidence was, in the minds of the jurors, a determining factor in assessing defendant's guilt. Immediately following the assault, the victim gave a description of her assailant from which a composite drawing was made. Defendant was recognized by a police officer and arrested based on this composite drawing. The victim made a positive voice identification, and an unequivocal in-court identification, based solely on her observations at the time of the crime. Results of blood tests pointed to the defendant as the perpetrator of the crime. Clothes matching those worn by the assailant were discovered in defendant's locker. There is no reasonable possibility that had the evidence been excluded, a different result would have been reached at trial. G.S. § 15A-1443(a); *State v. Jordan*, 305 N.C. 274, 287 S.E. 2d 827 (1982). We find no prejudicial error in the admission of this testimony.

[5] Finally, defendant contends that the trial court erred in failing to dismiss the charges against him because of insufficient evidence that defendant either employed a deadly weapon or in-

flicted serious personal injury on the victim. He argues that although the vise grips employed by defendant in this case could possibly be considered a deadly weapon, because he employed them to feign the presence of a gun and "neither by words nor by gestures indicated that the Vice Grips (sic) would be used as a club," the evidence was insufficient to support a finding that defendant employed a deadly weapon. As we understand defendant's reasoning, he argues that because he threatened to shoot the victim with the vise grips, her fear that he was going to crush her skull with them was inconsistent with the manner in which the weapon was employed or displayed. The argument is specious. Irrespective of the impossibility of defendant's intent to shoot the victim with a pair of vise grips, the victim had every reason to fear that the vise grips could and would be used to harm her. The jury was instructed to consider "the nature of the Vice Grips (sic), the manner in which it is used and the size and strength of Lesly Jean as compared to Kathy Wilson." The evidence was sufficient for the jury to find that defendant employed or displayed a deadly weapon. *See State v. Powell*, 306 N.C. 718, 295 S.E. 2d 413 (1982).

We, likewise, reject defendant's contention that there was insufficient evidence that he inflicted serious personal injury on the victim. Mrs. Wilson suffered a bruised and swollen cheek, a cut lip, and two broken teeth. The evidence was sufficient to support a finding of serious personal injury. *See State v. Roberts*, 293 N.C. 1, 235 S.E. 2d 203 (1977).

The defendant in this case appears to have been ably represented both at trial and on his appeal. In light of the severity of his sentence, we have reviewed his assignments of error with care and find none sufficiently prejudicial to warrant a new trial.

Defendant received a fair trial free of prejudicial error.

No error.

Justice MARTIN concurring.

I concur in the majority opinion. However, with respect to the impeachment issue, I find that the cross-examination of defendant was competent and admissible for the purpose of impeaching defendant's credibility. *State v. Gurley*, 283 N.C. 541,

196 S.E. 2d 725 (1973), controls this issue. In *Gurley*, evidence of defendant's possession of, familiarity with, and interest in pornographic magazines and photographs of nude women (defendant made one of the photographs) was held competent for the purpose of impeachment. *Gurley* has been cited as authority to impeach a defendant by questions on cross-examination about his possession of, familiarity with, and interest in pornographic magazines in 4 Strong's N.C. Index 3d *Criminal Law* § 86.5 (1976) and 1 Brandis on North Carolina Evidence § 111 (1982). The bench and bar rely upon these texts. No other citations of *Gurley* have been discovered in my research. I see no distinction between pornographic magazines and pornographic movies that would take this case outside the holding in *Gurley*.

If the Court were writing upon a clean slate, the wisdom of adopting the reasoning in *Gurley* would be the subject of vigorous debate. Whenever a court leaves the well-defined path of determining legal questions and undertakes to define moral issues, it embarks upon a journey through a Serbonian bog.

This Court has not overruled *Gurley*. So long as *Gurley* stands, we are bound thereby.

Chief Justice BRANCH joins in this concurring opinion.

Justice EXUM dissenting.

The majority holds it was not reversible error to permit a testifying defendant in a sex offense case to be cross-examined about watching a sexually explicit movie that depicted the same kind of acts with which defendant was charged. Defendant, willingly accompanied by someone of the opposite sex, viewed this movie in the privacy of his motel room five days after commission of the crimes with which he was charged. Believing that this cross-examination should not have been permitted, was highly inflammatory, and contributed to the verdict against defendant, I respectfully dissent.

I.

Unlike the majority, I believe the issue of defendant's guilt is close. This view colors my assessment of the impact of the challenged evidence.

The majority places great weight upon the victim's "unequivocal identification" of defendant *in court*, but attempts, I fear, to "paper over" equivocal identification efforts of the victim in pretrial identification sessions during which she saw defendant's photograph. During the first photographic array, which included defendant's picture, the victim made no identification. Less than twenty-four hours later, she saw the photographs again and could say only that defendant's picture made her feel sick. She did *not* identify him, tentatively or otherwise, as her assailant. At a live line-up almost a month later,[1] the victim identified defendant.

In determining what effect the challenged cross-examination had on the trial's outcome, we should view the victim's identification as a process—from her initial description through the pretrial identification proceedings to the testimony in the courtroom. Although her in-court identification was unequivocal, and I think admissible, despite a reasonably strong argument that it was irreparably tainted by unduly suggestive pretrial procedures, the victim's equivocal performance at these other procedures must detract from the strength of her in-court identification.

Even so-called "unequivocal" eyewitness identification especially when it functions as the nearly exclusive evidence of guilt, must be viewed carefully. *United States v. Holley*, 502 F. 2d 273, 274-75 (4th Cir. 1974); *United States v. Telfaire*, 469 F. 2d 552, 555-56 (D.C. Cir. 1972). Often recollections by victims are wrought with uncertainty and susceptible to suggestion. Identifications, especially by victims suffering from the shock and horror of their experiences, deserve particular scrutiny. Errors may all too readily plague their memories. *See generally* 3 Wigmore on Evidence § 786(a) (Chadbourn rev. 1970). "The vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification." *United States v. Wade*, 388 U.S. 218, 228 (1967).

1. Between the times she viewed the photographs and the live line-up, the victim underwent hypnosis in an effort to see if she could recall why defendant's photograph bothered her. Although defendant assigns no error dealing specifically with this hypnotic session, it underscores the dramatic change in the victim's ability to identify defendant as her assailant between the two photographic procedures and the line-up, not to mention the in-court identification. The victim's assertion at trial that no new information developed from the hypnotic session hardly assuages any lingering doubts as to the positiveness of her identification.

The upshot is that I cannot subscribe to the majority's heavy reliance on the victim's identification as supportive of a conclusion that the evidence against defendant was overwhelming.

The majority next refers to the "results of blood tests [which] pointed to defendant as the perpetrator of the crime." Suffice it to say simply that these results mean only that defendant, along with a large portion of the population, could have committed the crime. A number of states do not permit such evidence because they conclude it has little, if any, probative value. *State v. Gray*, 292 N.C. 270, 282, 233 S.E. 2d 905, 913-14 (1977). We do admit it, but we have also recognized that its probative value is slight. *Id.* at 283, 233 S.E. 2d at 914.

The majority finally notes that "clothes matching those worn by the assailant were discovered in defendant's locker." This statement obscures the fact that the items seized did not match precisely those attributed to the assailant. He allegedly wore navy blue jogging shorts and Nike tennis shoes. While two similar items were found in defendant's locker, they are hardly unique items of clothing. Furthermore, defendant's shorts had white stripes and his Nike shoes were laced with black shoestrings, the latter being a relatively unusual fact which was never mentioned in the victim's description, although she did notice and mention a "black swirl on the side of the tennis shoes."

Finally, on the closeness of the case question, I note the majority simply ignores defendant's considerable evidence supporting an alibi. Defendant was a lance corporal in the United States Marine Corps. He testified that at 11 p.m. on the evening during which the crime occurred he was in his "rack." Since he was scheduled for "mess duty" the next morning, he was due to be awakened at 2:45 a.m. Actually he was awakened sometime after 3 a.m., but he could not recall the exact time, or who woke him. He was at "chow hall" for roll call at 4 a.m., the time he was scheduled to be on duty.

This testimony gains crucial significance due to the victim's explicit testimony that the perpetrator was in her apartment from 3 a.m. until 4:15 a.m. by the clock. Defendant could not, of course, have been in both places simultaneously.

Considerable credible testimony[2] supported defendant's contentions. First Lieutenant Peter D. Lloyd, commander of defendant's platoon, confirmed that defendant was assigned "mess duty" for the morning in question and that defendant should have been awakened at 3 a.m. to be at "chow hall" at 4 a.m. He testified further that, had defendant not been at "chow hall" at that time, he would have been "written up" for an unauthorized absence. Lieutenant Lloyd confirmed that defendant had not been cited for an unauthorized absence on that day. Corporal Reubin Pitts, the non-commissioned officer in charge of defendant's squad, testified that he was awakened at 3:30 a.m. on the day in question and he woke defendant at 3:30 a.m. He actually touched defendant in waking him. Defendant was wearing white trousers and a T-shirt. He was certain also that defendant came to "chow hall" at 4 a.m. Private Brett James Crawford, who admitted having had "a difference" with defendant, and who, like defendant, had mess duty on 21 July, testified that he "pulled the covers off" defendant to try to wake him sometime between 3:30 and 4 a.m. on that day. He recalled seeing defendant at the mess hall shortly after he, the witness, left the barracks at 3:50 a.m. and working with him in the mess hall that morning. Finally, Lance Corporal William L. Tally, a chaplain's assistant, testified that he saw defendant in a recreation room in the upstairs of the barracks around 11 p.m. the night of the crime. He also saw defendant in his "rack" at 3:30 a.m. and on his way to "chow hall" at 3:50 a.m. on the morning of the attack.

As this brief review indicates, considerable evidence supported defendant's alibi. The majority curiously and inexplicably ignores it. The quantity and quality of this evidence makes defendant's case on its face at least as strong as that of the state. This alone makes the question of defendant's presence at the scene and therefore his guilt close indeed. I find the majority's contrary position to be unsupported by the record.

II.

The challenged cross-examination was admitted for the purpose of impeaching defendant's credibility as a witness. For this

2. Three of the four witnesses who corroborated defendant's account described themselves as merely acquaintances, not close friends, of defendant.

evidence to be admissible it must first be relevant to the issue of defendant's credibility; second, even if relevant, its prejudicial effect must not outweigh its probative value. The evidence meets neither standard.

The basic test of relevance is that the evidence have a logical tendency to prove a fact in issue. *See State v. Swift*, 290 N.C. 383, 226 S.E. 2d 652 (1976). *See generally* Fed. R. Evid. 401.[3] If the proffered evidence does not make a fact in issue more or less probable, it is not relevant.

The fact in issue for which the evidence below was offered was defendant's credibility. As the majority notes, the prosecution used the evidence only to impeach defendant. To be permissible, an attempt to impeach a witness's credibility should test his propensity for telling the truth. That a person may watch a sexually explicit movie in the privacy of a motel room with someone of the opposite sex has no bearing, *i.e.*, is not relevant, on the question of that person's propensity to tell the truth. That such conduct may be morally offensive to some (although certainly not all) people, does not imbue it with a logical tendency to prove or disprove a propensity for truthfulness. Support for this conclusion may be found in the federal rule which permits the impeachment of a witness's credibility by evidence referring "only to character for truthfulness or untruthfulness," Fed. R. Evid. 608(a), a rule which our legislature has adopted, effective 1 July 1984. An Act to Simplify and Codify the Rules of Evidence, Chap. 701, 1983 Sess. Laws, Rule 608(a).

Our case law retains the notion that a witness, even the defendant in a criminal case, may be impeached "by asking disparaging questions concerning collateral matters relating to his criminal and degrading conduct." *State v. Williams*, 279 N.C. 663, 675, 185 S.E. 2d 174, 181 (1971). Nevertheless, we have never said precisely what sort of conduct rises to the level of "criminal and degrading." In the vast majority of cases, the conduct consisted of an *illegal*, *i.e.*, criminal act. *See, e.g., State v. Leonard*, 300 N.C.

3. Our new evidence code, 1983 N.C. Adv. Legis. Serv. c. 701, adopts the federal standard for relevancy which includes "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed. R. Evid. 401.

223, 266 S.E. 2d 631, *cert. denied*, 449 U.S. 960 (1980) (killing); *State v. Herbin*, 298 N.C. 441, 259 S.E. 2d 270 (1979) (rape); *State v. Williams*, 292 N.C. 391, 233 S.E. 2d 507 (1971) (robberies); *State v. Mack*, 282 N.C. 334, 193 S.E. 2d 71 (1972) (assault and sodomy); *State v. Sims*, 213 N.C. 590, 197 S.E. 176 (1938) (gambling). I am confident that the phrase "criminal and degrading conduct," as used in *Williams*, means that the conduct must amount either to a violation of the criminal law[4] or to acts involving deceit, fraud, or trickery. While the conduct herein may be tasteless and morally wrong to many of us, it is neither a crime nor an act bearing on defendant's truthfulness. Its use, therefore, for impeachment purposes constitutes error.

The majority refers to a number of cases for the proposition that "disparaging conduct" may be used to impeach a witness. I concede there is loose language in some of the cases which tends to support the "disparaging conduct" rationale for admissibility, but there are no holdings which support the rationale. I think it is time, therefore, for this Court to reject "disparaging conduct," whatever it may encompass, as a test for admissibility of impeaching acts.

First, *State v. Gurley*, 283 N.C. 541, 196 S.E. 2d 725 (1973), from which Justice Martin and Chief Justice Branch get comfort, does not control the issue. Although the Court there did permit a testifying defendant to be cross-examined by questions regarding "his possession of, familiarity with and interest in [pornographic magazines] for the purpose of impeachment," the Court never characterized this conduct as "disparaging" or as "misconduct" and never stated that it tended to impeach defendant by way of showing his bad character. *Id.* at 547, 196 S.E. 2d at 729. The Court did not cite or otherwise rely on any of our cases establishing the rule that a testifying defendant may be cross-examined about specific acts of misconduct to show his bad character on the question of his overall credibility as a witness. Indeed, the Court in *Gurley* cited no cases for its conclusion and

4. As I point out in Section III, *infra*, the essence of impeachment is to probe the witness's credibility by testing his propensity for truth and veracity. *See* Fed. R. Evid. 608. Thus, even acts not necessarily criminal which reflect on a witness's tendency toward untruthfulness, *e.g.*, lying, fraud, or trickery, would be admissible for impeachment purposes. The acts involved in this case, however, have no relation to defendant's propensity for truth and veracity.

treated the question quite perfunctorily. Yet in the next succeeding paragraph the Court dealt at some length with the propriety of cross-examining defendant about his prior criminal activities, citing several cases for the proposition that a defendant "may be questioned as to particular acts impeaching his character." *Id.*

To understand why the Court so perfunctorily treated the pornographic magazine cross-examination in *Gurley*, one need only examine the facts in that case. This examination makes clear that the Court did not allow the cross-examination for the purpose of impeaching defendant by way of showing his bad character. Rather, it allowed the cross-examination on the substantive issue of Gurley's identity as the assailant for the purpose of impeaching Gurley's testimony that he had never seen the victim and had not raped or kidnapped her.

The record in *Gurley* reveals that the victim testified that her assailant "showed me a few magazines of his that were full of nude girls and stuff. Magazines with nude girls . . . a pile of them . . . on his nightstand. He showed me a couple of them." She said her assailant told her that she "belonged in them, in reference to a statement concerning my body." She said her assailant exhibited these magazines and made this statement during the two- to three-hour period in which he detained and repeatedly raped her. She identified five magazines marked state's Exhibit 11 as "similar to" the ones defendant showed her. Gurley, testifying in his own behalf, stated that he had never seen the victim and denied any involvement in her rape or kidnapping.

Thus the reason for the propriety of the pornographic magazine cross-examination in *Gurley* becomes obvious. Defendant's possession of, familiarity with and interest in pornographic magazines was one of the facts which tended to identify him as the victim's assailant. The Court in *Gurley* noted in its statement of facts that after the victim was released by her assailant she reported the matter immediately to the police "including a full description of her assailant, of the cloth used as a blindfold, of guns, of bed covers and of pornographic magazines observed by her in the apartment to which she was taken . . . ." *Id.* at 544, 196 S.E. 2d at 727. Thereafter, a deputy sheriff went to the apartment described by the victim, found the defendant there together

with a number of articles the victim had described, including the pornographic magazines. All of these articles, with the exception of the pornographic magazines, were admitted and exhibited to the jury. The Court further noted in its recitation of the facts in *Gurley* that defendant on cross-examination "acknowledged that the pornographic magazines had been in his apartment and that he was familiar with them. He described their contents in some detail." *Id.* at 544, 196 S.E. 2d at 728. For some reason, not apparent in the record, the trial court sustained defendant's objection to the introduction only of the magazines.

Thus, the pornographic magazine cross-examination in *Gurley* tended to identify Gurley as the victim's assailant. It did indeed tend to impeach his denial of his guilt, not by way of showing his bad character, but by way of showing that he, like the victim's assailant, possessed and had an interest in pornographic magazines.

I note, too, that at trial Gurley, for obvious reasons, raised no objections to the pornographic magazine cross-examination as he had not objected to the victim's description of her assailant as one who possessed and was interested in such literature.

Moreover, *Gurley*, unlike the case at bar, was not a close case on its facts. The Court in *Gurley* noted:

> In view of the overwhelming evidence presented by the state of unquestioned competence, any error in the admission of the evidence of which [defendant] now complains, assuming timely objection had been made, would clearly have been harmless error.

Id. at 548, 196 S.E. 2d at 730.

Finally, if *Gurley*, so long as it stands, should be thought to control, then, believing that *Gurley* is not sound law on this point, I would urge the Court to overrule this aspect of it.

The majority refers to *State v. Lynch*, 300 N.C. 534, 268 S.E. 2d 161 (1980), as being supportive of admissibility. The conduct at issue in *Lynch* was the defendant's having called the district attorney a "punk" and mouthed the word "mother" as defendant passed counsel's table during trial. This kind of conduct demonstrated defendant's contempt for the process of the trial itself and

an officer of the court charged with conducting that process. Arguably, therefore, it bears on the issue of defendant's credibility as a witness in that process.

Other cases referred to by the majority as supportive of admissibility are readily distinguishable. *Sparks*, 307 N.C. 71, 296 S.E. 2d 451, relied on the prosecutor's failure to address his cross-examination to a *specific act* of misconduct; it did not alter the definition of "criminal and degrading conduct." Because the question was framed improperly, the Court had no occasion to face the issue of whether defendant's conduct itself could be used for impeachment purposes. Likewise, *Small*, 301 N.C. 407, 272 S.E. 2d 128, involved a defendant's being cross-examined about sexual acts with women other than defendant's wife. Adultery is a form of deceit. Arguably, one who commits it is not as prone to be truthful as one who remains faithful to his or her spouse. But the critical fact in *Small* was the state's initial introduction, without objection, of that same evidence in its case in chief for substantive purposes to show defendant's motive for killing the victim who was his wife. Finally, *Lester*, 289 N.C. 239, 221 S.E. 2d 268, involved inquiry into defendant's dishonorable discharge. But the record reveals that defendant *voluntarily* indicated that he was discharged because he had been "busted for drugs." Thus, *Lester* stands for nothing more than the acceptability of impeachment by cross-examination on prior criminal acts.

When we permit impeachment by acts which we consider merely "disparaging," we risk encompassing conduct which some might simply consider immoral, or in bad taste, or merely "bad manners." The legislature has not prohibited watching even obscene movies; it proscribes only their dissemination. N.C. Gen. Stat. § 14-190.1(a). Our Court of Appeals has concluded that one cannot be constitutionally prosecuted for occupying a motel room for "immoral purposes" for the very reason that a court cannot properly determine what is and is not "immoral."

> G.S. 14-186 fails to define with sufficient precision exactly what the term 'any immoral purpose' may encompass. The word *immoral* is not equivalent to the word *illegal*; hence, enforcement of G.S. 14-186 may involve legal acts which, nevertheless, are immoral in the view of many citizens. One must necessarily speculate, therefore, as to what acts are immoral.

State v. Sanders, 37 N.C. App. 53, 55, 245 S.E. 2d 397, 398 (1978). To some people being in a motel room with someone of the opposite sex to whom you are not married or watching a sexually explicit movie with or without that person may be "disparaging conduct." To others not. Truly, as the Supreme Court itself has noted, "one man's vulgarity is another's lyric." *Cohen v. California*, 403 U.S. 15, 25 (1971). To read and see such critically acclaimed books and movies as, for example, *Lady Chatterly's Lover*, *Tropic of Cancer*, "Midnight Express" (depicting masturbation, homosexuality, and sadism), and "Last Tango in Paris" (depicting sodomy per anus) might be considered "disparaging conduct" to some. Yet this Court would not, nor should it, conclude that reading or seeing these works is "disparaging conduct" by which a witness's credibility can be impeached. Defendant's conduct at issue here seems no worse than this.

This, then, is the kind of quagmire into which we plunge when we refuse to reject acts which we consider merely "disparaging" as material for impeachment. A better rule which I wish this Court would adopt in this case is that a specific act used to impeach a witness must be either illegal, deceitful, or show contempt for the very process by which the defendant is being tried. *See State v. Black*, 308 N.C. 736, 303 S.E. 2d 804 (1983) (where the Court assumed that cross-examination of defendant about his prior employment at an adult bookstore was objectionable). Defendant's conduct, however offensive it might be to some, is neither legally wrong nor dishonest, nor does it demonstrate contempt for the legal process; it should not, therefore, be available for impeachment purposes. Simply stated, it bears no relevance to that issue.

III.

Even if this evidence passes the test of relevancy, I find its probative force to be greatly outweighed by its potential for inflaming the jury against defendant accused of sex offenses.[5]

5. Our common law evidence rule requiring this balancing has never been clearly articulated. *See State v. Stone*, 240 N.C. 606, 83 S.E. 2d 543 (1954); *State v. Brantley*, 84 N.C. 766 (1881). *See also*, 1 Brandis on N.C. Evidence § 80, pp. 295-96 (1982). In its adoption of an evidence code, effective 1 July 1984, the legislature followed precisely the applicable federal rule. Our new code provides that evidence,

The majority acknowledges that the sexual acts depicted in the movie "were the same type of sexual acts that had been forced upon the victim five days earlier." This renders the evidence inflammatory and inclines the jury to decide the case on an improper basis. The evidence's effect is all too clear. The jury hears that defendant was in a motel room, five days after the crime in issue, viewing with a girl friend a movie which depicts sexual acts similar to those with which defendant is charged. The jury improperly concludes not only that defendant has similar sexual desires but that he is disposed forcefully to satisfy them upon an unwilling victim. It is then a short step to the next conclusion that defendant is in fact the perpetrator of the crimes charged.

More generally, evidence of a defendant's bad acts always tends to draw a jury's attention from the real issues. *United States v. Bledsoe,* 531 F. 2d 888, 891 (8th Cir. 1976). The damaging force of such evidence is that it inclines the jury to convict simply because it disapproves of a defendant as a person. *See State v. Ervin,* 340 So. 2d 1379, 1381 (La. 1976).

The majority asserts that the introduction of this evidence, even if error, created no reasonable possibility that had it been excluded a different result would have been reached at trial. For the reasons set out in part I of this dissent, I strongly disagree.

The majority fails to note defendant's considerable evidence of an alibi. Contrary to the impression created by the majority, this case, as I have already shown, was close on the question of defendant's presence at the scene and consequently his guilt of the crime. The likelihood of prejudice, therefore, flowing from the admission of the challenged cross-examination is so enhanced that a reasonable possibility does exist that a different result would have obtained had the evidence been excluded.

---

although relevant, "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . . or misleading the jury . . . ." *Compare* N.C. Gen. Stat. § 8C-1, Rule 403, *with* Fed. R. Evid. 403. The federal rule requires exclusion if the evidence creates "an undue tendency to suggest decision on an improper basis." M. Graham, Handbook of Federal Evidence § 403.1 (1981). The evidence admitted below suggests just the sort of improper basis contemplated by this rule.

IV.

When such prejudicial evidence is admitted, defendant's right to a fair trial, etched in any notion of basic due process and fundamental fairness, is jeopardized. *See* Comment, *Impeachment of the Criminal Defendant by Prior Acquittals—Beyond the Bounds of Reason*, 17 Wake Forest L. Rev. 561, 591-95 (1981) (hereinafter *Impeaching the Testifying Defendant*). Based upon its overwhelmingly prejudicial effect alone, the evidence should have been excluded.

I am concerned by an inescapable effect transcending this case of the admission of this kind of evidence. It involves a defendant's decision whether to testify. When allowing impeachment of a testifying defendant, we must recognize that he possesses a statutory, if not a constitutional, right to testify. N.C. Gen. Stat. § 8-54 (1981); *Impeaching the Testifying Defendant, supra*, at 587-89; Bradley, *Havens, Jenkins and Salvucci, and the Defendant's Right to Testify*, 18 Am. Cr. L. Rev. 419, 420-23 (1981). Courts must zealously guard important rights, like the right to testify in defense of oneself. If we continue to refuse to reject irrelevant and unduly prejudicial evidence to be introduced on cross-examination under the guise of "character impeachment", defendants who might otherwise truthfully testify in their own defense will be improperly discouraged from exercising their right to do so. We should reject unjustified interpretations of evidentiary principles which impinge on this important right.

V.

I further dissent from the majority's conclusion that defendant was not entitled to the victim's prior statement when she testified on voir dire during the trial. I recognize that our recent decision in *State v. Williams* suggests the route taken by the majority. 308 N.C. 357, 302 S.E. 2d 438 (1983). It does not, however, compel this result; and I do not think it should be so extended.

We have held that prior statements of prosecution witnesses are not discoverable before trial. *State v. Hardy*, 293 N.C. 105, 122-24, 235 S.E. 2d 828, 838-39 (1977). That holding did not indicate that it should extend to pretrial hearings. In *Williams*, however, we extended the *Hardy* rule to pretrial hearings. 308 N.C. at 361,

302 S.E. 2d at 441. In retrospect, I am now troubled by our conclusion in *Williams*.

Our rationale for protecting prior statements of prosecution witnesses from pretrial discovery by the defense hinges on the need not to disclose their identity unnecessarily. We recognized the legislature's concern with this problem and the protection it accorded the identity of the state's witnesses in *Hardy*, 293 N.C. at 124, 235 S.E. 2d at 839 (noting legislative commentary to the criminal discovery statutes). Obviously, this justification fails to support nondisclosure of witnesses' statements once they testify at a voir dire hearing, either before or during trial. We did not analyze the issue carefully in *Williams*, as we noted only that any impeachment value of a former statement went to the weight rather than the admissibility of the witness's identification. 308 N.C. at 361, 302 S.E. 2d at 441. Impeachment value of a former statement, however, is nearly as important during a voir dire before the judge as it is during trial before the jury. The judge must assess the credibility of witnesses in rendering his judgment as to the admissibility of the evidence which is the subject of the voir dire. There is, therefore, no reason not to provide defendant with prior statements of witnesses who testify during voir dire and there are good reasons for providing them. A voir dire, no less than the trial itself, is a search for the truth. Insofar as prior statements shed light on this search, they should be available in both proceedings.

It is true, as the majority notes, that the legislature did prevent discovery of pretrial statements of a witness "until that witness has testified on direct examination in the trial of the case," N.C. Gen. Stat. § 15A-903(2). The legislature did not, as the majority states, refer to the trial "before a jury." I believe the construction of the statute which best accords with the legislative intent is that testifying "in the trial of the case" means testimony during any public judicial proceeding, whether before a judge on voir dire or a jury on the question of guilt, where the witness testifies concerning matters on which he or she has made a prior statement.

Here, of course, the voir dire took place *during the trial*, although out of the jury's presence. Assuming *Williams* was correctly decided on its facts, I would not extend *Williams* to voir

dires conducted during the trial of a case, *i.e.*, after the jury has been empaneled.

Given the content of the witness's prior statement, I do not believe it would have aided defendant in any way during the voir dire. Since the nondisclosure was not prejudicial in this case, it would not, standing alone, entitle defendant to a new trial.

Only because of the improper "impeachment" of defendant on cross-examination do I vote for a new trial.

Justice FRYE joins in this dissenting opinion.

J. GARFIELD WALL v. CHARLES W. STOUT AND BETSY W. SANDERS, GUARDIAN AD LITEM FOR MARIE L. WALL v. C. W. STOUT

No. 247PA83

(Filed 2 February 1984)

1. **Appeal and Error § 31.1— objections to jury instructions in charge conference—no necessity to repeat objections after jury instructions**

Where, at the conclusion of all the evidence, the trial judge held a charge conference at which counsel for plaintiffs objected to the giving of certain instructions, neither App. R. 10(b)(2) nor Rule 21 of the General Rules of Practice for the Superior and District Courts required plaintiffs to repeat their objections to the jury instructions after the charge was given in order to preserve the objections for appellate review.

2. **Physicians, Surgeons, and Allied Professions § 20.2— medical negligence action—jury instructions, as a whole, improper**

In a medical negligence action, the jury instructions, when considered as a whole, tended to exculpate defendant doctor by unduly emphasizing the limitations upon his liability for medical negligence.

3. **Physicians, Surgeons, and Allied Professions § 11.1— scope of a physician's duty to his patient**

The applicable standard of care which determines the scope of a physician's duty to his patient combines in one test the exercise of "best judgment," "reasonable care and diligence" and compliance 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," the standard of G.S. 90-21.12.

4. Physicians, Surgeons, and Allied Professions § 20.2— instructions—use of term "honest error" inappropriate

Because of the potentially misleading and exculpatory import of the term, the phrase "honest error" is inappropriate in an instruction on the liability of a doctor for medical malpractice and should not hereafter be given.

5. Physicians, Surgeons, and Allied Professions § 20.2— instructions in medical malpractice action

In a medical malpractice action, there was no error in the instructions given by the trial judge to the effect that the law does not hold a physician to a standard of infallibility nor require a degree of skill known only to a few in his profession.

6. Physicians, Surgeons, and Allied Professions § 20.2— error to instruct on standard of care required of general practitioners and specialists

In a medical malpractice action, the trial judge erred in instructing the jury concerning the standard of care required of general practitioners as well as the standard required of specialists since the charge on the standard of care for a general practitioner was not relevant to the issues presented, where the entire case dealt with the care required of a specialist in family practice such as defendant.

7. Physicians, Surgeons, and Allied Professions § 20.2— instructions—physician not an "insurer" instruction not supported by evidence

An instruction to the effect that a physician is "not an insurer of results" should not have been given since no issue concerning a guarantee was raised.

8. Physicians, Surgeons, and Allied Professions § 20.2— redundancy in instructions—overemphasizing plaintiffs' burden of proof

In a medical malpractice action, the instructions made it appear as though plaintiff had to prove four separate elements in order to recover, when in reality all the plaintiff must prove, after establishing the same or similar community standard, is that the doctor failed to comply with this standard and that this failure proximately caused the plaintiff's injury. Additionally, the trial judge in this case instructed the jury on three different occasions that negligence cannot be presumed from the mere fact of injury. The instructions should be given so that each element of the plaintiff's burden of proof is accurately and distinctly described to the jury only once in the trial court's review of the plaintiff's burden in a malpractice case.

9. Physicians, Surgeons, and Allied Professions § 20.2— malpractice instructions—failure to insert "probably" into instructions defining proximate cause—no error

In a medical malpractice action the trial court did not err by failing to insert the word "probably" into the pattern jury instruction defining proximate cause so that the instruction would read "proximate cause is a real cause, a cause without which the claimed injury probably would not have occurred . . . ." Failure to do so did not place an erroneous burden on plaintiffs to prove their case to a moral certainty.

10. Husband and Wife § 9— action for loss of consortium—date when action accrued

Plaintiff husband's cause of action for loss of consortium did not accrue until the date of the filing of the opinion in *Nicholson v. Hospital*, 300 N.C. 295 (1980), which case restored the cause of action for loss of consortium due to the negligence of third parties to both spouses. Therefore, plaintiff husband's cause of action for loss of consortium which was filed in 1981 was within the 3-year statute of limitations even though defendant's allegedly negligent acts occurred on 3 September 1977. G.S. 1-52(5).

ON discretionary review, pursuant to G.S. 7A-31, from a decision of the Court of Appeals, 61 N.C. App. 576, 301 S.E. 2d 467 (1983), affirming judgment entered by *Hobgood, Judge*, at the 19 October 1981 Special Session of GRANVILLE County Superior Court.

On 15 November 1983, plaintiff Betsy W. Sanders, guardian ad litem for Marie Wall, filed this civil action alleging medical malpractice on the part of Dr. Charles W. Stout, a family medicine physician practicing in Asheboro, North Carolina. Plaintiff J. Garfield Wall, husband of Marie Wall, filed an action seeking damages for loss of consortium on 27 February 1981. The two actions were consolidated for trial by order dated 23 September 1981.

At the conclusion of all the evidence presented at trial, the following issues were submitted to and answered by the jury:

1. Was the plaintiff, Marie L. Wall, injured by the negligence of the defendant, Dr. C. W. Stout?

ANSWER: No.

2. What amount, if any, is the plaintiff, Marie L. Wall, entitled to recover from the defendant, Dr. C. W. Stout?

ANSWER: ____

1. Did the defendant's negligence proximately cause the plaintiff, J. Garfield Wall, to lose the consortium of his wife, Marie L. Wall?

ANSWER: No.

2. What amount, if any, is the plaintiff, J. Garfield Wall, entitled to recover for loss of consortium?

ANSWER: ____

From a judgment entered on the verdict, plaintiffs appealed to the Court of Appeals.

In a unanimous decision, the Court of Appeals found no error in the trial. In reaching this conclusion, the court first held that plaintiffs' exceptions 3-5 and 8-11 did not comply with Rule 10(b)(2) of the North Carolina Rules of Appellate Procedure and that exception 2 did not comply with Rule 21 of the General Rules of Practice for the Superior and District Courts. The court further held that the jury instructions objected to by exceptions 12-15 relating to the required standards of skill and general liability of a medical doctor for negligence were "legally correct" and "directly relevant to the medical standard of practice in issue at trial." 61 N.C. App. at 578, 301 S.E. 2d at 469.

On 9 August 1983, we allowed plaintiffs' petition for discretionary review.

McCain & Essen, by Grover C. McCain, Jr., and Jeff Erick Essen and Watkins, Finch & Hopper, by William L. Hopper, for plaintiff appellants.

Amicus Curiae, North Carolina Academy of Trial Lawyers, McLeod & Senter, by Joe McLeod and William L. Senter.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, by James D. Blount, Jr., Nigle B. Barrow, Jr. and Susan M. Parker for defendant appellee.

BRANCH, Chief Justice.

[1] Before considering the merits of plaintiffs' appeal, we first address defendant's contention that plaintiffs' exceptions 2 and 12-15 have not been properly preserved for appellate review. Defendant argues that plaintiffs violated Rule 10(b)(2) of the North Carolina Rules of Appellate Procedure and Rule 21 of the General Rules of Practice for the Superior and District Courts by failing to object to the jury charge at the conclusion of the charge and before the jury began its deliberations.

Rule 10(b)(2) provides, in part, as follows:

> No party may assign as error any portion of the jury charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly that to which he objects and the grounds of his objection; . . . .

Similarly, Rule 21 of the General Rules of Practice for the Superior and District Courts provides, in pertinent part, that

> [a]t the conclusion of the charge and before the jury begins its deliberations, and out of the hearing, or upon request, out of the presence of the jury, counsel shall be given the opportunity to object on the record to any portion of the charge, or omission therefrom, stating distinctly that to which he objects and the grounds of his objection.

At the conclusion of all the evidence in the instant case, the trial judge held a charge conference at which time he went through the pattern jury instructions and indicated those which he intended to include in his charge to the jury. Counsel for plaintiffs objected to the giving of the medical malpractice pattern jury instructions concerning "infallibility" and "utmost degree of skill and learning" (exception 12), that a health care provider is not an insurer of results (exceptions 13 and 14), and that a doctor is not responsible for a mistake in judgment if it is the result of an "honest error" (exception 15). These objections are reflected in the trial transcript. Additionally, prior to the jury charge, plaintiffs' counsel requested that the word "probably" be inserted in the court's explanation of proximate cause. The record reflects that this change was requested both orally and in writing.

The trial judge overruled each of plaintiffs' objections to the pattern jury instructions and instructed in accordance with his intentions as previously stated at the charge conference. Counsel for plaintiffs made no additional objections following the charge to the jury.

It is our conclusion that neither Rule 10(b)(2) nor Rule 21 required plaintiffs to repeat their objections to the jury instructions after the charge was given in order to preserve their objections for appellate review. These rules were obviously designed to prevent unnecessary new trials caused by errors in instructions that

the court could have corrected if brought to its attention at the proper time. It is our opinion that this policy is met when a request to alter an instruction has been submitted and the trial judge has considered and refused the request. In most instances, it is obvious that further objection at the close of the instructions would be unavailing.

Rule 51 of the Federal Rules of Civil Procedure contains language almost identical to our Rule 10(b)(2). Under Rule 51, "[n]o party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, ..."

The Ninth Circuit Court of Appeals interpreted Rule 51 to permit appellate review of a jury instruction, even though no exception was entered after the charge had been given, when " 'the court [had] been fully informed in advance of the charge as to appellants' contention and it was clear that further efforts to persuade the court would have been unavailing.' [citations omitted] . . . Restating the identical point as an exception to the instruction would have been useless." *Robinson v. Heilman*, 563 F. 2d 1304, 1306 (9th Cir. 1977), *quoting, Cohen v. Franchard*, 478 F. 2d 115, 122 (2d Cir. 1973). *See also, Brown v. Avemco Investment Corp.*, 603 F. 2d 1367, 1371 (9th Cir. 1979) (to require plaintiffs to object after instructions is to require a "pointless formality"); *Stewart v. Ford Motor Co.*, 553 F. 2d 130, 140 (D.C. Cir. 1977) (to require additional objection after instructions given would be "an unnecessary elevation of form over substance").

On the basis of the record in this case, it appears plain that the trial judge's refusal at the charge conference to instruct in accordance with plaintiffs' proposals represented the judge's final decision and further objections would have been not only useless but wasteful of the court's time. As such, we hold that plaintiffs' failure to object following the giving of the jury instructions does not foreclose review by this Court of plaintiffs' exceptions 2 and 12-15.

Defendant also argues that plaintiffs' appeal should be dismissed for their failure to clearly reference the portions of the jury instructions complained of as required by Rule 10(b)(2). This Rule requires that "[i]n the record on appeal an exception to instructions given the jury shall identify the portion in question by

setting it within brackets or by any other clear means of reference."

We agree with defendant that the portions of the instructions excepted to by plaintiffs have not been clearly defined. The only indication of the challenged portions consists of handwritten notes which appear in the transcript between lines of type or at the end of lengthy paragraphs. It is never entirely clear whether plaintiffs except to a particular paragraph, to preceding paragraphs or only to particular sentences or phrases. Despite this handicap, we are enabled by the arguments presented in plaintiffs' brief to ascertain the particular portions complained of and we elect in our discretion to consider the merits of plaintiffs' contentions pursuant to Rule 2 of the Rules of Appellate Procedure.

[2] Each of plaintiffs' arguments on appeal relates to the jury instructions given in the instant case. Plaintiffs concede that the instructions given were in conformity with the North Carolina pattern jury instructions relating to medical negligence. It is their contention, however, that the incorporation of exculpatory legal maxims inapplicable to the factual situation presented, the unnecessary repetition of instructions favorable to defendant and the recitation of confusing statements relating to plaintiffs' burden of proof under G.S. 90-21.12 resulted in a charge that was emphatically favorable to defendant. Plaintiffs contend that these "unduly exculpatory instructions" constitute reversible error entitling them to a new trial.

We have examined each of plaintiffs' arguments respecting particular portions of the jury instructions to determine whether, when considered as a whole, the instructions tended to exculpate defendant by unduly emphasizing the limitations upon his liability for medical negligence. We conclude that although many of the instructions when considered in isolation were either correct or, if erroneous, were not sufficiently prejudicial to constitute reversible error, that the instructions in their totality were so emphatically favorable to defendant that plaintiffs are entitled to a new trial. In reaching this conclusion, we intend no especial criticism of the able trial judge, for the charge given, considered in its separate parts, was nearly in precise conformity with the pattern jury instructions and our prior case law. Our decision in this case is directed equally to the exculpatory nature of the pat-

tern jury instructions themselves and to their selections and use by the trial judge.

[3] Plaintiffs first argue that the trial judge erred in instructing that a doctor is not responsible for a mistake in his diagnosis or judgment if it is the result of an "honest error." Plaintiffs contend that the term "honest error" is misleading and unduly exculpatory and that it is irrelevant to the statutory definition of medical negligence.

General Statute 90-21.12 establishes a standard of care applicable to all health care professionals. This statute provides:

> 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.

It is plaintiffs' position that the common law standards of care enunciated in our prior cases are no longer relevant in a medical malpractice action. They argue that all other standards and requirements defining a physician's duty to a patient, such as the limitation of liability for an "honest error," are subsumed in this single statutory standard.

Defendant strenuously disagrees with plaintiffs' position that by adopting the statutory standard of care, the legislature intended to supplant established case law standards of care to which the "honest error" language relates. Defendant argues that the passage of G.S. 90-21.12 was merely intended to codify the "same or similar communities" standard of care previously adopted by this Court in *Wiggins v. Piver*, 276 N.C. 134, 171 S.E. 2d 393 (1970). This view is supported by case law of the Court of Appeals and by legal commentators. *See Thompson v. Lockert*, 34 N.C. App. 1, 5, 237 S.E. 2d 259, 261, *cert. denied*, 293 N.C. 593, 239 S.E. 2d 264 (1977) (standard of care developed by case law now adopted by

the legislature); Comment, Statutory Standard of Care for North Carolina Health Care Providers, 1 Campbell L. Rev. 111, 113 (1981) ("[The statutory standard] does not appear to materially alter the existing common law standard, which has existed for approximately seventy years.") *See also*, North Carolina Professional Liability Insurance Study Commission Report, p ii (1976).

We agree with the above-cited authorities that the adoption of the statute was not intended to accomplish the radical result contended by plaintiff. We simply cannot conceive that by passing this legislation, the General Assembly intended to eliminate the previously existing common law obligations of a physician to his patient. We therefore conclude that the intended purpose of G.S. 90-21.12 was merely to conform the statute more closely to the existing case law applying a "same or similar community" standard of care.

Considering the statute's limited purpose, we further disagree with plaintiffs that it would be sufficient to instruct the jury that the sole issue relating to a physician's alleged negligence is whether he complied with this statutory standard of care. Our case law makes clear that this is not the extent of the physician's duty to his patient.

The scope of a physician's duty to his patient has been variously described by this Court, but perhaps most succinctly by Justice Higgins in *Hunt v. Bradshaw*, 242 N.C. 517, 88 S.E. 2d 762 (1955).

> A physician or surgeon who undertakes to render professional services must meet these requirements: (1) He must possess the degree of professional learning, skill and ability which others similarly situated ordinarily possess;[1] (2) he must exercise reasonable care and diligence in the application of his knowledge and skill to the patient's case; and (3) he must use his best judgment in the treatment and care of his

1. This requirement is, of course, further refined by language in our later cases defining the "same or similar communities" standard and by G.S. 90-21.12. The physician is now required to provide care "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."

> patient. [Citations omitted.] If the physician or surgeon lives up to the foregoing requirements he is not civilly liable for the consequences. If he fails in any one particular, and such failure is the proximate cause of injury or damage, he is liable.

Id. at 521-22, 88 S.E. 2d at 765.

The applicable standard, then, is completely unitary in nature, combining in *one test* the exercise of "best judgment," "reasonable care and diligence" *and* compliance 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."

[4] Having determined that G.S. 90-21.12 did not abrogate the common law standards of care required of a physician and that an instruction combining elements of both the statute and phraseology from our earlier cases is necessary to fully explain the doctor's duty, we next consider whether the use of the term "honest error" is unduly exculpatory and misleading.

In *Teh Len Chu v. Fairfax Emergency Medical Associates*, 223 Va. 383, 290 S.E. 2d 820 (1982), the Virginia Supreme Court expressly disapproved of an instruction in a medical malpractice case that a doctor "is not liable for damages resulting from his *honest mistake* or a *bona fide* error in judgment." (Emphasis added.) The Virginia court concluded that

> terms such as "honest mistake" and "bona fide" error have no place in jury instructions dealing with negligence in medical malpractice cases. The terms not only defy rational definition but also tend to muddle the jury's understanding of the burden imposed upon a plaintiff in a malpractice action. If use of the terms were permitted, it would be appropriate to ask: Must a plaintiff prove a "dishonest mistake" or a "bad faith error" in order to recover? The obvious negative answer reveals the vice in the use of the terms.

Id. at 386, 290 S.E. 2d at 822.

We find this reasoning persuasive. An instruction using the term "honest error" could easily be interpreted by the jury to mean that a physician could not be liable for negligence unless he

was somehow dishonest, particularly when the term is not defined with reference to the physician's other obligations to the patient. We therefore hold that because of the potentially misleading and exculpatory import of the term, the phrase "honest error" is inappropriate in an instruction on the liability of a doctor for medical malpractice and should not hereafter be given. Language in our prior cases which may have sanctioned the use of this term in defining a physician's liability for medical negligence is hereby expressly disapproved.

We hasten to note that in our view, the jury can be properly instructed without the use of the term "honest error." The trial judge correctly instructed in this case that Dr. Stout

> must render the health care service in accordance with the standards of practice exercised by like specialists with similar training and experience who are situated in the same or similar communities at the time the health care service was rendered; that is, in 1977, September.
>
> Now, I instruct you further that it is the duty of the defendant, Dr. Stout, to exercise reasonable and ordinary care and diligence in the use of his skill and in the application of his knowledge to the plaintiff's condition and to exert his best judgment in the treatment and care of the plaintiff.

This was a complete and accurate summation of the defendant physician's responsibilities to plaintiff, incorporating the language earlier quoted with approval from *Hunt v. Bradshaw, supra.* The further instruction that a doctor is not responsible for a mistake in his judgment if, *inter alia,* "the mistake . . . is the result of an honest error," was unnecessary and added nothing to the correct and comprehensive charge earlier given.

[5] Plaintiffs next assign as error the following instruction relating to the applicable standard of care and degree of skill required of defendant.

> [T]he law does not require of the defendant absolute accuracy, either in his practice or in his judgment. It does not hold him to the standard of *infallibility* nor does it require of him the *utmost degree of skill and learning known only to a few in his profession* but only that degree of knowledge and

> skill ordinarily possessed by members of the profession similarly situated and in like situations.

(Emphasis added.)

Plaintiffs contend that the italicized portions of the instruction intimated favoritism to defendant and tended to exculpate him unnecessarily. We do not agree.

The challenged instruction is a clear and correct statement of North Carolina law. The phraseology used by Judge Hobgood to describe the physician's standard of care is derived precisely from case law long established in this jurisdiction.

> But the law does not require of a physician or surgeon absolute accuracy, either in his practice or in his judgment. It does not hold him to a standard of infallibility, nor does it require of him that utmost degree of skill and learning known only to a few in the profession.

Nash v. Royster, 189 N.C. 408, 414, 127 S.E. 356, 359-60 (1925). Furthermore, the standard of care which the jury was here instructed to apply conforms to the standard recognized by the legal commentators. *See* W. Prosser, *Law of Torts*, § 32 (4th ed. 1971) (physician "must have the skill and learning commonly possessed by members of the profession"); Restatement (Second) of Torts § 299A and Commentary at 74-75 (1963) (standard of care "not that of the most highly skilled").

We find no error in the instructions given by the trial judge to the effect that the law does not hold a physician to a standard of infallibility nor require a degree of skill known only to a few in his profession.

[6] We next consider plaintiffs' contention that the trial judge erred in including in the instructions a charge on the standard of care for a general practitioner.

All of the evidence indicated that Dr. Stout held himself out to be a board-certified specialist in family practice. North Carolina case law clearly holds that when a physician holds himself out as a specialist, he is required to bring to the care of his patients more than the average degree of skill possessed by general prac-

titioners. *Koury v. Follo*, 272 N.C. 366, 158 S.E. 2d 548 (1968); *Belk v. Schweizer*, 268 N.C. 50, 149 S.E. 2d 565 (1966).

We recognize that in addition to the instruction regarding the standard of care required of general practitioners, the trial court further instructed as to the standard required of specialists. We agree with plaintiffs, however, that both charges should not have been given. The charge on the standard of care for a general practitioner was not relevant to the issues presented, for the entire case dealt with the care required of a specialist in family practice such as Dr. Stout. Including both charges in a case where clearly only the standard as to specialists is involved is potentially confusing and misleading to the jury. We therefore hold that in this case, the instruction concerning the standard of care required of a general practitioner was erroneously included in the jury charge.

[7] Plaintiffs' next assignment of error similarly includes an attack upon instructions included in the trial court's charge to the jury that were not supported by the evidence. Plaintiffs here object to a series of instructions in which the trial judge stated that a physician is not an "insurer" of his diagnosis, judgment, analysis or treatment.

The court first instructed that "[a] doctor does not ordinarily ensure the success of his medical treatment; that would be in the absence of a guaranteed situation which we do not have before you for consideration." The trial judge then further instructed that "[a] doctor does not guarantee, warrant or assure a particular result or even that the patient will be in as good a condition after the medical services rendered as she was prior thereto." Finally, the court reiterated this instruction on guarantee a third time in the context of diagnosis and judgment: "Also, a medical doctor does not ordinarily guarantee or ensure the correctness of his diagnosis and judgment as to the patient's condition."

Plaintiffs argue that the facts of the case did not give rise to an issue concerning the guarantee of results or diagnosis and therefore these instructions should not have been given. The trial judge himself recognized that no issue of guarantee was present in the case.

We agree with plaintiffs that an instruction to the effect that a physician is "not an insurer of results" should not be given when no issue concerning a guarantee has been raised. The proposition explained by this instruction interjected unnecessary considerations that were not germane to determination of the issues in this case. The error was here compounded because an instruction concerning guarantee was repeated *three times.* Thus, the jury was repeatedly informed of a legal principle exculpatory to defendant that was inapplicable to the facts presented.

We quote from the case of *Spadaccini v. Dolan,* 63 A.D. 2d 110, 407 N.Y.S. 2d 840 (N.Y. App. Div. 1978), to emphasize our position on this point:

> With few exceptions, it cannot be said that any particular legal standard must be charged in every conceivable case. If the facts do not require a particular instruction a Trial Justice should not give it. Merely because a particular instruction is generally given in a particular type of case and is included in the standard PJI instruction and comes from a leading case does not require it in every case of that genre. The Court's instruction on the law is, rather, to be molded by the applicable facts.

Id. at 119, 407 N.Y.S. 2d at 845.

We further direct attention to the introductory comments to the North Carolina Pattern Jury Instructions which state that "[t]hese instructions do not eliminate the need to individually tailor each charge to the given factual situation and to comply with Rule 51(a) of the North Carolina Rules of Civil Procedure."

We hold that the series of instructions concerning the guarantee of diagnosis or results by a physician were unnecessary to decision in this case and should not have been given.

[8] In further support of their position that the instructions in the instant case were misleading and unnecessarily exculpatory to defendant, plaintiffs contend that the trial court failed to clearly explain their burden of proof under G.S. 90-21.12 and that the charge unduly emphasized the legal principle that negligence cannot be presumed from the mere fact of injury.

These arguments have not been properly preserved for appellate review because the portions of the instructions here complained of were not excepted to at trial. We nevertheless elect to consider them because when these challenged instructions are viewed in conjunction with those previously discussed, they further evidence a charge that tended to overemphasize the limitations upon defendant's liability.

The trial court instructed the jury on the issue of defendant's negligence as follows:

> To prevail on this issue the plaintiff must prove by the greater weight of the evidence the following four things: First, the plaintiff must prove that the defendant, in providing care as the personal family care doctor, failed to provide the standard of medical care services to the plaintiff as required by the standards of practice for family care doctors in the same or similar communities as Asheboro;
>
> Second, the plaintiff must prove that (sic) the standards of practice were among other family care doctors with similar training and experience and who were situate in the same or similar communities at the time the defendant provided medical treatment to the plaintiff in September of 1977.
>
> You must determine the standards of practice applicable, that is, the standards of practice were among the other family practice doctors with similar training and experience who were situate in the same or similar communities at the time the defendant rendered such medical treatment to the plaintiff in September of 1977.
>
> On the question of what standards of practice apply to what the defendant did, only witnesses who purport to have knowledge of those standards of practice are permitted by law to testify as to the applicable standards of practice. Therefore, in determining the standards of practice applicable in this case, you must weigh and consider the testimony of these doctor witnesses rather than your own ideas and standards.
>
> Third, the plaintiff must prove that the defendant did not act in accordance with such standards of practice when

he rendered medical treatment to the plaintiff in September of 1977.

In other words, you must find that other family practice doctors with similar training and experience and who were situated in the same or similar communities would not have done what the defendant did at the time the defendant did it.

Fourth, the plaintiff must prove that she was injured and that the defendant's negligence was a proximate cause as I have previously explained to you of that duty.

This instruction was nearly in exact conformity with the pattern jury instructions on this point.

We agree with plaintiffs that elements one and three as outlined in the pattern jury instructions and as explained by the trial judge are redundant, merely stating in a different manner the doctor's duty to comply with the "same or similar community" standard of care. It thus made it appear as though plaintiff had to prove four separate elements in order to recover, when in reality all the plaintiff must prove, after establishing the same or similar community standard, is that the doctor failed to comply with this standard and that this failure proximately caused the plaintiff's injury.[2]

The confusion inherent in this charge was compounded by a later instruction when the court again reviewed the elements necessary to the proof of plaintiffs' case.

---

2. We wish to emphasize again, however, that compliance with the "same or similar community" standard of care does not necessarily exonerate defendant from liability for medical negligence. The doctor must also use his "best judgment" and must exercise "reasonable care and diligence" in the treatment of his patient. *Hunt v. Bradshaw*, 242 N.C. 517, 521-22, 88 S.E. 2d 762, 765 (1955).

If, however, the plaintiff proves a violation of the statutory standard of care which proximately caused her injury, this is sufficient to establish liability on the part of the attending health care professional for medical negligence. It would similarly be sufficient to establish liability if the plaintiff were able to show that the defendant did not exercise his "best judgment" in the treatment of the patient *or* if the defendant failed to use "reasonable care and diligence" in his efforts to render medical assistance. These three elements here described relate to the doctor's *duty* to his patient, which is not necessarily synonymous with the plaintiff's *burden of proof* in a medical malpractice case. "If [the defendant] fails in any *one* particular [to fulfill his duty to the patient], and such failure is the proximate cause of injury or damage, he is liable." *Id.* at 522, 88 S.E. 2d at 765. (Emphasis added.)

> Now, members of the jury, if the plaintiff has proved by the greater weight of the evidence, first, that the defendant, Dr. Stout, was negligent in his medical treatment of Mrs. Wall and second, that other doctors with similar training and experience and who were situate in the same or similar communities at the time the defendant rendered the health care service here in question would have diagnosed and treated Mrs. Wall with a different standard of care and, third, that the defendant was negligent in that he failed to act in accordance with those standards of practice which required him to medically treat the plaintiff different than he treated the plaintiff; and, fourth, that such negligence was a proximate cause of plaintiff's injury, then it would be your duty to answer this issue yes, in favor of the plaintiff.

Again, the pattern jury instructions frame four separate elements comprising plaintiffs' burden of proof. Each of the first three elements are, however, restatements of the same requirement—that plaintiff must show a deviation from the standard of care practiced by those physicians situate in the same or similar communities.

We agree with plaintiffs' contention that these portions of the pattern jury instructions are misleading and tend to overemphasize the plaintiff's burden of proof in a medical malpractice case. The instructions should be given so that each element of the plaintiff's burden of proof is accurately and succinctly described to the jury only once in the trial court's review of the plaintiff's burden in a malpractice case.

Additionally, we note that the trial judge in this case instructed the jury on three different occasions that negligence cannot be presumed from the mere fact of injury. The pattern instruction includes this language only twice, and the second time it is within parentheses, indicating its optional nature. We are of the opinion that repetition of this legal maxim a second and third time in this case was excessive and tended to overemphasize yet another legal principle exculpatory to defendant.

[9] By their final assignment of error, plaintiffs argue that the trial judge erred in refusing to insert the word "probably" into the pattern jury instruction defining proximate cause.

The trial court instructed the jury that

> [p]*roximate cause is a real cause, a cause without which the claimed injury would not have occurred* and one which under the same or similar circumstances a reasonably careful and prudent person could foresee would probably produce such injury or some similar injurious result.

(Emphasis added.)

Plaintiffs requested the insertion of the word "probably" into this instruction so that the italicized portion would read as follows:

> Proximate cause is a real cause, a cause without which the claimed injury probably would not have occurred . . . .

Plaintiffs argue that in denying the requested addition to the charge on the issue of proximate cause, the court "in effect required [them] to prove their case to a moral certainty." We do not agree.

North Carolina case law defines proximate cause as "a cause that produced the result in continuous sequence and without which it would not have occurred, and one from which any man of ordinary prudence could have foreseen that such a result was probable under all the facts as they existed." *Nance v. Parks*, 266 N.C. 206, 209, 146 S.E. 2d 24, 27 (1966). *See also Kanoy v. Hinshaw*, 273 N.C. 418, 426, 160 S.E. 2d 296, 302 (1968); *Williams v. Boulerice*, 268 N.C. 62, 68, 149 S.E. 2d 590, 594 (1966). This was the precise meaning conveyed to the jury by Judge Hobgood in his instructions defining proximate cause.

We are further convinced that the instructions did not place an erroneous burden on plaintiffs to prove their case to a moral certainty because Judge Hobgood repeatedly emphasized that plaintiffs' burden was to prove only "by the greater weight of the evidence" that defendant's conduct was one of the proximate causes of Mrs. Wall's injury. We also note that the jury was instructed that proximate cause "is a cause without which the claimed injury would not have occurred and one which . . . would *probably* produce such injury . . . ." In our opinion, the insertion

of the word "probably" a second time in the definition of proximate cause would not have changed the juror's perception of the plaintiffs' burden in this case.

We therefore hold that the instructions on the definition of proximate cause, when considered in conjunction with the instructions on plaintiffs' burden of proof, were legally correct. This assignment of error is overruled.

We now turn to defendant's assertion that he "has not waived his conditional cross-appeal" relating to the trial court's failure to dismiss Mr. Wall's claim for loss of consortium. The basis of defendant's cross-appeal is, however, stated only in a footnote in the brief presented to this Court.

We recognize that pursuant to Rule 10(d),

> an appellee may set out exceptions to and cross-assign as error any action or omission of the trial court to which an exception was duly taken or as to which an exception was deemed by rule or law to have been taken, and which deprived the appellee of an alternative basis in law for supporting the judgment, order, or other determination from which appeal has been taken.

It is our conclusion, however, that the proper manner to preserve such a conditional cross-appeal for review in this Court is to set out the exceptions to which the assignment relates and to bring forth the assignment of error as a separate question presented in the brief. *See* North Carolina Rules of Appellate Procedure, Rule 10(a). ("No exception . . . which is not made the basis of an assignment of error may be considered on appeal.") A party is not entitled to rely upon the arguments presented in his brief to the Court of Appeals. Counsel is required to file a new and complete brief in this Court. Rule 15(g)(2) (the parties "shall file a new brief prepared in conformity with Rule 28 in the Supreme Court . . . .").

Although defendant's conditional cross-appeal has not been properly preserved for appellate review, in the interests of judicial economy we elect pursuant to Rule 2 of the North Caro-

lina Rules of Appellate Procedure to consider the merits of defendant's arguments.

[10] The basis of defendant's conditional cross-appeal is that the trial court erred in denying his motion to dismiss the claim of J. Garfield Wall for loss of consortium because such claim arose more than three years prior to the commencement of his action and was therefore barred by the statute of limitations.

The statute applicable to this action is G.S. 1-52(5), which provides that any cause of action for "injury to the person or rights of another, not arising on contract and not hereafter enumerated" must be brought within three years from the time the cause of action accrues.

Mr. Wall alleged in his complaint that the negligence upon which the cause of action for loss of consortium is based occurred in early September 1977. Mr. Wall filed the complaint on 27 February 1981 which, defendant contends, was outside the three-year period of limitations set forth in G.S. 1-52(5).

In our view, resolution of this issue cannot be undertaken by a mere computation of the time between the events giving rise to plaintiff's claim and the filing of the complaint. Thus, in order to fully address defendant's contentions, we briefly review the law in North Carolina relating to a spouse's right to sue for loss of consortium due to the negligence of a third party.

At common law, a husband could sue negligent third parties for loss of his wife's consortium, but a wife had no comparable cause of action until this Court's decision in *Hipp v. Dupont*, 182 N.C. 9, 108 S.E. 318 (1921). In *Hipp*, the Court held that as a husband could continue to sue for loss of his wife's consortium, then by virtue of the married women's provision in the North Carolina Constitution of 1868, Article V, Section 6, and by virtue of logic and fairness, the plaintiff's wife could also maintain an action in her own behalf for loss of her husband's consortium.

Four years later, this Court expressly overruled the *Hipp* decision in *Hinnant v. Tidewater Power Co.*, 189 N.C. 120, 126 S.E. 307 (1925), and held that in North Carolina a wife could no longer maintain an action for loss of consortium due to the negligence of a third party. The common law right of a husband to

maintain such an action, however, remained intact. This apparent inequity was addressed in *Helmstetler v. Duke Power Co.*, 224 N.C. 821, 32 S.E. 2d 611 (1945). In *Helmstetler*, the rule was established that neither spouse could recover for loss of consortium due to negligent injuries to the other spouse.

Thus, the cause of action for loss of consortium was not recognized in North Carolina until our more recent decision in *Nicholson v. Hugh Chatham Memorial Hospital, Inc.*, 300 N.C. 295, 266 S.E. 2d 818 (1980). In that case, the cause of action for loss of consortium due to the negligence of third parties was restored to both spouses. The *Nicholson* decision was given retrospective application in *Cox v. Haworth*, 304 N.C. 571, 576, 284 S.E. 2d 322, 326 (1981), to "all cases or claims pending and not barred by judgment, settlement or the statute of limitations as of 3 June 1980," the date of the *Nicholson* decision.

Plaintiff argues that although the events giving rise to his claim for loss of his wife's consortium occurred prior to 3 June 1980, he has a viable cause of action by virtue of the *Cox* decision giving *Nicholson* retroactive application. He further argues that his cause of action did not accrue until the date of the *Nicholson* opinion and therefore his claim was timely filed on 27 February 1981, well within the three-year statute of limitations established by G.S. 1-52(5).

Defendant, however, takes the position that plaintiff has no cause of action for loss of consortium because the retroactive application of *Nicholson* does not extend to Mr. Wall. Furthermore, defendant argues, even if *Nicholson* applies to this plaintiff's claim, his cause of action accrued on 3 September 1977, the date of the allegedly negligent medical treatment of Mrs. Wall, and therefore his action was barred by the statute of limitations when filed in February 1981.

We first examine the *Cox* opinion to determine whether it was intended that *Nicholson* be retrospectively applied so that this plaintiff would be entitled to sue for the loss of his wife's consortium.

As earlier stated, *Cox* provided that the *Nicholson* decision "recognizing a claim for loss of consortium will be applied to all cases or claims pending and not barred by judgment, settlement

or the statute of limitations as of 3 June 1980." 304 N.C. at 576, 284 S.E. 2d at 326.

Defendant argues that this language from the *Cox* decision "resolved any uncertainty as to the application of *Nicholson* . . . [and] is directly on point for the present action . . . ." "[It] indicates that Mr. Wall's action, barred by the statute of limitations, should have been dismissed." Defendant's Brief to the Court of Appeals, p. 34.

This logic is, in our view, fallacious in two crucial respects. First, the *Cox* decision limited retrospective application of *Nicholson* to those "cases or claims . . . not barred by . . . the statute of limitations *as of June 3, 1980.*" (Emphasis added.) Even assuming, *arguendo*, that plaintiff's cause of action accrued on 3 September 1977 when defendant administered medical care to Mrs. Wall in an allegedly negligent manner, plaintiff's cause of action would not have been barred by the statute of limitations *as of June 3, 1980.* Plaintiff would have had an additional three months to file his claim under the time limitations imposed by G.S. 1-52(5). Thus, this language limiting the retrospective application of the *Nicholson* decision does not operate to preclude Mr. Wall's suit for loss of consortium.

There is, however, an even more important reason to eschew defendant's interpretation of this language defining the retroactive application of *Nicholson.*

The *Nicholson* Court reestablished the right to maintain a cause of action for loss of consortium in North Carolina with the explicit proviso that a spouse's action for loss of consortium be joined with the other spouse's action for personal injury. 300 N.C. at 304, 266 S.E. 2d at 823. In light of this compelled joinder of the two actions, we interpret the effect of the *Cox* language on retroactivity to recognize a cause of action for loss of consortium so long as the *original negligence claim* of the injured spouse was not barred by "judgment, settlement or the statute of limitations as of 3 June 1980." Only by interpreting this language to refer to negligence claims can we give effect to the words "all cases or claims *pending*" that are not barred "as of 3 June 1980." There could be no cases or claims *pending* on *that date* in which a spouse alleged loss of consortium due to the negligence of a third party, since the cause of action for loss of consortium was not

restored until that date. For the same reason, there could be no claims for loss of consortium barred by "judgment" or "settlement" as of 3 June 1980, for no claims of that nature would have been filed until the *Nicholson* decision restored the right to sue for this type of injury. Thus, we interpret the ultimate holding in *Cox* to provide retrospective application of the *Nicholson* decision to those cases where the spouse's original claim of negligence against the offending party had not been barred as of 3 June 1980 by judgment, settlement or the statute of limitations. In other words, if on 3 June 1980, a person had a viable claim against a third party for negligence, his or her spouse could bring an action for loss of consortium, to be joined with the negligence action against the defendant.

In the instant case, defendant's allegedly negligent acts occurred on 3 September 1977. Mrs. Wall instituted her medical malpractice action against Dr. Stout on 15 November 1979. Thus, her action was in no way barred as of 3 June 1980. Under our interpretation of *Cox*, the *Nicholson* decision recognizing a claim for loss of consortium should therefore be applied retrospectively to Mrs. Wall's pending case, thereby allowing Mr. Wall's claim to be joined with her original action for negligence.

We are now confronted with defendant's argument that even if *Nicholson* is applied retroactively so as to recognize Mr. Wall's cause of action for loss of his wife's consortium, that the statute of limitations had run on his claim by the time he filed his action on 27 February 1981. Defendant asserts that since the allegedly negligent acts occurred on 3 September 1977, that the statute of limitations commenced to run on that date and therefore expired on 3 September 1980. Under this analysis, plaintiff's claim was filed some five and one-half months too late.

As earlier stated, plaintiff takes issue with this analysis. Plaintiff's position is that the cause of action for loss of consortium accrued on 3 June 1980, the date of the *Nicholson* opinion, that the statute of limitations did not begin to run until that time, and that his claim was therefore timely filed on 17 February 1981.

In *Burleigh House Condominium, Inc. v. Buchwald*, 368 So. 2d 1316 (Fla. 3d Dist. Ct. App.), *cert. denied*, 379 So. 2d 203 (Fla. 1979), the Florida District Court of Appeals reached the result

contended for by plaintiff on similar facts. In *Burleigh*, a condominium association brought suit on behalf of itself and its members to recover damages and equitable relief against the condominium developer. Such a cause of action was first recognized by the Florida Supreme Court in an opinion filed 31 March 1977. *Avila South Condominium Association, Inc. v. Kappa Corporation*, 347 So. 2d 599 (Fla. 1977). Ten years prior thereto it had been held that such a cause of action did not exist. *Fountainview Association, Inc. #4 v. Bell*, 203 So. 2d 657 (Fla. 3d Dist. Ct. App. 1967), *cert. denied*, 214 So. 2d 609 (Fla. 1968).

The plaintiffs in *Burleigh* filed the suit against the corporate developers one month after the *Avila* decision. The lease was executed, however, in 1969 and the condominium units were sold by 1970 or 1971. Thus, the defendant argued, the four-year statute of limitations had run by 15 April 1977 and plaintiffs' claim was not timely filed.

The Florida court disagreed, holding that the plaintiffs' cause of action against the condominium developer did not accrue until the date of the *Avila* decision and the date of that decision marked the commencement of the running of the statute of limitations. Plaintiffs' case was, then, timely filed one month later.

This interpretation of when a cause of action will be deemed to have accrued is supported by *United States v. One 1961 Red Chevrolet Impala Sedan*, 457 F. 2d 1353 (5th Cir. 1972), and *Neely v. United States*, 546 F. 2d 1059 (3rd Cir. 1976), *rehearing denied*, 554 F. 2d 114 (1977).

In the *Red Chevrolet* case, the owner of a motor vehicle filed suit to obtain the return of his vehicle which had been seized by the government in 1963 under circumstances not here pertinent. At the time of the seizure and forfeiture of the plaintiff's property, the state of the law was such that the right of an owner to require restitution of a vehicle so seized and forfeited did not exist.

In 1968, the United States Supreme Court established the right of an owner to obtain return of a vehicle seized under such circumstances as were present in the plaintiff's case. *Marchetti v. United States*, 390 U.S. 39 (1968) and *Grosso v. United States*, 390

U.S. 62 (1968). In the action filed thereafter by the plaintiff,[3] the government contended that the action was barred by the six-year statute of limitations. The *Red Chevrolet* Court rejected the government's argument, holding that the plaintiff's cause of action did not accrue as of the date of the taking of his property, but rather at the time of the 1968 decisions which recognized the existence of the cause of action which could not have been successfully asserted previously. In explaining their ruling, the Court said:

> The period of limitations does not always begin on the date of the wrong. . . . No cause of action generally accrues until the plaintiff has a right to enforce his cause. . . . The right to sue is hollow indeed until the right to succeed accompanies. Patently, appellant in the instant case had no reasonable probability of successfully prosecuting his claim against the government prior to the enunciation of the *Marchetti-Grosso* rule on January 29, 1968. We realize that mere ignorance of one's rights will not toll the limitations period. . . . This is not, however, a case in which a plaintiff is ignorant of his rights, but rather a case of a plaintiff without a right.

457 F. 2d at 1358 (citations omitted).

In a situation almost identical to that presented in the *Red Chevrolet* case, the Third Circuit Court of Appeals in *Neely v. United States*, 546 F. 2d 1059 (3rd Cir. 1976), stated as follows:

> To require clairvoyance in predicting new jurisprudential furrows plowed by the Supreme Court, under these circumstances, would be to impose an unconscionable prerequisite to asserting a timely claim.
>
> Accordingly, we hold that rights accruing under *Marchetti* and *Grosso* were inherently unknowable prior to January 29, 1968, when those cases were decided. The stat-

3. It is not entirely clear from the *Red Chevrolet* opinion when the plaintiff in that case filed the motions seeking to set aside the prior forfeiture and to obtain the return of all money and personal property previously forfeited. It is clear, however, that the suit was filed more than six years after the government actually executed the unlawful taking of the plaintiff's property.

ute of limitations on such claims was, therefore, suspended and did not begin to run until that date.

546 F. 2d at 1068.

We are persuaded by this reasoning and therefore hold that plaintiff's cause of action for loss of consortium did not accrue until the date of the *Nicholson* opinion, 3 June 1980. Therefore, the plaintiff's suit, which was instituted on 27 February 1981, was timely filed within the three-year statute of limitations and the trial judge correctly denied defendant's motion to dismiss Mr. Wall's claim.

For the reasons hereinabove stated regarding errors in the jury instructions, the decision of the Court of Appeals is reversed. This cause is remanded to the Court of Appeals with directions to remand to the Superior Court of Granville County for a new trial.

Reversed and remanded.

STATE OF NORTH CAROLINA v. GEORGE HARRIS THOMPSON

No. 305PA83

(Filed 2 February 1984)

1. Criminal Law § 138— perjury as aggravating factor in sentencing

Perjury at trial often indicates a defendant's continued defiance of society's system of laws and reflects on his potential for rehabilitation and is thus "reasonably related to the purposes of sentencing" within the meaning of G.S. 15A-1340.4. Therefore, perceived perjury by defendant may be used as an aggravating factor to be weighed in considering the sentence to be imposed upon a defendant. However, in view of some of the potential dangers inherent in this particular factor and also of its peculiar nature, a trial judge should refrain from finding perjury as an aggravating factor except in the most extreme cases.

2. Criminal Law § 138— perjury as aggravating factor in sentencing—sufficiency of evidence

The trial court did not err in finding that the aggravating factor that defendant had committed perjury during the trial had been proven by a preponderance of the evidence where defendant was unable to explain how, consistent with his alibi defense of having been in Charleston, South Carolina

during the entire month of August 1981, his signed affidavit of indigency, dated 18 August 1981 and sworn to before a deputy clerk in Cleveland County, North Carolina, came into being, and where his knowledge of many of the technical facts concerning the crime, as evidenced by his original confession to the police, belied his later disavowal of that statement at trial.

Justice FRYE dissents.

ON defendant's petition for discretionary review of decision of the Court of Appeals, 62 N.C. App. 38, 302 S.E. 2d 310 (1983), which found error in the trial before *Thornburg, Judge*, at the 1 March 1982 Session of CLEVELAND Superior Court.

Defendant was charged in an indictment, proper in form, with the armed robbery of a jewelry store. He entered a plea of not guilty.

At trial, the State offered evidence which tended to show that on 27 August 1981 at approximately 11:00 a.m., two black men entered D. Phillips Diamonds, Inc., in Shelby, North Carolina, and asked to look at pre-engagement rings. One of the men was wearing a flannel shirt and a hat. Shortly thereafter, one of the men pulled a gun and the two of them proceeded to rob the jewelry store. The men then ran out of the store carrying a cardboard box. According to a police officer who arrived at the scene, the men jumped into a green vehicle in which a driver was apparently waiting for them. The two robbers dropped a considerable amount of jewelry as they ran toward the car. Police officers failed to apprehend the fleeing car.

On 3 December 1981, defendant was arrested on unrelated charges and taken to the police station. At that time, after being properly warned of his rights and after executing a written waiver of his rights, defendant made an oral statement to Lieutenant Ledbetter of the Shelby Police Department. Defendant then agreed to record the statement and did so in the presence of Officer Oates. The recorded statement was then typed and given to defendant for his examination. After reading the statement, defendant accompanied Officers Oates and Ash to the office of the Clerk of Superior Court where the clerk, Mrs. Ruth Dedmon, asked defendant if he had read the statement and he replied in the affirmative. Mrs. Dedmon asked defendant to examine the statement in her presence, which he did. She then asked defend-

ant if that was his statement and he replied that it was. Defendant thereupon signed the written statement before the clerk.

Prior to admitting defendant's statement into evidence and after conducting a proper voir dire hearing, the trial court made findings of fact and conclusions of law and determined that the statement was given freely, knowingly and voluntarily.

In his statement, defendant related that on 27 August 1981 he, Ricky Howell, Ricky Woods and a girl called "Smiley" were at the Burger King in Shelby, North Carolina "getting things together." They then parked the green automobile in which they were riding across the street from the "D. Phillips Diamonds" jewelry store. Smiley remained in the automobile while defendant took a position outside the store as a lookout and Woods and Howell entered the store. After a short time Woods and Howell ran out of the store. Howell had a box in his hands, and some jewelry was dropped as the two men ran to the car. Defendant noticed a police car as he joined the other parties in fleeing the scene. They proceeded to Cherryville, North Carolina, where Ricky Howell sold some of the jewelry to a man whom defendant could only identify as "John." Defendant slept in John's garage for two nights and finally called his brother "Nub" to pick him up at Shoney's in downtown Cherryville. John gave defendant and Ricky Woods a ride to Shoney's where defendant's brother picked them up. Defendant stated that the weapons used in the robbery were a .25 caliber and a .38 caliber pistol. He also averred that he never received anything from the robbery, but Ricky Woods received twenty or thirty rings.

After making the inculpatory statement, defendant accompanied the officers to Cherryville in an effort to locate John's residence; however, he was unable to direct the officers to the residence. On cross-examination, Officer Oates stated that there was not a Shoney's in Cherryville, but that there was one in Gastonia. He further stated that after 27 August he saw defendant once or twice a week.

Defendant's defense was alibi and he offered witnesses who testified that he was in Charleston, South Carolina, at the time of the robbery. His mother stated that 27 August was her birthday and that on that day in 1981 she received a long distance tele-

phone call from defendant and her daughter Judy Currance who lived in Charleston, South Carolina.

Judy Currance testified that defendant was at her home in Charleston, South Carolina, on 27 August 1981 and that she and defendant called her mother on that day. She further testified that her brother was there during all the month of August.

Defendant testified that he was in Charleston, South Carolina, the whole month of August 1981. However, he admitted that he signed the inculpatory statement offered into evidence as part of the State's case, and he admitted that the voice on the tape recording was his. He further admitted that he went before the Clerk of Superior Court of Cleveland County and told her the statement he signed was true. Defendant testified that he made the statements because the officers threatened him and told him that Ricky Howell had already involved him. He maintained that he had made up the entire story in order to appease the officers and "to get off from the police station." When questioned concerning his knowledge of various details surrounding the crime, defendant insisted that the officers gave him the details prior to eliciting the statement from him. We quote the following pertinent portions of defendant's testimony:

> Q. In your statement, what did you say one of the boys was wearing, do you remember?
>
> A. I didn't say. I said Ricky Woods had a army jacket on.
>
> Q. Army jacket on. And why did you say he had an Army jacket on?
>
> A. Well, from what I had got from them, you know. I was just going on, really, what they had said, you know, but all this that I said on the tape, it ain't nothing but made up.
>
> Q. What size box did you say it was?
>
> A. It wasn't bigger than a shoe box.
>
> Q. How did you get that size?
>
> A. I just said it.
>
> . . . .

Q. . . . . Well, where did you get the information about the green car?

A. From them.

. . . .

Q. I see. Did he tell you anything else?

A. I don't remember.

Q. Well, then you had to be there to see them run down across that yard and drop all that jewelry, then, didn't you?

A. Huh uh. I wasn't there. That's some made up material that I just thought.

Q. In other words, you just made that up and it just happened to be exactly what Lieutenant Wall told on the stand. You made it up on December the third and it just come out of the blue sky, isn't that right?

A. They were asking me questions. I couldn't remember it all, but nevertheless, it was just questions leading to the robbery, you know. Like they asked me a question and I tried to answer.

Defendant was cross-examined concerning his alibi defense and particularly concerning an affidavit of indigency signed by him on 18 August 1981 as follows:

Q. Mr. Thompson, how long had you been down in Charleston on the twenty-seventh of August?

A. How long?

Q. Yes, sir.

A. Well, I stayed that whole month.

Q. That whole month of August.

A. Yeah.

Q. And that's 1981.

A. Yeah.

Q. August, 1981, all right, and when did you say you left?

A. It was about the first or second of September.

Q. First or second of September. Now, you're sure of those dates?

A. Yes.

Q. All right, now, Mr. Thompson, when you—can you recognize your signature?

A. Yeah.

Q. I want you to look on that affidavit of indigency there and see if that's your signature down there.

A. Yeah.

Q. Let's see now. Then right above there it says on the eighteenth day of August, 1981, you was here in Cleveland County at this courthouse. Now, you look at that and see if that's what that says there.

A. That's what it say.

. . . .

Q. Did you fill that on the eighteenth day of August, 1981, in that particular case?

A. I can't remember this.

Q. I'll say, is that your affidavit there?

A. I guess so.

Q. Did you swear to it that day in front of the Clerk?

A. Swear to what?

Q. This affidavit. It says right here, "Sworn to and subscribed before me this eighteenth day of August, 1981, Judy Wright, Deputy Clerk of Superior Court". Now, did you swear to that in front of Mrs. Wright?

A. I don't remember talking to no Miss Wright. I remember talking to Mrs. Spangler.

Ms. Judy Wright, Deputy Clerk of Cleveland County Superior Court, testified that her signature was on the affidavit of indigen-

cy and that "the name of George H. Thompson appears on it as having been sworn before [her] on . . . August the 18th, 1981."

The jury returned a verdict of guilty of armed robbery, an offense which carries a maximum sentence of forty years. The trial judge held a sentencing hearing pursuant to the provisions of Article 81A, and found four aggravating factors: (1) that the offense was committed for pecuniary gain; (2) that a co-defendant was armed with or used a deadly weapon at the time of the offense; (3) that the defendant had prior convictions for offenses punishable for more than sixty days imprisonment; and (4) that the "defendant deliberately presented during the course of the trial, evidence which he knew to be false about his presence on the day in question and deliberately presented false evidence concerning the statement attributed to him and obviously found by the jury to be false." The court found as a single mitigating factor that the defendant played a minor role in the commission of the offense. The court concluded that the aggravating factors outweighed the mitigating factor and thereupon imposed a sentence of imprisonment of twenty years, a sentence which exceeded the statutory presumptive sentence.

The Court of Appeals in a decision written by Judge Hill, concurred in by Judge Arnold with Judge Becton concurring in the result, held that the trial judge erred in finding the first two aggravating factors and remanded for resentencing. Judge Becton in his concurring opinion stated that an additional basis existed for a resentencing hearing in that the trial court erred in finding as an aggravating factor that defendant did not testify truthfully. Defendant gave notice of appeal and petitioned for discretionary review. On 27 September 1983, we dismissed defendant's notice of appeal and allowed defendant's petition for discretionary review, with review limited to the trial judge's finding of the above-named fourth aggravating factor, the presentation of false testimony by defendant.

Rufus L. Edmisten, Attorney General, by Grayson G. Kelley, Assistant Attorney General, for the State.

Adam Stein, Appellate Defender, by Ann B. Petersen, Assistant Appellate Defender, and James R. Glover, for defendant-petitioner.

BRANCH, Chief Justice.

The sole question presented by this appeal is whether the following finding by the trial judge may serve as an aggravating factor so as to warrant a more severe sentence under the Fair Sentencing Act: The defendant deliberately presented during the course of the trial evidence which he knew to be false about his presence on the day in question and deliberately presented false evidence concerning the statement attributed to him and obviously found by the jury to be false.

At early common law, every crime required a fixed penalty. 4 W. Blackstone, *Commentaries* 376 (J. Wendell ed. 1847). During the nineteenth century, however, this country saw a growing concern for rehabilitation of the offender and a concomitant development of the concept of indeterminate sentencing. *United States v. Grayson*, 438 U.S. 41 (1978) (hereinafter referred to as "*Grayson*"). *See* Comment, "Discretionary Penalty Increases on the Basis of Suspected Perjury," 1975 *U. of Ill. L.F.* 677 (1975) (hereinafter cited as "Comment, 'Suspected Perjury' "). Within the framework of indeterminate sentencing, generally there were prescribed minimum and maximum sentences, and the trial judge was vested with the duty and the authority to explore every conceivable source of information concerning the "particular rehabilitative needs of defendants." Comment, "Suspected Perjury," *supra*, pp. 678-79. Thus, trial judges have traditionally been afforded wide latitude when making sentencing determinations. *Grayson*, *supra*; *United States v. Tucker*, 404 U.S. 443 (1972); *Williams v. New York*, 337 U.S. 241 (1949). *See* Note, "Past Arrests and Perceived Perjury as Sentencing Factors in Illinois," 13 Loy Chi L.J. 935 (1982); Comment, "Suspected Perjury," *supra*.

As stated in *United States v. Tucker*, and reiterated in *United States v. Grayson*, prior to imposing a sentence, "a judge may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come." *United States v. Tucker*, 404 U.S. at 446, *quoted in Grayson*, *supra*, at 50.

Likewise, the accepted rule in North Carolina for many years was that within the limits of the sentence permitted by statute the extent of punishment is a matter committed to the sound discretion of the trial judge, and reviewable only upon a showing of

gross abuse of discretion. *State v. Suddreth*, 184 N.C. 753, 114 S.E. 828 (1922); *State v. Stansbury*, 230 N.C. 589, 55 S.E. 2d 185 (1949). In passing sentence the court has not been confined to evidence relating to the offense charged but could look "anywhere within reasonable limits, for other facts calculated to enable it to act wisely in fixing punishment. Hence, it may inquire into such matters as the age, the character, the education, the environment, the habits, the mentality, the propensities, and the record of the person about to be sentenced." *State v. Cooper*, 238 N.C. 241, 244, 77 S.E. 2d 695, 698 (1953); *State v. Stansbury*, *supra*.

As early as 1917 a federal circuit court determined that the trial judge's discretion when it came to sentencing extended to consideration of the judge's own belief that the defendant suborned perjury, and that such a consideration in connection with defendant's character could form the basis for an enhanced sentence. *Peterson v. United States*, 246 F. 118 (4th Cir. 1917), *cert. denied*, 246 U.S. 661 (1918). Similarly, a number of federal circuit courts have, over the years, approved the appropriateness of the trial judge's taking into account his belief that the defendant committed perjury during trial. *United States v. Nunn*, 525 F. 2d 958 (5th Cir. 1976); *United States v. Hendrix*, 505 F. 2d 1233 (2d Cir. 1974), *cert. denied*, 423 U.S. 897 (1975); *Hess v. United States*, 496 F. 2d 936 (8th Cir. 1974); *United States v. Moore*, 484 F. 2d 1284 (4th Cir. 1973); *United States v. Cluchette*, 465 F. 2d 749 (9th Cir. 1972); *United States v. Wallace*, 418 F. 2d 876 (6th Cir. 1969), *cert. denied*, 397 U.S. 955 (1970); *United States v. Levine*, 372 F. 2d 70 (7th Cir.), *cert. denied*, 388 U.S. 916 (1967); *Humes v. United States*, 186 F. 2d 875 (10th Cir. 1951). A number of states which have considered the issue of whether the judge may consider perceived perjury as a factor in sentencing have, like the federal courts, concluded that such a consideration is relevant to defendant's potential for rehabilitation. *E.g.*, *Fox v. State*, 569 P. 2d 1335 (Alaska 1977); *Re Perez*, 84 Cal. App. 3d 168, 148 Cal. Rptr. 302 (4th Dist. 1978); *People v. Wilson*, 43 Colo. App. 68, 599 P. 2d 970 (1979); *People v. Meeks*, 81 Ill. 2d 524, 411 N.E. 2d 9 (1980).

Significantly, despite the obvious tendency to uphold the trial judge's consideration of defendant's perjury, the courts have con-

sistently rejected any notion that a defendant may receive a greater sentence as *punishment* for his perjury. *E.g., United States v. Hendrix*, 505 F. 2d 1233 (2d Cir. 1974); *United States v. Moore*, 484 F. 2d 1284 (4th Cir. 1973); *Strachan v. State*, 615 P. 2d 611 (Alaska 1980); *Re Perez*, 84 Cal. App. 3d 168, 148 Cal. Rptr. 302 (1978). While it has been held permissible to consider defendant's perjury within the scope of evaluating his character for rehabilitative potential, to enhance a defendant's sentence as punishment for the substantive offense of perjury for which he has not been indicted, tried and convicted would clearly be improper. *Id. See also* Comment, "Suspected Perjury" n. 43 at 682.

In *United States v. Grayson*, the United States Supreme Court squarely faced the issue of whether a trial judge may take into account, for sentencing purposes, his belief that the defendant deliberately lied on the stand. That Court first examined the permissible scope of a trial court's examination and evaluation of a defendant's character and conduct for purposes of determining his potential for rehabilitation. The Court held that perceived perjury was a permissible consideration and quoted with approval the observation made by Judge Marvin Frankel in *United States v. Hendrix*:

> The effort to appraise "character" is, to be sure, a parlous one, and not necessarily an enterprise for which judges are notably equipped by prior training. Yet it is in our existing scheme of sentencing one clue to the rational exercise of discretion. If the notion of "repentance" is out of fashion today, the fact remains that a manipulative defiance of the law is not a cheerful datum for the prognosis a sentencing judge undertakes. . . . Impressions about the individual being sentenced—the likelihood that he will transgress no more, the hope that he may respond to rehabilitative efforts to assist with a lawful future career, the degree to which he does or does not deem himself at war with his society—are, for better or worse, central factors to be appraised under our theory of "individualized" sentencing. The theory has its critics. While it lasts, however, a fact like the defendant's readiness to lie under oath before the judge who will sentence him would seem to be among the more precise and concrete of the available indicia.

Grayson, 438 U.S. at 51. The Court further held that consideration of a defendant's perjury in the process of evaluation of his character did not violate his right to due process of law. *Id.* at 53-55.

Despite the plethora of case law which supports the judge's consideration of perceived perjury in the evaluation process, defendant contends in the instant case that the trial judge erred in finding as an aggravating factor that defendant lied during trial. Defendant acknowledges that, at first blush, *Grayson* would appear to control this question. He maintains, however, that further analysis reveals that *Grayson* provides no basis for permitting the judge to use perceived perjury as an aggravating factor under our Fair Sentencing Act. Defendant points to the statute upon which the *Grayson* Court in part relied. That statute, 18 USC, § 3577 (1976), provides:

> No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.

Defendant concedes that the *Grayson* Court's analysis may have been instructive under our former scheme of indeterminate sentencing in which there was virtually no limit upon matters which the court could consider. *See State v. Cooper*, 238 N.C. 241, 77 S.E. 2d 695. However, defendant argues that our determinate sentencing scheme, embodied in the Fair Sentencing Act, G.S. 15A-1340.1 *et seq.*, limits the discretion historically accorded trial judges in this area, and that our statutory provisions do not permit the trial court's assigning to his belief that a defendant lied at trial the status of an aggravating factor.

We agree that our Fair Sentencing Act originated in a movement away from indeterminate sentencing and toward the imposition of presumptive terms for specified crimes. *See generally* Comment, Criminal Procedure—"The North Carolina Fair Sentencing Act," 60 N.C. L. Rev. 631 (1982). In fact, however, it is not clear the extent to which the act limits the sentencing discretion of the trial judge. *Id.* As Justice Meyer observed in *State v. Ahearn*, 307 N.C. 584, 300 S.E. 2d 689 (1983):

> The Fair Sentencing Act is an attempt to strike a balance between the inflexibility of a presumptive sentence which insures that punishment is commensurate with the crime, without regard to the nature of the offender; and the flexibility of permitting punishment to be adapted, when appropriate, to the particular offender.

Id. at 596, 300 S.E. 2d at 696. The trial judge still has "discretion to increase or reduce sentences from the presumptive term upon findings of aggravating or mitigating factors, the weighing of which is a matter within [his] sound discretion." *Id.* at 597, 300 S.E. 2d at 697. (Quoting with approval *State v. Davis*, 58 N.C. App. 330, 333, 293 S.E. 2d 658, 661 (1982).) Furthermore, the Act was not intended "to remove all discretion from our able trial judges. The trial judge should be permitted wide latitude in arriving at the truth as to the existence of aggravating and mitigating circumstances, for it is only he who observes the demeanor of the witnesses and hears the testimony." *Id.* at 596, 300 S.E. 2d at 697.

[1] The issue in the instant case, however, is not really one of the extent of the trial judge's discretion, for the statute does not purport to grant him the discretion to create new aggravating factors. Rather, the statute lists several aggravating factors which the trial judge is required to consider and also authorizes him to consider any other aggravating factors "that he finds are proved by the preponderance of the evidence, and that are reasonably related to the purposes of sentencing. . . ." G.S. 15A-1340.4. The issue in this case, then, is twofold: (1) whether the use of defendant's perjury to aggravate his sentence is "reasonably related to the purposes of sentencing"; and (2) whether the trial judge's finding of perjury is supported by a preponderance of the evidence.

In G.S. 15A-1340.3, we find:

> The primary purposes of sentencing a person convicted of a crime are to impose a punishment commensurate with the injury the offense has caused, taking into account factors that may diminish or increase the offender's culpability; to protect the public by restraining offenders; to assist the offender toward rehabilitation and restoration to the community as a lawful citizen; and to provide a general deterrent to criminal behavior.

Of the purposes listed, only one[1] is applicable to the issue of enhancement of a sentence due to perceived perjury: "rehabilitation and restoration to the community as a lawful citizen." As we have noted, almost without exception, courts have permitted the trial judge to consider a defendant's perjury during trial to influence the judge's assessment of defendant's potential for rehabilitation. *E.g., Grayson, supra; United States v. Nunn*, 525 F. 2d 958 (5th Cir. 1976); *United States v. Hendrix*, 505 F. 2d 1233 (2d Cir. 1974); *United States v. Moore*, 484 F. 2d 1284 (4th Cir. 1973); *Fox v. State*, 569 P. 2d 1335 (Alaska 1977); *People v. Wilson*, 43 Colo. App. 68, 599 P. 2d 970 (1979); *Re Perez*, 84 Cal. App. 3d 168, 148 Cal. Rptr. 302 (1978 4th Dist.); *People v. Meeks*, 81 Ill. 2d 524, 411 N.E. 2d 9 (1980). As long as the sentence is not increased to punish the perjury itself and the perceived perjury is being treated as only a factor to be weighed, we can find nothing in our statute which would preclude the use of perjury as an aggravating factor, provided, of course, it is proved by a preponderance of the evidence. G.S. 15A-1340.4.

In initially determining the propriety of the use of perceived perjury in sentencing, we find the Illinois case of *People v. Meeks* to be instructive and persuasive. In 1977, Illinois became one of the first states to adopt a determinate sentencing scheme for felonies. Ill. Rev. Stat. ch. 38 ¶ 1005-8-1. By 1979, the lower appeals courts had split on the issue of whether perjury could be a sentencing consideration. *Compare People v. Cowherd*, 63 Ill. App. 3d 229, 380 N.E. 2d 21 (4th Dist. 1978) (holding that the federal statute relied upon in *Grayson* did not control in Illinois) *with People v. Galati*, 75 Ill. App. 3d 860, 393 N.E. 2d 744 (2d Dist. 1979) (holding that perceived perjury could be considered as indicative of defendant's rehabilitative potential). In *Meeks*, the defendant was convicted of three counts of unlawful delivery of a controlled substance. The crime allegedly took place in Centralia. Her defense at trial was alibi and she "testified that for a two-month period, the period which spanned the sales of these drugs,

1. While obviously the first two purposes do not apply here, it may appear at first blush that the deterrence purpose might apply since enhancement of punishment on the basis of perjury would likely deter others from lying during trial. However, as noted earlier, it is impermissible to increase a sentence as punishment for the perjury, for such a practice would likely violate due process. Increasing punishment on the basis of perjury in order to deter others from commission of perjury amounts to the same thing.

she was at all times in Chicago." 81 Ill. 2d 524, 536, 411 N.E. 2d 9, 15. A neighbor in Centralia, who was a police officer, testified that he saw defendant off and on there in Centralia during the period in question. Furthermore, during impeachment of defendant, the State introduced an employment application signed by her and submitted to a Centralia employer and dated during the period that she contended she was in Chicago. The defendant could not explain how the Centralia employer received the application.

In sentencing defendant, the trial judge noted that the jury did not believe defendant's alibi. He stated that, "the jury drew the only conclusion it had, that she was dealing a false hand." *Id.* at 531, 411 N.E. 2d at 13. The Fifth District Appellate Court had remanded the case because, among other things, the trial judge had considered for sentencing purposes his belief that defendant had committed perjury. 75 Ill. App. 3d 357, 393 N.E. 2d 1190 (1979). The Supreme Court reversed. Relying on *Grayson, supra*, the court found no constitutional violation. The Court further held that the consideration of defendant's perjury was relevant in terms of evaluating her potential for rehabilitation. The Court noted:

> As we stated in *People v. Jones*: "Realistically, it is impossible for a judge, in determining what sentence should be imposed, to erase from his mind the testimony of the defendant. The impact of that testimony upon the sentencing judge can hardly be said to be irrelevant to an appraisal of the defendant's character and his prospects for rehabilitation."

Id. at 536, 411 N.E. 2d at 15 (quoting *People v. Jones*, 52 Ill. 2d 247, 249-50, 287 N.E. 2d 680, 681 (1972)).

We are constrained to agree that the character of the defendant, his conduct, and particularly that conduct as it reflects his attitude toward society and its laws, are relevant considerations for a trial judge in determining what sentence to be imposed. Perjury at trial often indicates a defendant's continued defiance of society's system of laws and to that extent reflects on his potential for rehabilitation and is thus "reasonably related to the purposes of sentencing."

[2] Turning now to the second prong of our statute's requirement for finding additional aggravating factors, we cannot say that the judge's determination that defendant lied on the stand was not proved by a preponderance of the evidence. In *State v. Ahearn*, we reiterated what that standard means within the context of our sentencing act. Quoting from 2 Stansbury's North Carolina Evidence § 212 (Brandis Rev. 1973), Justice Meyer wrote:

> "This preponderance does not mean number of witnesses or volume of testimony, but refers to the reasonable impression made upon the minds of the jury by the entire evidence, taking into consideration the character and demeanor of the witnesses, their interest or bias and means of knowledge, and other attending circumstances."

307 N.C. at 596, 300 S.E. 2d at 697.

A reading of the transcript in the instant case reveals numerous discrepancies in the defendant's testimony. The most notable of these was his inability to explain how, consistent with his alibi defense of having been in Charleston, South Carolina during the entire month of August, his signed affidavit of indigency, dated 18 August 1981 and sworn to before a deputy clerk in Cleveland County, North Carolina, came into being. His curious knowledge of many of the technical facts surrounding the crime, as evidenced by his original confession to the police, belied his later disavowal of that statement at trial. These inconsistencies, together with our traditional deference to the trial judge's personal observation and consideration of the defendant's conduct and demeanor upon the stand, lead us to conclude that the trial court in this case committed no error in finding that defendant perjured himself during trial.

Even so, we are not unaware of the numerous criticisms of the *Grayson* holding, and of the sundry dangers that lurk in giving the trial judge carte blanche to find perjury in every case in which there are inconsistencies in a defendant's testimony or the jury does not believe his defense. *E.g.*, *Grayson*, *supra* (Stewart, Brennan and Marshall, JJ., dissenting); *United States v. Moore*, 484 F. 2d 1284 (4th Cir. 1973) (Craven, J., concurring); *Scott v. United States*, 419 F. 2d 264 (D.C. Cir. 1969). *See also*, Note, "Past Arrests and Perceived Perjury as Sentencing Factors in Illinois,"

13 Loy Chi L.J. 935 (1982); Note, "Judge's Discretion to Consider Defendant's False Testimony," 17 Duq. L. Rev. 521 (1979); Comment, "Suspected Perjury," *supra.* The potential problems raised by the commentators fall into four general areas. The first, often cited, is that permitting the trial judge to enhance a defendant's sentence based on perceived perjury at trial chills the criminal defendant's right to testify in his own behalf. *Id.* While there may indeed be some instances where a defendant may be reluctant to testify, we are not persuaded that the potential of an enhanced sentence will seriously deter most defendants from testifying. Furthermore, we can see no real quantitative or qualitative difference between a defendant's dilemma in this situation and his having to decide in the first place whether or not to take the stand and subject himself to impeachment by the bringing out of past bad acts. As the United States Supreme Court observed in *Crampton v. Ohio,* 402 U.S. 183 (1971):

> It is not thought overly harsh in such situations to require that the determination whether to waive the privilege take into account the matters which may be brought out on cross-examination. It is also generally recognized that a defendant who takes the stand in his own behalf may be impeached by proof of prior convictions or the like. [Citations omitted.] Again, it is not thought inconsistent with the enlightened administration of criminal justice to require the defendant to weigh such pros and cons in deciding whether to testify.

Id. at 215. In short, we do not believe that allowing the judge to consider perjury in evaluating defendant's prospects for rehabilitation, and thus opening up the possibility of an increase in punishment on that basis, rises to the level of an impermissible chill on his right to testify since it requires no more significant a strategic choice than does electing to take the stand to begin with. *See* Note, "Judge's Discretion to Consider Defendant's False Testimony," 17 Duq. L. Rev. 521, *supra.*

A second criticism of permitting the use of perceived perjury to aggravate a sentence is that for the most part it is an unreviewable determination. *See Grayson, supra* (Stewart, J., dissenting). *See also* Note, "Judge's Discretion to Consider Defendant's False Testimony," 17 Duq. L. Rev. 521 (1979); Note, "Discre-

tionarily Enhanced Sentences Based Upon Suspected Perjury at Trial," VII Fordham Urb. L.J. 441 (1979); Note, "Past Arrests and Perceived Perjury as Sentencing Factors in Illinois," 13 Loy Chi L.J. 935 (1982); Comment, "Suspected Perjury," *supra.* Central to this particular criticism is the fact that, as made clear in the *Grayson* opinion, the trial judge in many cases is not required to record his reasons for enhancing a defendant's sentence. Almost without exception, the critics of *Grayson* suggest that an obvious cure for this ill is to require the judge to disclose the factors upon which he bases the sentence. *E.g.,* Note, "Judge's Discretion to Consider Defendant's False Testimony," 17 Duq. L. Rev. 521 (1979); Comment, "Suspected Perjury," *supra.* The requirement of disclosure assures the appellate courts an opportunity to review the factual bases which support the trial judge's determination.

The problem of lack of reviewability does not arise in this case, however, since our statute by its terms requires (with certain exceptions not applicable here) the judge, in imposing a sentence other than the presumptive sentence, to make findings in the record. G.S. 15A-1340.4(b). The statute also requires that any finding in aggravation or mitigation must be proved by a preponderance of the evidence. G.S. 15A-1340.4. Thus, in this State, the judge must not only list factors; there is also a specific standard against which the appellate courts may gauge the trial court's findings.

A third criticism in this area is that the defendant's proclivity to protest his innocence at trial does not necessarily reflect his potential for rehabilitation. *E.g., United States v. Moore,* 484 F. 2d 1284, 1288 (4th Cir. 1973) (Craven, J., concurring). As the court noted in *Scott v. United States,* a pre-*Grayson* case,

> the peculiar pressures placed upon a defendant threatened with jail and the stigma of conviction make his willingness to deny the crime an unpromising test of his prospects for rehabilitation if guilty. It is indeed unlikely that many men who commit serious offenses would balk on principle from lying in their own defense. The guilty man may quite sincerely repent his crime but yet, driven by the urge to remain free, may protest his innocence in a court of law.

419 F. 2d 264, 269 (1969). While we are not unmindful of human nature and of the natural tendency in both the best and the worst

of us to protest our innocence, we cannot as a court condone a defendant's taking the stand and violating the oath, however "natural" it might be to do so. Whether or not the fact that a defendant lied at trial is indicative of his potential for rehabilitation would seem to depend upon the facts and circumstances of each case and would definitely influence the weight to be given to it by the trial judge in the evaluative process.

The fourth criticism generally leveled at permitting a finding of perjury is straightforward: the judge may be wrong. *E.g.*, *United States v. Moore*, 484 F. 2d 1284, 1288 (4th Cir. 1973) (Craven, J., concurring). While error here is no doubt possible, in our opinion, the chance of it is significantly lessened due to the requirement in North Carolina that a record be kept and that all factors be proved by a preponderance of the evidence.

Despite our holding today that nothing in our Fair Sentencing Act specifically precludes the use of perceived perjury as an aggravating factor to be weighed in the overall assessment of a defendant's rehabilitative potential, we do not encourage the use of such perjury to enhance a defendant's sentence. As we have noted, permitting judges to use perjury as an aggravating factor is fraught with potential dangers, and it is our recognition of those dangers, together with our recognition of the frailties of human perception, which leads us to adhere to the following admonition issued by Judge Butzner in *United States v. Moore*:

> We caution, however, that sentencing judges should not indiscriminately treat as a perjurer every convicted defendant who has testified in his own defense. Witnesses induced by sordid motives or fear have been known to fabricate accusations with such guile that even conscientious triers of fact have been misled. Moreover, some essential elements of proof of criminal conduct, such as knowledge, intent, malice, and premeditation are sometimes so subjective that testimony about them cannot be readily categorized as true or false. Judges must constantly bear in mind that neither they nor jurors are infallible. A verdict of guilty means only that guilt has been proved beyond a reasonable doubt, not that the defendant has lied in maintaining his innocence. It is better in the usual case for the trial judge who suspects perjury to request an investigation. Then, if the facts warrant it, the

[District Attorney] may institute prosecution for this separate and distinct crime.

484 F. 2d 1284, 1287-88.

[1] We, therefore, hold that nothing in our Fair Sentencing Act specifically precludes a finding of perjury as an aggravating factor to be weighed in considering the sentence to be imposed upon a defendant, provided, of course, the finding meets the requirements of the statute; however, in view of some of the potential dangers inherent in this particular factor and also of its peculiar nature, a trial judge should exercise extreme caution in this area and should refrain from finding perjury as an aggravating factor except in the most extreme case.

We find no error in the holding of the Court of Appeals that the trial judge did not err in finding as an aggravating factor that the defendant committed perjury at trial.

The decision of the Court of Appeals is

Affirmed.

Justice FRYE dissents for the reasons stated in the concurring opinion in the Court of Appeals.

BETTYE HAIRSTON, ADMINISTRATRIX OF THE ESTATE OF JOHN O. HAIRSTON, PLAINTIFF v. ALEXANDER TANK AND EQUIPMENT CO. AND HAYGOOD LINCOLN MERCURY, INC., ORIGINAL DEFENDANTS, AND ALEXANDER TANK AND EQUIPMENT CO., THIRD PARTY PLAINTIFF v. JAMES FULTON WHITBY AND TWO-WAY RADIO OF CHARLOTTE, INC., THIRD PARTY DEFENDANTS

No. 80PA83

(Filed 2 February 1984)

1. Negligence § 9— negligence of defendant car company a proximate cause of death—element of foreseeability

A jury could find that a reasonably prudent person should have foreseen that a car company's negligence in failing to tighten the lug on the wheel of a new automobile could cause the car to be disabled on the highway and struck by another vehicle, causing harm to the driver.

2. **Automobiles and Other Vehicles § 87.4; Negligence § 10— error to find negligence of truck driver completely insulated negligence of car company in failing to tighten wheel lugs**

In an action to recover for the wrongful death of plaintiff's intestate who was killed while standing behind his new car after the left rear wheel came off, the negligence of defendant car dealer in failing to tighten the lug bolts on the left rear wheel and in failing to check the car before delivery to the intestate was not completely insulated by the negligence of defendant truck driver in failing to keep a proper lookout and in failing to keep his vehicle under proper control. "In order for the conduct of the intervening agent to break the sequence of events and stay the operative force of the negligence of the original wrongdoer, the intervening conduct must be of such nature and kind that the original wrongdoer had no reasonable ground to anticipate it," and on the facts of this case, a jury might readily find that defendant car dealership could have reasonably foreseen the subsequent acts of defendant truck driver and the resultant harm to decedent that occurred barely six minutes and 3.5 miles away from the dealership. The truck driver's negligence was not so highly an improbable or extraordinary occurrence as to bear no reasonable connection to the harm threatened by the car dealership's original negligence.

3. **Automobiles and Other Vehicles § 21.1— failure to instruct on doctrine of sudden emergency—proper**

Defendant was not entitled to invoke the doctrine of sudden emergency, and therefore the trial court did not err in failing to so instruct, where the evidence showed that defendant's negligence created the emergency he contended confronted him.

4. **Evidence § 49.1— hypothetical question—present monetary value of decedent—opinion properly allowed**

A hypothetical question put to an economics expert concerning the present monetary value of decedent to his wife and his daughter for the loss of the reasonably expected net income and services of decedent was entirely proper where the question included only those facts in evidence or logically inferred from the evidence and were sufficient to enable the witness to form a satisfactory opinion. Further, the expert's opinion was based on a proper foundation.

ON certiorari to review the decision of the Court of Appeals, 60 N.C. App. 320, 299 S.E. 2d 790 (1983), finding no error in the judgment entered by *Lewis, J.*, at the 1 June 1981 Mixed Session of Superior Court, MECKLENBURG County. Heard in the Supreme Court 5 October 1983.

This is an action for the wrongful death of plaintiff's decedent instituted on 10 September 1979. At the conclusion of the trial on 9 June 1981, the jury answered all issues in favor of the plaintiff and against both corporate defendants, awarding damages in the amount of $200,000. On 10 June 1981, both defendants

filed motions under Rule 50 of the North Carolina Rules of Civil Procedure for judgment notwithstanding the verdict and under Rule 59 for a new trial. All motions of defendant Alexander Tank and Equipment Company (Alexander Tank) were denied. The motion of defendant Haygood Lincoln Mercury, Inc. (Haygood) for judgment notwithstanding the verdict was allowed. Haygood's motion in the alternative for a new trial was denied. On 11 June 1981, judgment was entered against the defendant Alexander Tank in the principal sum of $209,709.29 in accordance with stipulated additional damages for medical and hospital expenses, funeral expenses, and property damage.

Plaintiff and defendant Alexander Tank appealed from the granting of the motion of defendant Haygood for judgment notwithstanding the verdict. Defendant Alexander Tank also appealed from the court's denial of other post-trial motions of Alexander Tank. All matters having to do with third-party claims by Alexander Tank against James Fulton Whitby and Two-Way Radio of Charlotte, Inc. have been disposed of and are not a part of this appeal.

Tucker, Hicks, Sentelle, Moon and Hodge, P.A., by John E. Hodge, Jr., Fred A. Hicks and David B. Sentelle, for plaintiff.

Hasty, Waggoner, Hasty, Kratt & McDonnell, by Robert D. McDonnell and William J. Waggoner, and Golding, Crews, Meekins, Gordon & Gray, by Fred C. Meekins and Henry C. Byrum, Jr., for defendant Alexander Tank and Equipment Company.

Hedrick, Feerick, Eatman, Gardner & Kincheloe, by J. A. Gardner III and Scott M. Stevenson, for defendant Haygood Lincoln Mercury, Inc.

MARTIN, Justice.

John O. Hairston's death was caused by a collision on the South Fork River Bridge on Interstate 85 in Gaston County on 17 April 1978. Taken in the light most favorable to plaintiff, her evidence tends to establish the following facts: On Friday, 14 April 1978, Hairston negotiated the purchase of a 1978 Lincoln Continental automobile at Haygood Lincoln Mercury, Inc. in Lowell, North Carolina. The automobile as originally received by Haygood from the Ford Motor Company had been equipped with

optional turbine spoke wheels. These wheels were included on the original invoice. When Hairston returned to Haygood to complete the transaction and pick up the car the following Monday, 17 April 1978, he found the Lincoln equipped with standard steel wheels. At his request and while he waited, Haygood's service department employees replaced the standard wheels with turbine wheels from another automobile, installed a CB radio, and undercoated the car. Although Haygood's normal procedure was to test drive a new car before delivery to a customer, no one road tested the Lincoln prior to turning it over to Hairston. The service manager did not make any inspection of the car after the wheels were changed.

A few minutes past five o'clock that afternoon, Hairston was driving his new automobile north on Interstate 85 toward Charlotte. He had entered I-85 from North Carolina Highway 7, the Lowell-McAdenville Road, which crosses over the interstate approximately six-tenths of a mile south of the South Fork River Bridge.

Traffic was moderate. It was daylight and the light was good. The road was dry. Proceeding north from N.C. 7 to the South Fork River Bridge, I-85 curves slightly to the right, then is straight for at least a quarter of a mile to the bridge. The interstate is downgrade from N.C. 7 to the South Fork River Bridge, and visibility is unobstructed from the end of the entrance ramp at N.C. 7 to the bridge. There are two northbound lanes of I-85 over the South Fork River. The downgrade continues on the bridge, levelling out before the bridge is crossed.

When Hairston had traveled approximately 3.5 miles from the Haygood dealership and was approaching the South Fork River Bridge on I-85, the left rear wheel of the new Lincoln car came off and went down an embankment on the right side of the interstate. Gouge marks in the roadway made by the left rear hub on the Hairston car extended for a total of 208 feet from a point thirty-eight feet before the beginning of the bridge to where Mr. Hairston brought the automobile to a stop, 170 feet onto the bridge, in the far right lane of travel. There were concrete bridge abutments on the left and right sides of the bridge. There were no shoulders on the road where it crossed the bridge.

James Fulton Whitby, driving a 1970 Ford Econoline van owned by Two-Way Radio of Charlotte, Inc. had seen the Hairston vehicle as it entered I-85 from the Lowell exit ramp and had been

traveling several car lengths behind Hairston, there being one passenger car between his van and Hairston's car. After the wheel came off the Lincoln, the passenger car between Whitby and Hairston changed into the left-hand lane of travel and proceeded north, going around the Hairston car where it had come to a stop on the bridge. Whitby stopped his van approximately twenty feet behind the disabled Lincoln, set his hand brakes, activated his two-way emergency flashers, and got on his mobile telephone to call for help.

Mr. Hairston, having turned on the Lincoln's flashers, got out of his car. He looked at the left rear hub where his wheel had been, went to the other side of the car and looked, then went to the middle of the rear of his car where he was attempting to open his truck. Mr. Whitby, meanwhile, was calling for help, and as he observed in his outside left rearview mirror, traffic in the right lane was moving with no difficulty over into the left lane to bypass the stopped vehicles.

Among the approaching vehicles Whitby saw in his rearview mirror after he stopped behind Hairston was the G.M.C. flatbed truck operated by Robert F. Alexander, still about a quarter of a mile away. Within seconds the right front end of Alexander's truck struck the left rear of the Two-Way Radio van, knocking it into the rear of the Hairston automobile. Mr. Hairston, who was between the van and his car at the time of the collision, was killed. Approximately ninety seconds had elapsed from the time Whitby had first stopped his van behind the decedent until he was struck by Alexander.

Examination of the left rear wheel assembly of the Lincoln following the accident revealed that none of the lug bolts had been stripped or otherwise damaged. The brake drum showed signs that it had come loose and fallen down onto the lug bolt threads. The outside of the aluminum wheel was marked by "chewed up" aluminum indicating where the lug bolts had spun off. An expert witness called by plaintiff testified that the lug nuts used on the left rear wheel of the Lincoln had a right-hand thread which if left loose would unscrew when the wheel rolled forward. In his opinion, the wheel on the Lincoln had come off, therefore, because the lug nuts had not been tightened on the wheel studs.

The jury found both defendants negligent, whereupon defendant Haygood argued the following to the court in support of its motion for judgment notwithstanding the verdict:

> 2. That the evidence unequivocally reflects that the negligence, if any, of Haygood Lincoln Mercury, was not a proximate cause of the death of the decedent, John O. Hairston;
>
> 3. That the evidence has failed to show active negligence on the part of the defendant Haygood Lincoln Mercury, Inc.;
>
> 4. That the negligence, if any, of Haygood Lincoln Mercury, was insulated as a matter of law by the negligence and actions of the defendant Alexander Tank and Equipment Company, Inc.

In its unanimous opinion, the Court of Appeals upheld Judge Lewis's decision to allow the Haygood motion, finding:

> The record clearly shows sufficient evidence from which the jury could find Haygood was negligent in failing to tighten the lug bolts on the left rear wheel and in failing to check the new car before delivery. These acts of negligence, however, are not the proximate cause of the death of plaintiff's intestate, and such negligent acts of Haygood are insulated by the subsequent negligent acts of Alexander.

60 N.C. App. at 327, 299 S.E. 2d at 794.

We do not so interpret the law. On the facts of this case, defendant Haygood's negligence was one of the proximate causes of Hairston's death. At no time was this liability superseded or excused by the subsequent negligence of Alexander Tank and Equipment Company, Inc. which occurred all too foreseeably on I-85 within one and one-half minutes of decedent's automobile becoming disabled on the interstate.

In order to establish actionable negligence, plaintiff must show (1) that there has been a failure to exercise proper care in the performance of some legal duty which defendant owed to plaintiff under the circumstances in which they were placed; and (2) that such negligent breach of duty was a proximate cause of the injury. *Murray v. R.R.*, 218 N.C. 392, 11 S.E. 2d 326 (1940); *Whitt v. Rand*, 187 N.C. 805, 123 S.E. 84 (1924). In determining whether the Court of Appeals properly affirmed the trial court's entry of judgment notwithstanding the verdict in favor of defendant Haygood, we must ask, as we would in the case of a directed

verdict, *Summey v. Cauthen*, 283 N.C. 640, 197 S.E. 2d 549 (1973): Did the evidence at trial, when taken in the light most favorable to the plaintiff and with the benefit of all favorable inferences, either (1) fail to establish a prima facie case of negligence on the part of Haygood, or (2) establish beyond question that the negligence of Haygood was insulated as a matter of law by the intervening negligence of defendant Alexander Tank? *Norwood v. Sherwin Williams Co.*, 303 N.C. 462, 279 S.E. 2d 559 (1981); *Summey v. Cauthen, supra.*

We agree with the Court of Appeals that the record clearly reveals sufficient evidence from which a jury could find the first requisite of liability, negligence. That Haygood violated a legal duty to this plaintiff in failing to tighten the lug bolts on the left rear wheel and in failing to check the new car before delivery is self-evident.

For reasons which follow, however, it is also our opinion that from the evidence presented at trial the jury could reasonably infer that defendant's negligence was a proximate cause of Hairston's death. The jury could further infer from the facts in this case that while the subsequent negligence of defendant Alexander Tank joined with Haygood's original negligence in proximately causing the death of Hairston, it did not supersede the negligent acts of Haygood and thereby relieve Haygood of liability.

[1] Proximate cause is a cause which in natural and continuous sequence, unbroken by any new and independent cause, produced the plaintiff's injuries, and without which the injuries would not have occurred, and one from which a person of ordinary prudence could have reasonably foreseen that such a result, or consequences of a generally injurious nature, was probable under all the facts as they existed. *Kanoy v. Hinshaw*, 273 N.C. 418, 160 S.E. 2d 296 (1968); *Green v. Tile Co.*, 263 N.C. 503, 139 S.E. 2d 538 (1965). *See generally* Byrd, *Proximate Cause in North Carolina Tort Law*, 51 N.C. L. Rev. 951 (1973). Foreseeability is thus a requisite of proximate cause, which is, in turn, a requisite for actionable negligence. *Nance v. Parks*, 266 N.C. 206, 146 S.E. 2d 24 (1966); *Osborne v. Coal Co.*, 207 N.C. 545, 177 S.E. 796 (1935).

It is well settled that the test of foreseeability as an element of proximate cause does not require that defendant should have

been able to foresee the injury in the precise form in which it actually occurred.

> All that the plaintiff is required to prove on the question of foreseeability, in determining proximate cause, is that in "the exercise of reasonable care, the defendant might have foreseen that some injury would result from his act or omission, or that consequences of a generally injurious nature might have been expected."

Hart v. Curry, 238 N.C. 448, 449, 78 S.E. 2d 170, 170 (1953) (citation omitted). *See also Drum v. Miller*, 135 N.C. 204, 47 S.E. 421 (1904) (and citations therein).

The law requires only reasonable prevision. A defendant is not required to foresee events which are merely possible but only those which are reasonably foreseeable. *Bennett v. R.R.*, 245 N.C. 261, 96 S.E. 2d 31 (1957). *See also* 9 Strong's N.C. Index 3d *Negligence* § 9 (1977).

We note, however, that the law of proximate cause does not always support the generalization that the misconduct of others is unforeseeable. The intervention of wrongful conduct of others may be the very risk that defendant's conduct creates. In the absence of anything which should alert him to the danger, the law does not require a defendant to anticipate specific acts of negligence of another. It does, however, fix him with notice of the exigencies of traffic, and he must take into account the prevalence of that "occasional negligence which is one of the incidents of human life." *Beanblossom v. Thomas*, 266 N.C. 181, 146 S.E. 2d 36 (1966); Restatement (Second) of Torts § 447, comment c (1965). *See also* Byrd, *Proximate Cause in North Carolina Tort Law*, 51 N.C. L. Rev. 951 (1973).

There may be more than one proximate cause of an injury. When two or more proximate causes join and concur in producing the result complained of, the author of each cause may be held for the injuries inflicted. The defendants are jointly and severally liable. *Hall v. Carroll and Moore v. Carroll*, 255 N.C. 326, 121 S.E. 2d 547 (1961); *Riddle v. Artis*, 243 N.C. 668, 91 S.E. 2d 894 (1956).

Proximate cause is an inference of fact to be drawn from other facts and circumstances.

> It is only when the facts are all admitted and only one inference may be drawn from them that the court will declare whether an act was the proximate cause of an injury or not. But that is rarely the case. . . . Hence, "what is the proximate cause of an injury is ordinarily a question for the jury."

Conley v. Pearce-Young-Angel Co.; Rutherford v. Pearce-Young-Angel Co., 224 N.C. 211, 214, 29 S.E. 2d 740, 742 (1944) (citations omitted.) *See Oxendine v. Lowry*, 260 N.C. 709, 133 S.E. 2d 687 (1963); *Rouse v. Jones*, 254 N.C. 575, 119 S.E. 2d 628 (1961).

Applying the foregoing to the facts of this case to determine whether the negligence of defendant Haygood was a proximate cause of decedent's death, the decisive question is one of foreseeability. Under the circumstances here disclosed, we believe a jury could find that a reasonably prudent person should have foreseen that Haygood's negligence in failing to tighten the lugs on the wheel of the new automobile could cause the car to be disabled on the highway and struck by another vehicle, causing harm to the driver. Absent Haygood's original negligence, the tragic series of events on I-85 would not have occurred; the danger was foreseeable. Proximate causation is thus established and, with it, defendant's liability.

[2] We turn now to the question whether the evidence in this case is susceptible of the single inference by the jury that Haygood's negligence ceased to be the proximate cause of decedent's death and that it was superseded and insulated by the subsequent negligence of defendant Alexander Tank.

The Court of Appeals found that Alexander was negligent in failing to keep a proper lookout for vehicles stopped on the highway and in failing to keep his vehicle under proper control. "These negligent acts of Alexander—new and independent of any negligent acts of Haygood—constitute the proximate cause of injury and the death of plaintiff's intestate, and the negligence of Haygood was shielded by the subsequent acts of negligence by Alexander." 60 N.C. App. at 328, 299 S.E. 2d at 795.

We do not agree with the conclusion of the Court of Appeals. Under the applicable law summarized above, the negligent acts of Alexander quite properly may be found to be a proximate cause

of the injury and death in this case: Without Alexander's negligence, the collision would not have occurred; the injury was clearly foreseeable, given the failure to keep a proper lookout. It is also true, of course, that Alexander's unfortunate lack of attention to the road acted independently of Haygood's earlier carelessness. These facts, however, do not of themselves absolve defendant Haygood from his liability.

Insulating negligence means something more than a concurrent and contributing cause. It is not to be invoked as determinative merely upon proof of negligent conduct on the part of each of two persons, acting independently, whose acts unite to cause a single injury. *Essick v. Lexington*, 233 N.C. 600, 65 S.E. 2d 220 (1951); *Evans v. Johnson*, 225 N.C. 238, 34 S.E. 2d 73 (1945). *See also* 65 C.J.S. *Negligence* § 111(2) (1966). Contributing negligence signifies contribution rather than independent or sole proximate cause. *Essick v. Lexington, supra; Noah v. R.R.*, 229 N.C. 176, 47 S.E. 2d 844 (1948).

The following analysis of the doctrine of insulating negligence is determinative with respect to this issue:

> "An efficient intervening cause is a new proximate cause which breaks the connection with the original cause and becomes itself solely responsible for the result in question. It must be an independent force, entirely superseding the original action and rendering its effect in the causation remote. It is immaterial how many new elements or forces have been introduced, if the original cause remains active, the liability for its result is not shifted. Thus, where a horse is left unhitched in the street and unattended, and is maliciously frightened by a stranger and runs away: but for the intervening act, he would not have run away and the injury would not have occurred; yet it was the negligence of the driver in the first instance which made the runaway possible. This negligence has not been superseded nor obliterated, and the driver is responsible for the injuries resulting. If, however, the intervening responsible cause be of such a nature that it would be unreasonable to expect a prudent man to anticipate its happening, he will not be responsible for damage resulting solely from the interven-

tion. The intervening cause may be culpable, intentional, or merely negligent."

Harton v. Telephone Co., 141 N.C. 455, 462-63, 54 S.E. 299, 301-02 (1906) (citation omitted).

> It is immaterial how many new events or forces have been introduced if the original cause remains operative and in force. In order for the conduct of the intervening agent to break the sequence of events and stay the operative force of the negligence of the original wrongdoer, the intervening conduct must be of such nature and kind that the original wrongdoer had no reasonable ground to anticipate it. . . .
>
> "The 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." . . .
>
> In 38 Am. Jur., Negligence, Sec. 67, pp. 722 and 723, the principle is stated this way: "In order to be effective as a cause superseding prior negligence, the new, independent, intervening cause must be one not produced by the wrongful act or omission, but independent of it, and adequate to bring about the injurious result; a cause which interrupts the natural sequence of events, turns aside their cause, prevents the natural and probable result of the original act or omission, and produces a different result, that reasonably might not have been anticipated."

Riddle v. Artis, supra, 243 N.C. at 671, 91 S.E. 2d at 896-97 (citations omitted).

It is true that

> [a] man's responsibility for his negligence must end somewhere. If the connection between negligence and the injury appears unnatural, unreasonable and improbable in the light of common experience, the negligence, if deemed a cause of the injury at all, is to be considered a remote rather than a proximate cause. It imposes too heavy a responsibility for negligence to hold the tort feasor responsible for what is

unusual and unlikely to happen or for what was only remotely and slightly probable.

Phelps v. Winston-Salem, 272 N.C. 24, 30, 157 S.E. 2d 719, 724 (1967). *See also* Restatement (Second) of Torts § 435(2) (1965).

The well-settled rule in this jurisdiction is that except in cases so clear that there can be no two opinions among men of fair minds, the question should be left for the jury to determine whether the intervening act and the resultant injury were such that the author of the original wrong could reasonably have expected them to occur as a result of his own negligent act. *Davis v. Jessup and Carroll v. Jessup*, 257 N.C. 215, 125 S.E. 2d 440 (1962); *Bryant v. Woodlief*, 252 N.C. 488, 114 S.E. 2d 241 (1960); *Harton v. Telephone Co., supra*, 141 N.C. 455, 54 S.E. 299.

We hold that on the facts of this case a jury might readily find that defendant Haygood could have reasonably foreseen the subsequent acts of Alexander and the resultant harm to Hairston that occurred on I-85, barely six minutes and 3.5 miles away from the Haygood dealership. Alexander's negligence in driving was, as the Court of Appeals noted, inexcusable. It was not, however, so highly improbable and extraordinary an occurrence in this series of events as to bear no reasonable connection to the harm threatened by Haygood's original negligence. *Nance v. Parks, supra*, 266 N.C. 206, 146 S.E. 2d 24; *Hall v. Coble Dairies*, 234 N.C. 206, 67 S.E. 2d 63 (1951); *Palsgraf v. Long Island R.R. Co.*, 248 N.Y. 339, 162 N.E. 99 (1928). The area of risk created by the negligence of Haygood included the subsequent events and wrongful death of John Hairston.

The trial judge erred in granting Haygood's motion for judgment notwithstanding the verdict.

[3] Defendant Alexander Tank has argued that the trial court's failure to instruct the jury on the doctine of sudden emergency was prejudicial and reversible error. We have carefully reviewed the relevant facts, and we agree with the Court of Appeals that considering the evidence in the light most favorable to this defendant, Alexander Tank was not entitled to the requested instruction.

The law of the sudden emergency doctrine has been thoroughly stated by this Court. *Crowe v. Crowe*, 259 N.C. 55, 129

S.E. 2d 585 (1963); *Schloss v. Hallman*, 255 N.C. 686, 122 S.E. 2d 513 (1961); *Brunson v. Gainey*, 245 N.C. 152, 95 S.E. 2d 514 (1956); *Hoke v. Greyhound Corp.*, 227 N.C. 412, 42 S.E. 2d 593 (1947). *See Harris v. Guyton*, 54 N.C. App. 434, 283 S.E. 2d 538 (1981), *disc. rev. denied*, 305 N.C. 152 (1982); 9 Strong's N.C. Index 3d *Negligence* § 4 (1977). It serves no useful purpose to restate these principles here.

A motorist is required in the exercise of due care to keep a reasonable and proper lookout in the direction of travel and is held to the duty of seeing what he ought to have seen. *Wall v. Bain*, 222 N.C. 375, 23 S.E. 2d 330 (1942). Where a motorist discovers, or in the exercise of due care should discover, obstruction within the extreme range of his vision and can stop if he acts immediately, but his estimates of his speed, distance, and ability to stop are inaccurate and he finds stopping impossible, he cannot then claim the benefit of the sudden emergency doctrine. 7A Am. Jur. 2d *Automobiles and Highway Traffic* §§ 800-801 (1980). *See Ennis v. Dupree*, 258 N.C. 141, 128 S.E. 2d 231 (1962).

The crucial question in determining the applicability of the sudden emergency doctrine is thus whether Alexander, when approaching the stopped vehicle, saw or by the exercise of due care should have seen that he was approaching a zone of danger. Did his failure to decrease his speed and bring his truck under control without first ascertaining the nature of the highway conditions ahead of him constitute negligence on his part which contributed to the creation of the emergency thereafter confronting him? The sudden emergency must have been brought about by some agency over which he had no control and not by his own negligence or wrongful conduct. *Foy v. Bremson*, 286 N.C. 108, 209 S.E. 2d 439 (1974).

The relevant facts are these: As Mr. Alexander drove north on Interstate 85 that day, he had a clear and unobstructed view downgrade for at least a quarter of a mile to the South Fork River bridge. As Mr. Alexander approached the South Fork River bridge, there was one car in front of him. It was a passenger car moving at about the same speed as he was. It was a standard car, without a rack on top of it, not pulling a trailer, and it was lower than the level of his eye.

The cab of Mr. Alexander's truck was seven feet tall, as tall as the Two-Way Radio van, which was taller than an ordinary passenger car. Mr. Alexander, who was five feet ten inches tall, was sitting in a seat approximately three and a half to four feet off the ground. The seat was chest high to him. When sitting in the vehicle, the top of the cab was about six inches above his head. From this vantage point, he could see over cars ahead of him. In fact, he testified that his practice was to "look over the particular car that is in front of me to see what's ahead." On this occasion, he could see the bridge over the top of the car that was in front of him.

The Two-Way Radio van was red, was six to six and one-half feet wide, and was several feet taller than an ordinary passenger car. Mr. Alexander testified that the van was "a complete red color, almost in a rusty red color." It had a white top and bumper and white lettering across the back. According to Mr. Alexander's testimony, the Two-Way Radio vehicle was about the same height as his own truck. The rear lights of the van were about waist high off the ground. There was at least one rear light burning, emitting a brighter light than a standard tail light. Mr. Alexander thought it was a brake light.

The car in front of Mr. Alexander signalled and moved to its left when it was approximately two hundred feet back from the van. At that time, Mr. Alexander was approximately one hundred feet behind the car in front of him. The evidence, considered in the light most favorable to Mr. Alexander, is susceptible to the inference either that Mr. Alexander did not see the van until the car in front of him moved left, or that he did see it prior to the car moving from in front of him but did not realize that the van was not moving.

Upon realizing that the van was stopped in front of him, Mr. Alexander then applied his brakes, glanced into his left rearview mirror, ascertained that there was nothing behind him for three to four hundred feet, put on his own signal for a left turn, and began a gradual moving out of the right lane into the left lane. He applied his brakes with normal pressure. As he was gradually moving out of the right lane into the left, he collided with the van.

We find that the above evidence, taken in the light most favorable to Mr. Alexander, is not sufficient to yield any inference that Alexander faced a sudden emergency not of his own making or to which his own actions did not contribute. On the contrary, the evidence demonstrates that to the very end Mr. Alexander did not himself perceive any "emergency."

Failing to appreciate that the van was stopped, he compounded his error by misjudging what he then needed to do to avoid hitting the vehicle. The Two-Way Radio van, stopped on the bridge for ninety seconds, was visible for a quarter of a mile and could have been seen by Mr. Alexander within the distance and framework of time had he been keeping a proper lookout.

Any emergency existing on these facts was of defendant's own creation, coming after and because of his negligence. The evidence did not support an instruction on the doctrine of sudden emergency.

[4] In support of its alternative motion for a new trial, defendant Haygood has argued that the trial court committed error in allowing economics expert J. Finley Lee to testify pursuant to certain hypothetical questions.[1]

Dr. Lee's testimony under N.C.G.S. 28A-18-2(b)(4) went to the present monetary value of the decedent to his wife, Mrs. Bettye Hairston, and his daughter, Jonalyn Hairston, for the loss of the reasonably expected net income and services of Mr. Hairston.

On direct examination, the expert was asked the following hypothetical question:

> Q. Dr. Lee, if you will listen closely, I'm going to ask you a hypothetical question. If the Jury, sir, should find from the evidence, and by its greater weight, that John O. Hairston was born on April 13, 1931 and at the time of his death was 47 years of age, and had a life expectancy of 27.38 years; that on April 17, 1978 he suffered injuries, as a result of which, he

1. Effective 1 October 1981, hypothetical questions are not required in examining expert witnesses. N.C. Gen. Stat. § 8-58.12 (1981). This trial began 1 June 1981. This statute simplifies the presentation of expert witnesses and is designed to eliminate the abuse of the hypothetical question. *See Ingram v. McCuiston*, 261 N.C. 392, 134 S.E. 2d 705 (1964).

died on April 19, 1978; that at the time of his death, he had a work life expectancy of 18 years; that at the time of his death, Mr. Hairston was married to Bettye T. Hairston, who is now 42; that Mr. Hairston had one child, a daughter, who was 17 at the time of his death; that prior to his death, Mr. and Mrs. Hairston lived in Charlotte and his daughter lived in Oakland, California; that Mr. Hairston was an excellent employee; that he worked hard and took pride in his job; that Mr. Hairston enjoyed entertaining, nice cars, and nice clothes; that prior to his injuries on April 17, 1978 Mr. Hairston played Tennis, worked one full-time and one part-time job, and was active in community affairs; that Mr. Hairston graduated from West Charlotte High School and continued his education at Johnson C. Smith University where he graduated with a Bachelor of Arts Degree in Political Science; that beginning in 1956 and until his death in 1978, for a period of 23 years, Mr. Hairston was an employee of the United States Postal Service as a Mail Carrier; that also at the time of his death and for some period prior thereto, Mr. Hairston was employed part-time by Grier's Funeral Home; that Mr. Hairston's gross earnings from his employment at the Post Office were in 1975—$15,208.00; in 1976—$16,820; in 1977—$18,975.46; that Mr. Hairston—strike that last part—based on your expertese [sic] and experience, as an Economist/Statistician and on the facts hypothesized, do you have an opinion, as an Economist Statistician as to the present monetary value of Mr. Hairston to his wife and daughter for the loss of his reasonably expected net income of Mr. Hairston? Do you have an opinion?

Defendants' counsel objected to this question solely on the grounds that it did not include any facts concerning Hairston's personal expenses. When questioned about sources for his calculations of Hairston's personal living expenditures, Dr. Lee testified that (1) he had no personal knowledge about decedent or details of the accident; (2) his information concerning decedent's consumption habits and personal expenses came from decedent's wife, from attorneys for the plaintiff, and from the trial testimony; (3) he had concluded on the basis of this information that the decedent's personal consumption habits "were of a reasonable and average nature"; and (4) he therefore adopted a figure of .3 or 30

percent for this factor in his overall analysis, basing that number on a United States Government consumption study and a study on consumption done in the state of California.

The hypothetical question was reworded to include the phrase "that his consumption habits were reasonable and average in nature." Over the objection of counsel, Dr. Lee was then permitted to offer his calculations into evidence.

Defendant Haygood's objections to the admissibility of this opinion testimony go both to the form of the above hypothetical and to the basis of the opinion elicited thereby.

With respect to the form of the question, Haygood claims that it was error to permit the inclusion of the factual reference to decedent's "reasonable and average" consumption habits, there being no support for such an assumption in the evidence. Other evidence in the case had established, for example, that decedent had purchased a 1977 Cadillac the year before he bought the new Lincoln in 1978 for $14,426.95; at the time of his death, Hairston had a balance of $35.61 in his checking account, $1,000 in personal property, no savings, and no real property.

A hypothetical question may include only such facts as are in evidence or such as the jury will be justified in inferring from the evidence. *Keith v. Gas Co.*, 266 N.C. 119, 146 S.E. 2d 7 (1966); 1 Stansbury's North Carolina Evidence § 137 (Brandis rev. 1973). There is, however, substantial authority to the effect that the interrogator may form his hypothetical question on any theory which can be deduced from the evidence and select as a predicate therefor such facts as the evidence reasonably tends to prove. *Dean v. Coach Co.*, 287 N.C. 515, 215 S.E. 2d 89 (1975); 31 Am. Jur. 2d *Expert and Opinion Evidence* § 56 (1967). In such matters, the trial judge is quite competent to decide whether there is any evidence of the facts assumed to exist in the hypothetical. *Bailey v. Winston*, 157 N.C. 252, 72 S.E. 966 (1911).

Dr. Lee himself testified that the information he gathered was that Mr. Hairston had average consumption habits. Furthermore, the data upon which he based his calculations are broad averages, designed to incorporate extremes of a person "driving a luxury car and one driving a Volkswagon." That the evidence might support contrary facts is not determinative.

We find that the hypothetical questions put to this economics expert were entirely proper. The questions included only those facts in evidence or logically inferred from the evidence and were sufficient to enable the witness to form a satisfactory opinion. Defendant's objection to the form of these questions is without merit.

We find equally untenable the argument that the expert's opinion testimony lacks a proper foundation based as it was on information gleaned from "statistics that have been prepared by other people" and from the plaintiff or her lawyer.

This question has been resolved by this Court contrary to defendant's contentions in *Highway Commission v. Conrad*, 263 N.C. 394, 139 S.E. 2d 553 (1965):

> "The fact that certain elements are not independently admissible in evidence . . . does not bar their consideration by an expert witness in reaching an opinion. Thus, it has been said: 'An integral part of an expert's work is to obtain all possible information, data, detail and material which will aid him in arriving at an opinion. Much of the source material will be in and of itself inadmissible evidence but this fact does not preclude him from using it in arriving at an opinion. All of the factors he has gained are weighed and given the sanction of his experience in his expressing an opinion. It is proper for the expert when called as a witness to detail the facts upon which his conclusion or opinion is based and this is true even though his opinion is based entirely on knowledge gained from inadmissible sources.' "

Id. at 399, 139 S.E. 2d at 557 (citation omitted). *See State v. DeGregory*, 285 N.C. 122, 203 S.E. 2d 794 (1974). *Accord Potts v. Howser*, 274 N.C. 49, 161 S.E. 2d 737 (1968).

It is the function of cross-examination to expose any weaknesses in such testimony, which defense counsel undertook to do in fifty-three pages of the transcript.

Defendant's objections to this opinion testimony are without merit.

Appellate courts, absent error of law, are bound by the jury's verdict. Having determined that the trial court erred in entering

the judgment notwithstanding the verdict and that no other errors of law were committed, we hold that the jury verdict in favor of the plaintiff must be reinstated. Accordingly, we reverse the decision of the Court of Appeals and remand this case to that court with instructions to remand it to the Superior Court, Mecklenburg County, for entry of judgment in accordance with the jury verdict in favor of plaintiff.

Reversed and remanded.

STATE OF NORTH CAROLINA v. ANNE SPEIGHT HINSON

No. 657A82

(Filed 2 February 1984)

1. Homicide § 12— indictment for first degree murder

An indictment in the form authorized by G.S. 15-144 was sufficient to charge defendant with murder in the first degree.

2. Homicide § 4— first degree murder—motion to try as non-capital case

The trial court properly denied the motion of a defendant charged with first degree murder that the case be tried as a non-capital felony since, without more, all first degree murder cases are properly tried as capital cases. G.S. 14-17.

3. Criminal Law § 135.3; Jury § 7.11— first degree murder—death qualification of jury—no denial of impartial jury

A bifurcated trial in capital cases requiring the jury to be "death qualified" does not result in a "guilt prone" jury, thereby denying a defendant the right to trial by an impartial jury.

4. Criminal Law § 102.4— remark by prosecutor—impropriety cured by court

Any impropriety in the prosecutor's remark, "I like these jurors, Your Honor," was cured when the court admonished the prosecutor that it was not a question of whether he personally liked them but whether he passed them.

5. Jury § 6.4— "backbone" to impose death penalty—question by prosecutor

The trial court did not err in failing to sustain defendant's objection to the prosecutor's inquiry as to whether a juror had the "backbone" to impose the death penalty where the prosecutor was merely attempting to determine, in light of the juror's apparent equivocation, whether she had the strength of her convictions and could comply with the law and return a sentence of death if the evidence so required.

6. Jury § 6.4— questions concerning juror's writing of paper on capital punishment

Defendant was not prejudiced by the prosecutor's questions to a prospective juror concerning the details of a paper which she had written on capital punishment.

7. Criminal Law § 71— shorthand statement of fact

An officer's testimony that a mark in the shoulder of the road behind the victim's truck "appeared to have been made by a car tire" was competent as a shorthand statement of fact although the testimony may have had only slight probative value because there was no showing that the mark corresponded to the tires on defendant's car.

8. Criminal Law § 89.2— admissibility of license plate for corroboration

In a prosecution of defendant for the first degree murder of her husband, a South Carolina license plate discovered in a garbage can behind the house of defendant's lover was admissible to corroborate defendant's statements to officers that her lover and another man had placed a South Carolina tag on her car a short time prior to the murder and removed it a short time after the murder, although there was no showing that the recovered license plate was the same one used on the night of the murder.

9. Criminal Law § 57— alleged murder weapon—broken mainspring—cause of break

The trial court did not err in the admission of the alleged murder weapon, a shotgun, although the mainspring was broken when the shotgun was recovered. Moreover, a firearms expert was properly permitted to testify that simply firing the weapon might break the mainspring.

10. Criminal Law § 99.4— remark of trial court—no expression of opinion

When the prosecutor requested that defendant be instructed to watch him, not her lawyer, during questioning, the trial court did not commit error in responding that this was being done in the presence of everybody in the courtroom and that this was "part of her makeup on the stand, to be judged by the jury as she testifies."

11. Criminal Law § 75.2— confessions not result of illegal arrest or coercion

The evidence supported the trial court's determination that nine statements given by defendant to law officers with her attorney's acquiescence, at least four of which were in the presence of her attorney, were not fruits of an illegal arrest and were voluntary and not the result of "subtle psychological coercion" or improper inducements of fear and hope.

12. Criminal Law § 80.2— refusal to permit advance corroboration

The trial court did not err in refusing to permit advance corroboration of defendant by pre-arrest statements she had made to an SBI agent where there was no effort to introduce the pre-arrest statements when defendant did take the stand, and following her testimony, defendant was given an opportunity to recall the SBI agent.

13. Criminal Law § 102— right to opening and closing arguments

Where defendant offered evidence at trial, the prosecution had the right to make the opening and closing arguments to the jury.

14. Criminal Law § 76.1— confessions—refusal to give instructions concerning admissibility

The trial court did not err in refusing to give defendant's requested instructions that her confessions should be disregarded if they were the product of promises or threats or were otherwise procured by inquisitorial compulsion, that the jury should disregard the confessions if they were suggested by the district attorney or law enforcement officers under circumstances which might imply that the police were acting under instructions of the district attorney, or that the jury could not consider the statements if the prosecution had not produced substantial independent evidence on the crime charged, since the proffered instructions raised issues concerning the admissibility (i.e., voluntariness) of defendant's confessions, and such issues were for the court and not the jury to resolve.

DEFENDANT appeals pursuant to G.S. 7A-27(a) from a life sentence upon her conviction of murder in the first degree. Judgment was entered by *Britt, J.*, at the 16 August 1982 Special Criminal Session, Superior Court, SCOTLAND County. Heard in the Supreme Court 7 June 1983.

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

Donald M. Dawkins, for defendant-appellant.

FRYE, Justice.

Defendant was convicted of the 12 February 1982 murder of David Floyd Hinson. The victim was the defendant's husband. David Hinson's body was discovered in his pickup truck at approximately 10:30 p.m. on 12 February 1982. An investigation of the scene disclosed the following physical evidence: Two shotgun waddings were discovered near the body. There was a large hole in the rear window of the truck. There were "gouge" marks in the dirt shoulder of the road behind the truck. The victim appeared to have been shot in the back with a shotgun.

Beginning on 18 February and continuing until 16 July, the defendant gave numerous statements to law enforcement officers. Each of these statements was given either with the acquiescence or in the presence of her attorney. Details of the events

preceding the murder unfolded with each statement. To summarize briefly, it appears that the defendant and a co-worker, Fred Barfield, were next door neighbors, living in the Town of Wagram in Scotland County. They became lovers. Barfield was acquainted with Jack McIntyre. McIntyre was from Hartsville, South Carolina, but had resided for some time at a prison camp at Wagram. Barfield and the defendant determined to kill the defendant's husband. They enlisted the help of McIntyre. In defendant's words, the following took place:

> Sometime in June 1981, Fred call Jack McIntyre and ask him if he could do him a favor. He then discuss the killing of David. Fred talk with him on several occasion about this. In Sept. Fred got Jack gun and started to practice at the garden. Fred was going to do it himself (to kill David). I told him (Fred) that he couldn't do that.
>
> In Dec. things got worst. Fred call Jack and made plans for he and I to meet him in Bennetvill, S.C. we did and Jack said that he would have to have $25,000. That I could give it to him in 3 months. The money was for the killing of David.
>
> In Jan. I talk to Jack on the phone. Fred gave me a number to call him in Laurinburg. He ask me how were things going and I told him worst. He told me about the money and I told him that I didn't have it and he said, he would get it later.
>
> In Jan. I pick up Fred at the mill and we made a dry run. We left J. P. Stevens to turn at Creeds lake road and then to Lee's Mill Rd. and then turn to Highland Rd. Because Fred suppose to do it himself (to kill David). He couldn't because I told him not to. He then in turn call Jack again and so then made the plans. On Feb. 11, Fred call me and said that I would have to ride for the purpose of not taking.
>
> I told Fred not to do it because they put him in prison. And we had to close of a friend-ship.
>
> On Thur. (Feb. 11) night Fred call me at 10:15 p.m. and said that I would have to ride and so for me to pick him up at 9:30 p.m. (on Fri). I left the house at 9:30 p.m., pick him up (at J. P. Stevens) and when to creeds pond and pick Jack up. I got in the back seat, Fred drove, Jack got out of his El

Camaro and put the S.C. license plate on my car. I don't know who put the plates on, but the S.C. plate belong to Fred, which he had bought a red Cadillac from S.C. Both were at the trunk of my car. Fred then drove to Lee's Mill Rd. turn on Highland Rd. Jack get the gun out of his car and carry in to my car, along with the blue light. Fred drove down Highland road and didn't meet David so he turn around and drove some distance, when he met him (David) Fred turn around and follow him (David) and pull him (David) over and Jack got out and shot him. The blue light was cut on. I did not see who cut it on. We then turn around and went the same direction. We turn down Lee Mill Rd. Jack throw the shell out just befor the creek, then we turn to Creeds pond road and Jack throw the gun in the Creeds pond. After throwing the gun out Fred drove Jack to his car and took off the license plate. Jack cared the blue light with him. I in turn took Fred back to the plant. Fred cared the plates with him. He told me to call him when I got home. . . .

The reason that Fred and I had to ride, because we didn't have any up front money, and Jack said that we had to go so to keep the money in line. He (Jack) also told me that if I didn't pay. He would be looking for me. Sometime at 9:55 p.m. on Fri. Feb. 12, Jack shot David. Jack got out of the car and walk to the back of the truck and shot David.

Pursuant to a warrant, a search of Barfield's premises was conducted where law enforcement authorities discovered a South Carolina license plate in a garbage can behind the house. Based on information provided by the defendant, a shotgun was found in Creed's Pond where she indicated the murder weapon had been thrown. However, the mainspring of the shotgun was broken and no connection between the shotgun pellets in the victim's body or the wadding found beside the body could be made to the gun. To further corroborate defendant's statements, testimony at trial revealed that several long distance phone calls had been made from the defendant's residence to McIntyre's residence in Hartsville, South Carolina.

Defendant testified on her own behalf at trial. She repudiated all statements made prior to trial, denied being present at the scene of the crime, and offered the testimony of her two daughters as alibi witnesses.

Defendant's sixty-seven assignments of error, many of which have been expressly abandoned, fall into numerous broad categories which include rulings on pre-trial motions; rulings made during the jury selection process; rulings during trial as to certain evidentiary matters; rulings related to the admissibility of defendant's numerous pre-trial statements; issues concerning jury arguments; rulings related to requests for instructions; and rulings on post verdict motions. Upon a searching review of the record and trial transcript and careful consideration of those assignments of error brought forward and argued, we conclude that the defendant received a fair trial free of prejudicial error.

I. RULINGS ON PRE-TRIAL MOTIONS

[1] Defendant first assigns as error the trial court's failure to dismiss the indictment for murder in the first degree, arguing that the indictment did not adequately inform her of the facts and material elements of the offense charged. The indictment charged that:

> Anne Speight Hinson late of the County of Scotland on the 12th day of February 1982, with force and arms, at and in the said County, feloniously, wilfully, and of his malice aforethought, did kill and murder David Floyd Hinson contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State.

The indictment appears in the form approved by G.S. § 15-144 and is in all respects proper. *State v. May*, 292 N.C. 644, 235 S.E. 2d 178, *cert. denied*, 434 U.S. 928 (1977).

[2] Prior to trial, defendant filed motions requesting "an Order declaring that this case . . . be tried as a non-capital felony," and "that death qualification voir dire questions not be allowed as being unconstitutional . . . ." The trial judge denied the motions.

With respect to defendant's first motion, G.S. § 14-17 provides:

> A murder which shall be perpetrated by means of poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate, and premeditated killing, or which shall be committed in the perpetration or attempted perpetration of any arson, rape or a sex offense, robbery, kid-

napping, burglary, or other felony committed or attempted with the use of a deadly weapon shall be deemed to be murder in the first degree, *and any person who commits such murder shall be punished with death or imprisonment in the State's prison for life as the court shall determine pursuant to G.S. 15A-2000.* (Emphasis added.)

Thus, without more, all first degree murder cases are properly tried as capital cases.

[3] With respect to defendant's second motion, we have repeatedly rejected the argument that a bifurcated trial in capital cases, requiring the jury to be "death qualified," results in a "guilt prone" jury, thereby denying a defendant the right to trial by an impartial jury. *See State v. Warren*, 309 N.C. 224, 306 S.E. 2d 446 (1983); *State v. Franklin*, 308 N.C. 682, 304 S.E. 2d 579 (1983); *State v. Hill*, 308 N.C. 382, 302 S.E. 2d 202 (1983). Defendant here offers neither evidence nor argument to require reconsideration of the well-established principles and concomitant reasoning set forth in the above cited cases. The motion was properly denied.

II. Rulings During Jury Selection Process

Under three separate assignments of error, defendant challenges the propriety of certain comments made by the prosecutor during the jury selection process. She variously describes the prosecutor's conduct as "showy," theatrical, and unfair. Specifically, defendant objects to the prosecutor's comment respecting the first full jury panel, to wit: "I like these jurors, Your Honor." Secondly, during jury selection, an alternate juror indicated that although she believed the death penalty necessary, it was "not something [she] could do." The prosecutor responded, "You think it's necessary, but you just don't have backbone to do it, is that what you are saying?" He then thanked the juror for her "honesty," because it "save[d] the Clerk a lot of work." The Clerk of Court was in the process of determining when the juror had previously served. Finally, defendant objects to an incident which took place during the questioning of a juror who was later peremptorily excused by the defendant. The prosecutor elicited from this juror the fact that she had written a paper on capital punishment and later questioned the juror concerning the details of the paper. We will discuss seriatim each of these assignments of error.

[4] Following the prosecutor's comment that he "liked" the jurors, the trial judge admonished: "It's not a question of whether or not you personally like them. It's a question of whether or not you have passed them. I will ask you to do so." Any impropriety in the prosecutor's remark was thereby cured. *See, e.g., State v. Woods*, 307 N.C. 213, 297 S.E. 2d 574 (1982).

[5] With respect to the failure of the trial court to sustain defendant's objection to the prosecutor's inquiry as to whether a juror had the "backbone" to impose the death penalty, we find no prejudicial error. The prosecutor was merely attempting to determine, in light of the juror's apparent equivocation, whether she had the strength of her convictions and could comply with the law and return a sentence of death if the evidence so required. *See State v. Oliver*, 309 N.C. 326, 307 S.E. 2d 304 (1983). We would, however, urge the prosecutor to comport his language to the dignity of the courtroom.

[6] We have reviewed that portion of the transcript dealing with the prosecutor's questioning of Juror Hamby concerning her paper on capital punishment. Although it appears that the prosecutor may have been searching the juror for information favorable to the cause of capital punishment, the juror was not helpful. The "paper" was merely a four page theme, based on little outside reading, and contained no citations of authority. The juror was not asked, nor did she volunteer information concerning the substance of the paper. The defendant has failed to show how she was prejudiced by the mere asking of the questions. We find nothing in these comments or questions sufficiently prejudicial to warrant the granting of a new trial.

III. EVIDENTIARY QUESTIONS

[7] Defendant contends that the trial judge erred in overruling her objection and motion to strike the following statement made by Detective Patterson, the crime scene investigator. Detective Patterson testified that "[b]ehind the [victim's] truck, on the ground, approximately six feet behind the truck, there was a mark, skid mark, or gouge like place in the shoulder of the road that appeared to have been made by a car tire."

This testimony was admissible. As the crime scene investigator, Detective Patterson was merely describing what he

observed. This he was permitted to do. *State v. Jones*, 292 N.C. 255, 232 S.E. 2d 707 (1977). The witness' statement that the mark "appeared to have been made by a car tire" qualifies as a shorthand statement of fact. *State v. Joyner*, 301 N.C. 18, 269 S.E. 2d 125 (1980); *State v. Smith*, 300 N.C. 71, 265 S.E. 2d 164 (1980).

Defendant, however, challenges the probative value of the reference to the skid mark and notes that there was no showing that the mark corresponded to the tires on defendant's car. Assuming *arguendo* that the reference had slight probative value, defendant has failed to show any prejudicial effect warranting exclusion. Defendant acknowledges that the witness never attempted to compare the mark he observed at the crime scene to the tires of any specific vehicle. *Compare State v. Silhan*, 302 N.C. 223, 275 S.E. 2d 450 (1981). The trial court properly overruled defendant's objection.

[8] Defendant next assigns as error the admission into evidence of the South Carolina license plate discovered in a garbage can located behind Fred Barfield's house. Defendant argues that the State did not provide a sufficient foundation prior to the introduction of the plate into evidence and again challenges the probative value of this evidence.

Following the introduction of the South Carolina license plate into evidence, the State introduced defendant's statements in which it was revealed that Barfield and McIntyre had placed a South Carolina tag on defendant's car a short time prior to the murder and removed it a short time after the murder. There was no showing at trial, however, that the license plate recovered was the same one used on the night of the murder.

Certainly the discovery of the South Carolina license plate was relevant as tending to corroborate the defendant's statements. Its admission into evidence prior to the introduction of defendant's statement was premature. However, "when admissibility of evidence depends upon some preliminary showing, [the trial judge may] permit its introduction upon counsel's assurance that such showing will be forthcoming." 1 Brandis on North Carolina Evidence § 24 (1982); *State v. Duncan*, 282 N.C. 412, 193 S.E. 2d 65 (1972). Furthermore, a lack of a later foundation for prematurely admitted evidence, if the evidence is of little significance, will not be regarded as prejudicial. *See State v.*

Lyles, 298 N.C. 179, 257 S.E. 2d 410 (1979). Where, as here, the evidence served merely a corroborative purpose, its significance was clearly diminished. Under these circumstances, failure to show that the license plate found was that described in defendant's statement goes to the weight of this evidence, rather than its admissibility.

[9] Defendant challenges the admissibility of the alleged murder weapon, a shotgun, into evidence and contends that the trial court erred in allowing certain opinion testimony respecting the condition of the shotgun. Both contentions are premised on the fact that the mainspring on the shotgun was broken when it was recovered from Creed's Pond. Defendant argues that the State was erroneously permitted to question a firearms expert as to what might cause a mainspring failure. Over objection the witness answered, "They could break." The witness also answered affirmatively when asked whether simply firing the weapon might break the mainspring. Defendant offers this Court no guidance as to why the questions were improper or the answers prejudicial. The testimony was within the permissible scope of the witness' expertise. *See State v. Miller*, 302 N.C. 572, 276 S.E. 2d 417 (1981). Nor do we find erroneous the admission of the shotgun itself into evidence, despite defendant's argument that the "admission of the shotgun that had the faulty mainspring gave the District Attorney something he could pass to and point at the jury so as to further inflame them and prevent them from using their rational thinking as to how impossible it was for [the shotgun] to be the murder weapon." Defendant's argument goes to the weight of this evidence and not to its admissibility. *See State v. Joyner*, 301 N.C. 18, 269 S.E. 2d 125 (1980).

Finally, defendant argues that the trial court erred in the manner in which it permitted the prosecutor to cross-examine the defendant. Defendant directs our attention to two instances during her cross-examination in which the prosecutor allegedly questioned her improperly. The rule is well established that the scope of cross-examination rests largely within the discretion of the trial court, and its rulings thereon will not be disturbed absent a clear showing of abuse of discretion. *State v. Newman*, 308 N.C. 231, 302 S.E. 2d 174 (1983). Our review of the transcript, particularly those portions of defendant's cross-examination to which she objects, discloses no erroneous rulings.

[10] Defendant further objects to the trial judge's remarks following the prosecutor's request that defendant be instructed to watch him, not her lawyer, during questioning. The trial judge responded, "Well, this is being done in the presence of everybody in this courtroom, and—I won't try to control her eyes. That is part of her makeup on the stand, to be judged by the jury as she testifies." We consider the trial judge's response appropriate under the circumstances.

IV. ADMISSIBILITY OF PRE-TRIAL STATEMENTS

[11] During the six months following the murder of defendant's husband, she gave a total of nine statements to law enforcement authorities, six of which were given following her arrest, and each one supplying more detail than those preceding it. From the record two important facts emerge concerning these statements. First, it appears that at all times prior to trial it was the defendant's intention to cooperate fully with law enforcement authorities on the understanding that in return for her cooperation and testimony against Barfield and McIntyre, a plea arrangement would follow. Thus, all of the defendant's statements were made with the acquiescence of her attorney and, in the case of at least four of the statements, in the presence of her attorney. In addition, the trial court conducted extensive *voir dire* hearings prior to the admission of these statements, following which he made numerous findings of fact and concluded that each statement was freely and voluntarily given. Nevertheless, the defendant now argues that all six inculpatory statements given after her arrest were erroneously admitted into evidence because they were fruits of an illegal arrest, were not voluntary but were, rather, the result of "subtle psychological coercion," and were based on improper inducements of fear and hope.

Defendant was arrested pursuant to a validly issued warrant based on information gleaned from the scene of the crime together with two statements made by the defendant which strongly suggested her complicity in the murder. Furthermore, our review of the record discloses no evidence of improper or coercive methods employed during questioning. To the contrary, the evidence fully supports the trial judge's findings of fact. The findings support the trial judge's conclusions of law that, under the totality of the circumstances, all of the defendant's state-

ments were voluntary and admissible. *Frazier v. Cupp*, 394 U.S. 731, 89 S.Ct. 1420, 22 L.Ed. 2d 684 (1969); *State v. Schneider*, 306 N.C. 351, 293 S.E. 2d 157 (1982). Defendant's arguments are simply without merit.

[12] Defendant's first three statements concerned some exculpatory information which the defendant attempted to introduce through the testimony of SBI Agent Snead. Defendant argues that it was error to exclude this testimony as it tended to corroborate her trial testimony. At the time Agent Snead took the stand, however, the defendant had not yet testified. While it is true that the trial judge may admit corroborative evidence prior to the testimony of the testifying witness, *State v. Lyles*, 298 N.C. 179, 257 S.E. 2d 410 (1979), a failure to allow advance corroboration absent a request cannot be considered erroneous. *State v. Westbrook*, 279 N.C. 18, 181 S.E. 2d 572 (1971), *death penalty vacated*, 408 U.S. 939 (1972). There is no right to corroboration in advance. When defendant eventually took the stand, no effort was made to introduce the three pre-arrest statements into evidence. Indeed, during a lengthy direct-examination, an exhaustive cross-examination, and a short redirect-examination, defendant only testified concerning all inculpatory statements in an effort to repudiate them. Following her testimony, the defendant was afforded an opportunity to recall Agent Snead. She declined to do so. Under these circumstances, defendant has failed to show error on the trial judge's part in refusing to permit advance corroboration.

V. JURY ARGUMENT

[13] Defendant raises two questions concerning jury arguments which took place at the guilt phase of the trial. She first contends that the trial judge permitted the prosecutor to make improper arguments to the jury. We have reviewed each statement alleged to have been "improper" and find no error. The prosecutor merely argued the law and the facts in evidence and reasonable inferences to be drawn therefrom. His closing argument remained well within the bounds of propriety. He presented the State's case "with earnestness and vigor, using every legitimate means to bring about a just conviction." *State v. Hockett*, --- N.C. ---, ---, --- S.E. 2d, ---, --- (12-6-83); *State v. Craig*, 308 N.C. 446, 302 S.E. 2d 740, *cert. denied*, --- U.S. ---, 104 S.Ct. 263, 78 L.Ed.

2d 247 (1983). Defendant, however, further argues that the objected to portions of the State's argument were prejudicial in that, having been denied the right to the last argument, she was unable to refute them. In fact, as her second contention, defendant assigns error to the trial court's denial of her motion to have the final argument. As defendant offered evidence at trial, the prosecution had the right to make the opening and closing argument to the jury. Superior and District Court Rule 10; *See State v. Taylor*, 289 N.C. 223, 221 S.E. 2d 359 (1976). The contentions are without merit.

VI. JURY INSTRUCTIONS

[14] Defendant contends that the trial court erred in denying certain of her requested jury instructions during the guilt phase of the trial. For the most part, the instructions given were essentially in accordance with those requested. Defendant has therefore failed to show prejudice. The trial judge, however, gave only the following instruction concerning defendant's confessions:

> Now, there is evidence in this case which tends to show that the defendant, Anne Speight Hinson, confessed that she was present when the killing charged in this case was done. If you find that the defendant made that confession, then you should consider all the circumstances underwhich it was made in determining whether it was a truthful confession and the weight you will give it.

Defendant, on the other hand, in nine separate instructions, requested that the trial judge instruct the jury essentially as follows: that the statements would be inadmissible and should be disregarded if they were the product of promises, threats or otherwise "procured by inquisitorial compulsion"; that if the statements "were suggested by the District Attorney, or law enforcement officers, under circumstances which might infer that the police were acting under instructions of the District Attorney," the jury could disregard them; and that if the prosecution had not produced substantial independent evidence of the crime charged, the jury could not consider the statements.

The proffered instructions, for the most part, raise issues concerning the admissibility (i.e. voluntariness) of defendant's confessions, issues which are not for the jury to resolve. As we

stated in *State v. Jenkins*, 292 N.C. 179, 185, 232 S.E. 2d 648, 652 (1977):

> Neither do we find merit in defendant's contention that the trial judge erred by failing to instruct the jury as to the law relating to the voluntariness of defendant's confession. The language contained in *State v. Walker*, 266 N.C. 269, 145 S.E. 2d 833, supports our conclusion. There Justice Bobbitt (later Chief Justice), speaking for the Court stated:
>
> > . . . In *S. v. Davis*, 253 N.C. 86, 116 S.E. 2d 365, Higgins, J., in accordance with decisions cited in the quotation from *S. v. Rogers*, 233 N.C. 390, 64 S.E. 2d 572, said: "According to our practice the question whether a confession is voluntary is determined in a preliminary inquiry before the trial judge." After such preliminary inquiry has been conducted, the approved practice is for the judge, in the absence of the jury, to make findings of fact. These findings are made only for one purpose, namely, to show the basis for the judge's decision as to the admissibility of the proffered testimony. *They are not for consideration by the jury and should not be referred to in the jury's presence.* (Emphasis in the original.)
> >
> > If the judge determines the proffered testimony is admissible, the jury is recalled, the objection to the admission of the testimony is overruled, and the testimony is received in evidence for consideration by the jury. If admitted in evidence, it is for the jury to determine whether the statements referred to in the testimony of the witness were in fact made by the defendant and the weight, if any, to be given such statements if made. Hence, evidence as to the circumstances under which the statements attributed to defendant were made may be offered or elicited on cross-examination in the presence of the jury. Admissibility is for determination by the judge unassisted by the jury. Credibility and weight are for determination by the jury unassisted by the judge.

These principles have most recently been affirmed in *State v. Barnett*, 307 N.C. 608, 300 S.E. 2d 340 (1983). The trial judge prop-

erly denied defendant's requests for jury instructions on the voluntariness aspect of her confessions.

VII. Post Verdict Motions

Following defendant's conviction of murder in the first degree, she made the following motions: (1) motion in arrest of judgment; (2) motion to set aside the verdict; (3) motion for a new trial; and (4) motions for appropriate relief on the grounds that the court failed to dismiss the charge prior to trial; that the court's rulings were contrary to law with regard to motions made before or during trial, or with regard to the admission or exclusion of evidence; that the evidence at the close of all the evidence was insufficient to justify submission of the case to the jury; that the court erroneously instructed the jury; and that the verdict was contrary to the weight of the evidence. The motions were properly denied. We find substantial evidence of each essential element of the offense charged and of the defendant as the perpetrator of the crime. The denial of defendant's motion to dismiss was proper. *State v. Tysor*, 307 N.C. 679, 300 S.E. 2d 366 (1983). The motion to set aside the verdict for insufficiency of the evidence was addressed to the sound discretion of the trial judge. His ruling will not be disturbed on appeal absent a showing of an abuse of discretion. *Id.* We find no such showing in the instant case. Nor have we found error in defendant's trial which would provide a basis for granting her motions for appropriate relief. Defendant received a fair trial free of prejudicial error.

No error.

STATE OF NORTH CAROLINA v. GROVER FRANKLIN BAUGUSS

No. 554A82

(Filed 2 February 1984)

1. Criminal Law § 75.8— no relation between possibly tainted statement and two subsequent admissions

In a prosecution for murder, there was nothing in the record which supported a finding that a statement to an officer who administered a polygraph test either tainted or bore any relation to two subsequent statements made to two other officers where neither the State nor the defendant included a

substantive account of the admission made to the polygraph operator; the polygraph statement was not introduced at trial and used against defendant; and there was no showing that the statement was inculpatory. Further, assuming defendant did make an incriminating admission, there was no evidence presented to indicate that the admission was consistent with the subsequent statements.

2. **Criminal Law § 75.11— attorney's representation of defendant on other charges—waiver of attorney for present charges**

An attorney could not validly assert the defendant's Fifth and Sixth Amendment rights with regard to charges on which he did not represent the defendant, and defendant could validly waive the services of an attorney on the charges even though his attorney for the other charges told the sheriff that he did not want anyone talking to the defendant unless he, the attorney, was notified.

Justice EXUM dissenting.

APPEAL by defendant as a matter of right from the judgment of *Rousseau, J.*, entered at the 3 May 1983 Criminal Session, WILKES County Superior Court. Defendant was charged in indictments, proper in form, with first degree murder and armed robbery. The jury returned a verdict of guilty of first degree murder in the perpetration of a felony and Judge Rousseau imposed a sentence of life imprisonment.

In relevant part, the evidence for the State tended to show the following: On 30 December 1981, the deceased, Mark Absher, was working at Groce's Store in Wilkesboro, North Carolina. Between 9:45 and 10:00 a.m. on that day, William J. Howell, Jr. drove by the store and noticed a small blue foreign economy car parked at the gas pumps in front of the store. He returned to the store to buy gasoline approximately fifteen minutes later. The blue car was still parked in front of the store. Howell waited in his car for the car owner to return and move the car so he could drive closer to the gasoline pump. After about thirty seconds, Howell observed a man, whom he later identified as the defendant, walk from the store to the car. The person got in the car and left in a normal manner. Howell testified that the man had a mustache and long sideburns and was wearing a dark blue cap and a blue jump suit similar to bib overalls. Further, Howell noted that he did not see a gun or money, nor did he recall whether a pickup truck was parked nearby. When Howell drove beside the gas pump he determined the price was too high and left without ever getting out of his car.

About 10:35 a.m. Herbert Clonch stopped at Groce's Store. A man whom he later learned was Dr. Smith was pumping gas out front. As Clonch entered the store, he found Smith's young son standing in the doorway. The doctor followed Clonch into the store. The three discovered Mark Absher lying on the floor behind the counter. While Clonch checked for a pulse and heart beat, the doctor telephoned for an ambulance and the police. Upon finding no heart beat, Clonch decided the victim was dead. Clonch further testified that the cash drawer was closed.

Modesto Scharyj, a medical doctor who specializes in pathology, performed an autopsy on Absher at about 3:30 p.m. the same day. He concluded that Absher died from a single bullet wound to the head. It was his opinion that death ensued within a "very few minutes" after the infliction of the wound. The bullet entered behind the deceased's left ear and traveled in a slightly downward path. The deceased was twenty-two years old and five feet two and one-half inches tall.

No fingerprints of the defendant were found in the store. The cash register had no paper money in it and an accounting revealed approximately eighty dollars ($80.00) missing.

Chief of Police Delbert Wilson of Wilkesboro, testified that at about 1:00 p.m. on 5 February 1982 defendant made an incriminatory statement to him and Wilkes County Deputy Sheriff Gary Phillips. Defendant told them that he agreed to be a "look out" for a man named Mike Lewis who robbed and killed Absher. The Chief of Police testified that his department was unsuccessful in their attempts to locate Lewis.

Special Agent Steve Cabe of the State Bureau of Investigation testified that he interrogated the defendant at approximately 9:00 p.m. on the same day the defendant gave the statement to Chief of Police Wilson. Agent Cabe testified that the defendant told him a more detailed version of the defendant's involvement in the offense, but it was consistent with the statement made to Wilson and Phillips earlier the same day.

Defendant did not present any evidence.

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

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

Assistant Appellate Defender Malcolm Ray Hunter, Jr., for the defendant.

COPELAND, Justice.

Defendant brings forward and argues two assignments of error which he contends require a new trial. We find no error in defendant's trial.

In his first assignment of error defendant urges this Court to find error in the denial of his motion to suppress his inculpatory statements to the authorities. The defendant argues that the uncontradicted evidence showed that the statements were obtained in violation of defendant's *Miranda* rights,[1] specifically, his rights to remain silent and to have counsel present. Furthermore, he contends the trial court failed to resolve conflicts in the evidence presented at the hearing on the motion to suppress.

In this connection the defendant first argues that his two inculpatory statements made to Chief of Police Wilson and SBI Agent Cabe should have been suppressed for the following reasons:

(1) Defendant was not properly informed of his *Miranda* rights prior to the polygraph examination in which he made his first inculpatory statement and therefore, the subsequent statements to Chief Wilson and Agent Cabe were tainted by the initial statement.

(2) The defendant initially invoked his right to counsel under the Sixth Amendment of the United States Constitution through Attorney Paul Freeman and defendant's subsequent waivers were in violation of this right.

In order to properly address these issues, we must review the chain of events which led to the inculpatory statements. On 18 January 1982, the defendant was in custody in Horry County,

1. See *Miranda v. Arizona*, 384 U.S. 436, 16 L.Ed. 2d 694 (1966), which interpreted the Federal Constitution as affording a criminal defendant specific enumerated rights.

South Carolina. SBI Agent Cabe went to Horry County to discuss with the defendant the charges of obtaining property by false pretenses, which had allegedly occurred in Wilkes County and were unrelated to the Absher murder and armed robbery. At approximately 8:30 p.m. on 18 January 1982, Agent Cabe advised defendant of his *Miranda* rights. Defendant indicated that he wanted an attorney, so no further questions were asked. A few minutes later the defendant initiated a conversation in which he stated he wanted to talk with Agent Cabe without an attorney. After a written waiver of rights was executed, Agent Cabe and defendant discussed matters relating to the false pretense charges only.

The following day, after again being advised of his rights, the defendant was removed to the Wilkes County jail and charged with obtaining property by false pretense. He was not questioned about nor charged with murder and armed robbery.

On 21 January 1982 at approximately 2:30 p.m., Agent Cabe talked with the defendant at the jail about the murder of Mark Absher. Defendant was advised of his *Miranda* rights and he told Cabe at that time that he wanted to talk to him without an attorney. Whereupon, they talked for thirty to forty-five minutes. At that time, the defendant appeared to be in good health, coherent and responsive.

Paul Freeman, an attorney in Wilkes County, was appointed to represent the defendant on the false pretense charges, but not the murder charge. He met with the defendant on 25 January, 2, 3, and 4 February, 1982. At each meeting, Attorney Freeman informed the defendant of his rights. He advised him not to talk to a law enforcement officer. Attorney Freeman told the Sheriff of Wilkes County that he did not want the defendant to talk to anyone. He admitted to the Sheriff that he did not represent the defendant on the murder and armed robbery charges.

In the afternoon of 3 February 1982, Agent Cabe and Chief Wilson talked with the defendant. The defendant agreed to take a polygraph examination with regard to his 21 January statement involving a Tennessee pickup truck at the scene of the murder.

Thereupon, on 5 February 1982, the defendant was taken, with his consent, to Hickory, North Carolina for the purpose of

taking a polygraph examination concerning the Mark Absher murder and armed robbery. Prior to taking the test, SBI Agent Whitman presented the defendant with a standard polygraph waiver of rights form, which defendant signed. This waiver of rights form contained the *Miranda* rights. In addition, Agent Whitman told the defendant that he was not required to answer any question and could leave the room at any time because he was not in custody on the murder and armed robbery charges. The agent advised defendant of the questions he would ask him prior to the examination. At the conclusion of the first chart of the polygraph, Agent Whitman formed an opinion that defendant was being deceptive. Thereupon, he stopped the polygraph examination and told the defendant that they needed to talk. The defendant and Agent Whitman then talked from 10:46 a.m. until approximately 1:00 p.m. Agent Whitman testified that the inculpatory statement was made probably thirty minutes into this discussion.

About 1:00 p.m., Agent Whitman called in Deputy Phillips and Chief Wilson to talk to the defendant. Chief Wilson, in the presence of Deputy Phillips, began informing the defendant of his *Miranda* rights. Defendant told Chief Wilson that he did not need to read the *Miranda* rights to him because he was familiar with them. Nevertheless, defendant was required to remain quiet until the rights were read. According to witnesses for the State, the defendant waived his *Miranda* rights. The defendant then made a statement to Chief Wilson.

Later that night, the defendant gave a similar but more explicit inculpatory statement to Agent Cabe. Again defendant was read his rights prior to the taking of this statement.

[1] Defendant asserts that his Fifth Amendment rights were violated because his admissions to Chief Wilson and Agent Cabe were precipitated by an illegally obtained statement given to Agent Whitman. As a result of defendant's motion to suppress the inculpatory statements, the trial court conducted a voir dire hearing on the admissibility of the statements. In ruling on the motion to suppress, the trial court found that "at no time did Officer Whitman explain the *Miranda* rights to the defendant."

Assuming that the statement to Agent Whitman was made in violation of defendant's *Miranda* rights, we nevertheless find no

relation between that statement and his two subsequent admissions.

In order to conclude that the two subsequent admissions were in fact "fruits of the poisonous tree," pursuant to *Wong Sun v. United States*, 371 U.S. 471, 9 L.Ed. 2d 441 (1963), we must first find poison in defendant's statement made while in the polygraph examination room. From the record before us there remains no reasonable means for us to adequately determine whether the first statement tainted the latter two. Neither the State nor the defendant thought to include a substantive account of this alleged admission in the record. Furthermore, this polygraph statement was not introduced at trial and used against the defendant. We also find no showing that the statement was inculpatory. But assuming defendant did make an incriminating admission, there was no evidence presented to indicate that the admission was consistent with the subsequent statements. Finally, the possibility that the original statement caused defendant to give the later two statements, as defendant seems to contend, is but mere conjecture without appreciable facts to substantiate such a claim.

In essence, we are of the opinion that the record reveals nothing which supports a finding that the admissions to Chief Wilson and Agent Cabe were the tainted fruit of the polygraph statement.

[2] Also in connection with defendant's first assignment of error that his statement to the polygraph operator was illegally obtained, defendant contends that the law enforcement officials violated the rule promulgated by the United States Supreme Court in *Edwards v. Arizona*, 451 U.S. 477, 68 L.Ed. 2d 378 (1981). The *Edwards* rule requires that once a suspected criminal invokes his right to counsel, the interrogation must cease until counsel is provided unless the suspected criminal initiates further dialogue.

Defendant argues that he asserted his right to counsel and his right to remain silent through his attorney Paul Freeman. Freeman, who did not represent defendant on the murder and armed robbery charges, testified that he told the Wilkes County Sheriff that he did not want anyone talking to the defendant about the murder investigation or anything else unless he was notified. The Sheriff did not convey this message to the officials

in charge of that investigation. Freeman also testified that the defendant told him that he didn't want to take the polygraph.

The State presented evidence through the investigating officers that the defendant consistently waived his right to counsel. Agent Cabe testified that he and Chief Wilson explained the polygraph examination twice to defendant, and never did he indicate to them a reluctance to take the examination. Agent Cabe also related that during a conversation with Attorney Freeman, the attorney remarked that he did not "give a damn about the other cases" and that he was only representing the defendant on the false pretense charges.

We attach significance to the fact that Attorney Freeman represented the defendant in a matter unrelated to the Absher murder investigation. As the State points out, prior to defendant's inculpatory statements, defendant was not a suspect in the murder case, but was merely a witness cooperating with law enforcement officials in their investigation. We agree that if Attorney Freeman had represented the defendant on the murder and robbery charges, he could have controlled access to the defendant.

However, the law in this State is that a "defendant may waive the presence of an attorney in a case under investigation when the attorney represents him on an unrelated charge." *State v. Patterson*, 288 N.C. 553, 568, 220 S.E. 2d 600, 611 (1975), *modified*, 428 U.S. 904 (1976). We further held in *State v. Smith*, 294 N.C. 365, 241 S.E. 2d 674 (1978), that the fact that an attorney represents a defendant on an unrelated charge *does not* mean that he represents that defendant on all criminal charges.

In *Smith*, the defendant, at the time of his arrest for murder, was in jail awaiting trial on unrelated charges of forgery and armed robbery. An attorney represented the defendant on the forgery charges, but not the armed robbery charge. The defendant was interrogated by the district attorney, in the presence of his attorney, about information defendant claimed to have on a murder which the police were investigating. When the district attorney refused to bargain with the defendant, the interrogation ceased. Two days later, he incriminated himself which caused his arrest and subsequent conviction of murder. Chief Justice Sharp, speaking for the Court, rejected defendant's contention that the

presence of his attorney "was a prerequisite to a valid waiver of his right to remain silent and to have counsel present during any custodial interrogation." *Id.* at 373, 241 S.E. 2d at 679.

In the instant case, the defendant essentially appears to be advocating that we adopt a rule similar to the one first espoused by the New York Court of Appeals in *People v. Arthur*, 22 N.Y. 2d 325, 292 N.Y.S. 2d 663, 239 N.E. 2d 537 (1968). As we have previously held, this New York rule, "that a defendant in custody who is represented by counsel may not waive his constitutional rights in counsel's absence, is not the law in this State." *Smith*, 294 at 375, 241 S.E. 2d at 680. We hold that Attorney Freeman could not validly assert the defendant's Fifth and Sixth Amendment rights with regard to charges on which he did not represent the defendant.

It is uncontradicted that a criminal defendant's right to counsel under the Sixth Amendment attaches upon the institution of adversary judicial proceedings, be that "by way of formal charge, preliminary hearing, indictment, information or arraignment." *Kirby v. Illinois*, 406 U.S. 682, 689, 32 L.Ed. 2d 411, 417 (1972); *State v. Franklin*, 308 N.C. 682, 688, 304 S.E. 2d 579, 583 (1983).

At the time of defendant's statements to the polygraph examiner, the State had not initiated judicial proceedings against defendant for the Absher murder. The record indicates that when the defendant entered the polygraph test room, SBI Agent Whitman explained to him that "he was not in custody concerning the Mark Absher murder and that he was free to leave that room at any time. . . . [I]f at any time he decided he wanted to stop talking . . . he was free to leave."

We, therefore, are of the opinion that there was no violation of the *Edwards* rule in this case. The defendant's Sixth Amendment right to counsel in the Absher murder had not attached prior to defendant making inculpatory statements. Furthermore, the defendant had not invoked his right to counsel with respect to the murder investigation and charge.

Nevertheless, had the defendant invoked his rights to counsel and to remain silent, he still would have retained his prerogative to subsequently waive these rights and cooperate with the law

enforcement authorities. *U.S. v. Hart*, 619 F. 2d 325 (4th Cir. 1980); *State v. Fincher*, 309 N.C. 1, 305 S.E. 2d 685 (1983).

In *Jordan v. Watkins*, 681 F. 2d 1067 (5th Cir. 1982), *reh. den.*, 688 F. 2d 395 (1982), the Fifth Circuit Court of Appeals reasserted that an accused may validly choose to waive his rights and respond to questioning. The rationale for this recognized principle, as stated in *Jordan*, can be attributed to the United States Supreme Court opinion of *Michigan v. Mosley*, 423 U.S. 96, 46 L.Ed. 2d 313 (1975). There the court reasoned that "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 investigative activity, and deprive suspects of an opportunity to make informed and intelligent assessments of their interests." *Id.* at 102, 46 L.Ed. 2d at 320.

Further, the right to counsel can be waived without notice to an attorney. In *Brewer v. Williams*, 430 U.S. 387, 51 L.Ed. 2d 424 (1977), the Supreme Court, in excluding a confession made in the absence of retained counsel during a critical stage, held that the Sixth Amendment right to counsel could be waived without notice to the attorney. Mr. Justice Stevens writing for the court held:

> The Court of Appeals did not hold, nor do we, that under the circumstances of this case Williams *could not*, without notice to counsel, have waived his rights under the Sixth and Fourteenth Amendments.

Id. at 405-6, 51 L.Ed. 2d at 441.

Since we have determined that no violation of the *Edwards* rule occurred in the case *sub judice*, our next inquiry is whether the defendant's admissions were the result of a voluntary, knowing and intelligent waiver of his fifth and sixth amendment rights. This crucial question must be favorably resolved before a confession can be deemed admissible. *State v. Davis*, 305 N.C. 400, 290 S.E. 2d 574 (1982). In any case the validity of a waiver must be determined by analyzing "the particular facts and circumstances surrounding that case, including the background, experience and conduct of the accused." *Oregon v. Bradshaw*, --- U.S. ---, 77

L.Ed. 2d 405, 413 (1983) (quoting *North Carolina v. Butler*, 441 U.S. 369, 374-375, 60 L.Ed. 2d 286, 293 (1979) and *Johnson v. Zerbst*, 304 U.S. 458, 464, 82 L.Ed. 1461, 1466 (1938)); *State v. Rook*, 304 N.C. 201, 216, 283 S.E. 2d 732, 742 (1982), *cert. den.* 455 U.S. 1038 (1982).

The record discloses that the defendant was informed of his Miranda rights by the law enforcement officers at least three times before being taken to Hickory for the polygraph test. Each time he responded that he understood his rights. In his first encounter with officials, defendant asserted his right to counsel, but within minutes, upon his own initiative, waived that right. Thereafter, he never requested the presence of his attorney during questioning, nor did he refuse to answer any question. We note that defendant had been advised of his rights by Attorney Freeman on at least four occasions before taking the polygraph. The polygraph waiver form, which defendant signed was similar to the waiver forms encountered by defendant on previous occasions. Finally, according to Chief Wilson's testimony, the defendant, on 5 February 1982, prior to Chief Wilson informing him of his rights, "started explaining and making a statement." Upon asking defendant to wait until his rights were read, the defendant answered that the officers "didn't need to read them [the rights] to him because he was familiar with them."

The trial court, after an extensive voir dire hearing, concluded that defendant's two statements to Chief of Police Wilson and Agent Cabe were admissible, for the reasons that the defendant was fully advised of his constitutional rights according to the *Miranda* decision, no threats or promises or hopes of reward were made or given to the defendant and his statements were freely and voluntarily made.

This conclusion is based upon and supported by findings of fact that are well supported by the voir dire testimony. Accordingly, these findings and conclusions are binding upon this Court on appeal. *State v. Williams*, 308 N.C. 47, 301 S.E. 2d 335 (1983).

Defendant claims that the trial court's failure to resolve conflicts presented at the hearing on his motion to suppress was prejudicial error. Although the record reveals conflicting evidence, the trial court's findings of fact, as we have stated, were supported by substantial competent evidence. Therefore, we

will not disturb the trial court's ruling, regardless of the fact that evidence existed from which a different conclusion could have been reached. *Williams*, 308 at 60, 301 S.E. 2d at 344.

Under the second assignment of error the defendant contends that the court erred in denying the defendant's pretrial motion to prohibit death qualification of the jury, permitting the State to ask death qualification questions and allowing the State to strike for cause jurors opposed to the death penalty. The defendant argues that the process of death qualifying the jury prior to the guilt phase of a capital case and requiring the same jury to hear both the guilt and the penalty phase of the trial is unconstitutional. The defendant concedes that our Court has decided this claim against him in *State v. Avery*, 299 N.C. 126, 261 S.E. 2d 803 (1980) and has recently affirmed the *Avery* decision in *State v. Taylor*, 304 N.C. 249, 283 S.E. 2d 761 (1981), *cert. den.* --- U.S. ---, 77 L.Ed. 2d 1398 (1983) and *State v. Pinch*, 306 N.C. 1, 292 S.E. 2d 203 (1982). We have re-examined our position and reaffirm our previous holdings.

We conclude that the defendant received a fair trial free of prejudicial error.

No error.

Justice EXUM dissenting.

I disagree with the majority's position that the false pretense and the murder cases were unrelated. The majority correctly notes "that if attorney Freeman had represented the defendant on the murder and robbery charges, he could have controlled access to the defendant." Because, under the circumstances here, the murder and robbery charges were related, I believe that at the time Freeman advised Sheriff Gentry that no one should talk to his client, Freeman was in fact speaking for his client on both the false pretense and the murder charges, although he had only been formally appointed in the false pretense cases. At least the evidence before the trial court at the voir dire hearing on admissibility was such that the trial court should have resolved any questions of fact regarding the relationship of the false pretense cases to the murder case.

Freeman was appointed to represent the defendant in the false pretense cases on 25 January 1982. Before this appointment, SBI Agent Cabe had discussed with defendant the murder case on 21 January 1982. Defendant had admitted his guilt in the false pretense cases to Cabe and had told Cabe that he knew something about the Absher murder. According to Freeman's testimony, Cabe told Freeman that defendant "had been cooperating with them in another matter." Freeman asked if it was serious and Cabe said, "Yes, it is a murder, a homicide." Freeman then discussed with Cabe the possibility of a plea bargain in the false pretense cases if defendant would cooperate with the prosecution in the murder case. Cabe was receptive to this idea. Thereafter, Freeman spoke to defendant and defendant admitted that he had made a statement to law enforcement investigators about "another case." Freeman advised defendant not to talk with anybody. Freeman then learned that the other murder case involved the Absher killing.

Freeman spoke with Sheriff Gentry, one of whose deputies was involved in the Absher murder investigation. Gentry told Freeman that he understood defendant "had been cooperating" in the murder investigation. Freeman told Gentry that he "didn't want anybody talking to Mr. Bauguss about that or anything else unless I was notified." Although Sheriff Gentry advised Freeman that the murder investigation was "not my case," the sheriff agreed to "pass the word along."

On 4 February defendant advised Freeman that Agent Cabe and Chief of Police Delbert Wilson wanted him to take a polygraph examination "about the Absher matter." Freeman advised defendant that he did not have to take the polygraph and that if he did not want to take it, he should not take it. Defendant told Freeman that although he had earlier agreed with the officers to take the polygraph, "he had changed his mind and he didn't understand why they wanted him to take it." Freeman told defendant that he would "try to find out more about it."

Later on 4 February Freeman received a call from Chief Wilson. During this telephone conversation Freeman advised Wilson that defendant did not want to take the polygraph and he asked Chief Wilson "why it is that you want him to take the polygraph." Chief Wilson said, "It is part of our investigation." Freeman ad-

vised the chief that defendant was "not going to take the polygraph test or talk to anybody until you tell me what this is all about." Chief Wilson replied that Freeman did not represent defendant on anything but the false pretense cases. Freeman replied, "No I don't represent him on anything else, Delbert, but it is my duty as an attorney and I have a client and I see he is in a situation where he may get himself in danger, then I have to look out for his best interest whether I represent him on that particular charge or not." Chief Wilson refused to tell Freeman why they wanted defendant to take a polygraph and what the subject of the polygraph examination would be. Freeman ended the conversation by telling the chief, "You think about it and let me know but until you let me know, Bauguss is not going to take a polygraph and he is not going to talk to anybody and I don't want anybody talking to him."

On 5 February 1982, without the knowledge of defendant's attorney, Freeman, the investigators took defendant to Hickory, North Carolina, where the polygraph was administered. It concerned the Absher murder case. The polygraph operator, Whitman, testified that the examination indicated deception on defendant's part. Whitman said, "At this time I stopped the . . . polygraph and told him I felt like we needed to talk." Whitman and defendant then talked from 10:46 a.m. until approximately 1 p.m. "Less than thirty minutes" into the conversation, defendant made a statement to Whitman "implicating himself in the death of Mark Absher."

If Freeman's testimony is true, the false pretense cases were indeed related to the murder case. Freeman was trying to work out a plea bargain in the false pretense cases in return for defendant's cooperation in the murder case. Although Freeman had not formally been appointed as counsel in the murder case, he was in fact advising and speaking for defendant with regard to it. Under these circumstances, I think Freeman had the right to control access to his client. When law enforcement officers ignored Freeman's admonitions and continued to interrogate defendant about the Absher murder case despite these admonitions, they deprived defendant of his Sixth Amendment right to counsel.

Sheriff Gentry admitted that Freeman told him that "he didn't want anybody talking with his client, Mr. Bauguss." Sheriff Gentry replied, "Okay." Although the sheriff knew that one of his deputies was involved in the Absher murder investigation and that other agencies were also involved, he did not pass on Freeman's request to his own investigating deputy, or anyone else.

It is, therefore, uncontradicted that Freeman advised the sheriff that he did not want any officers talking to his client. I think the sheriff had a duty to pass this admonition along to others whom he knew were involved in the Absher murder investigation. Since Freeman's conversation with Sheriff Gentry is not contradicted, this is enough to conclude that defendant's Sixth Amendment right to counsel was violated.

I recognize that Police Chief Wilson denied that Freeman ever told him not to talk to defendant. Chief Wilson said that Freeman told him only that Mr. Bauguss should not take the polygraph unless and until he was fully advised of the reasons for it. Neither did Agent Cabe corroborate Freeman's testimony regarding the plea bargain discussion.

There is, therefore, some conflict in the evidence regarding what Freeman said to Chief Wilson and what he said to Cabe. The trial court did not resolve this conflict. If resolution of the conflict is necessary in order to determine whether defendant was denied his right to counsel, then I think the matter should be remanded to the trial court for that purpose.

Justice FRYE joins in this dissent.

STATE OF NORTH CAROLINA v. JAMES HARDEN HORNER

No. 189A83

(Filed 2 February 1984)

1. **Criminal Law § 15.1— pretrial publicity—denial of venue change**

The trial court in a rape case did not err in the denial of defendant's motion for a change of venue because of pretrial publicity in the county of trial where defendant supported his motion with only two newspaper articles which referred to defendant's escape from custody and not to the rape charges, and where defendant's trial was held about three and one-half months after these publications appeared.

2. **Criminal Law § 91.6— time to review discovery materials—denial of continuance**

The trial court did not err in the denial of defendant's motion for a continuance made on the ground that defense counsel needed additional time in which to review discovery materials where defendant filed no affidavit in support of his motion; defendant failed to give specific reasons to support his assertion that counsel had not had sufficient time to examine the discovery materials; and defendant failed to introduce into evidence the discovery materials defense counsel allegedly needed additional time to review.

3. **Searches and Seizures § 44— denial of motion to suppress—oral rulings at trial—later written order**

The trial court's order denying defendant's motion to suppress several items of physical evidence was not improperly entered "out of session and out of district" where the court passed on each part of the motion to suppress in open court as it was argued and later reduced its ruling to writing, signed the order, and filed it with the clerk. Furthermore, defendant failed to show prejudice from the failure of the trial court to make the findings at the time the rulings were made during the suppression hearing. G.S. 15A-977(d), (f); G.S. 15A-1443(a).

4. **Searches and Seizures § 21— affidavit for search warrant—hearsay information from another officer**

An officer's affidavit based on information reported to him by another officer in the performance of her duties was sufficient to support issuance of a warrant to search defendant's car for a rug allegedly used during a rape.

5. **Criminal Law § 113.1— recapitulation of the evidence**

The trial judge is not required to recapitulate the evidence but is only required to summarize enough evidence to allow him to explain and apply the appropriate rules of law. G.S. 15A-1232.

6. **Criminal Law § 163— failure to object to instructions—waiver of objection**

Failure of a party to object to the jury charge before the jury retires constitutes a waiver of any such objection. App. R. 10(b)(2).

7. Criminal Law § 163— court's summary of the evidence—plain error rule inapplicable

Although the trial court's summary of the evidence approached the irreducible minimum for application of the law to the evidence, the "plain error" rule will not be applied to the court's summary, particularly in light of the court's invitation to counsel to request further instructions.

8. Rape and Allied Offenses § 6.1— first degree rape—refusal to submit attempt to rape

The trial court in a first degree rape prosecution did not err in refusing to submit the lesser included offense of an attempt to commit first degree rape where the nine-year-old victim testified to a completed act of vaginal intercourse, and defendant in his testimony merely denied that he had sexual intercourse with the victim.

APPEAL by defendant from judgments entered by *Barnette, J.*, at the 3 January 1983 Criminal Session of Superior Court, CHATHAM County. Heard in the Supreme Court 7 November 1983.

Defendant was tried and convicted of two charges of rape in the first degree. From consecutive sentences of imprisonment for life, defendant appealed.

The state's evidence, in brief, showed: Defendant is the father of nine-year-old Angela Horner. He and Angela's mother, Carolyn, are divorced; Carolyn has remarried and has custody of Angela. Defendant is now married to Gilda Horner. Defendant was released from prison a short time before the alleged rapes occurred.

On Friday, 20 August 1982, defendant and Gilda picked up Angela and her brother Robbie for weekend visitation. Defendant had been drinking heavily for about a month before this date. He consumed a large quantity of beer before picking up the children. During the return to Siler City, Gilda took over the operation of the car because of defendant's drinking. They arrived back at defendant's home after midnight. Defendant then asked Angela to go to the store with him, and they left the house in defendant's car. He proceeded down a dirt road, stopped, took Angela out of the car, undressed her, and placed her upon a dirty red rug which he had removed from the car trunk. He then had sexual intercourse with her. Afterwards, they drove to the store and bought potato chips and Mountain Dew drinks. Defendant drove back to the same dirt road and again had sexual intercourse with Angela.

He used her Mountain Dew drink to wash the blood from between her legs and took her home. Two days later, Angela was taken to the Alamance Hospital and was examined and treated by a doctor. She was also examined and questioned at Duke Hospital. The medical evidence indicated that Angela had a tear in her vagina which required repair by sutures with Angela under a general anesthesia. In the doctor's opinion, the injuries to Angela were caused by the forced entry of a large object such as a penis into her vagina.

Defendant's evidence showed: On the day in question he had consumed a large quantity of beer and three "hits of speed." On Saturday morning, 21 August 1982, defendant took the red rug out of the car to use while he worked on the car. Angela sat on the rug at that time.

Defendant denied having sexual intercourse with Angela. When questioned at trial about the alleged events of Friday night, defendant replied "Not as I know of." (For example, "Did you get in your car with your daughter and head towards the store?" "Not as I know of.") On cross-examination, defendant stated that he did not remember anything after he turned the car over to Gilda to drive back to Siler City.

Rufus L. Edmisten, Attorney General, by Myron C. Banks, Special Deputy Attorney General, for the state.

Adam Stein, Appellate Defender, by Lorinzo L. Joyner, Assistant Appellate Defender, for defendant.

MARTIN, Justice.

[1] Defendant first argues that the trial court should have allowed his motion for change of venue. Defendant's motion was based upon prejudicial pretrial publicity in Chatham County. In support of this motion, the defendant "handed up" two newspaper articles, one from the Chatham Record of Thursday, 23 September 1982, and one from the Chatham County Herald of 9 September 1982. Neither of the articles was offered into evidence nor is either before us as an exhibit. The trial judge filed a written order denying defendant's motion. In so doing he found that the articles referred to defendant's escape from custody and not to the rape charges. The newspapers are weekly publications.

Defendant's trial was held the week of 3 January 1983, about three and one-half months after these publications appeared. The burden is on defendant to show prejudicial error in the denial of the motion for change of venue. *State v. Dobbins*, 306 N.C. 342, 293 S.E. 2d 162 (1982); *State v. Boykin*, 291 N.C. 264, 229 S.E. 2d 914 (1976). This he has failed to do.

[2] The trial court denied defendant's motion for a continuance, and defendant insists that this constitutes prejudicial error. We do not agree. The crimes were allegedly committed on 20 or 21 August 1982. Defendant's counsel was appointed 30 August 1982. The bills of indictment were returned on 13 September 1982 and 29 November 1982. The defendant escaped from the Chatham County jail on 16 September 1982 and was recaptured 5 November 1982. Defendant filed two motions for discovery. The first was in November, and defendant concedes it was complied with by the state. The second motion was filed on Wednesday, 29 December 1982, five days before the trial date. The motion to continue was filed at the same time.

The trial court held that the state had complied with the discovery motions, and defendant did not except to this ruling. He now contends that he needed additional time in which to review the discovery materials.

A motion for continuance is ordinarily addressed to the discretion of the trial judge, and his ruling thereon is not subject to review absent abuse of discretion. *State v. Stinson*, 267 N.C. 661, 148 S.E. 2d 593 (1966). However, when the motion is based upon a constitutional right, the issue is a reviewable question of law. *State v. Mason*, 295 N.C. 584, 248 S.E. 2d 241 (1978), *cert. denied*, 440 U.S. 984 (1979). Here, defendant's constitutional right to effective assistance of counsel is raised by the motion on the theory that defendant's counsel must have a reasonable time to investigate, prepare, and present defendant's case. Because no set length of time is guaranteed, each case must be decided upon its own circumstances. Continuances should not be granted unless the reasons therefor are fully established. Therefore, a motion for continuance should be supported by an affidavit showing sufficient grounds. *State v. Stepney*, 280 N.C. 306, 185 S.E. 2d 844 (1972); *State v. Gibson*, 229 N.C. 497, 50 S.E. 2d 520 (1948). Defendant failed to file such affidavit.

While defendant told the trial court in a general way that he had not had sufficient time to examine the discovery material, he did not give specific reasons to support the assertion. Furthermore, defendant failed to introduce into evidence the discovery materials he allegedly needed additional time to review. Absent these materials, the reviewing court is left with only the naked assertion of defendant that he required additional time to review the materials. Defendant has failed to present us with adequate and specific circumstances of the case to support his claim of constitutional violation. *State v. Harrill*, 289 N.C. 186, 221 S.E. 2d 325 (1976). (Defendant failed to include in evidence the autopsy report which he relied upon as requiring additional time to review.) Defendant states in his brief only that the materials were the results of laboratory tests performed in September 1982 and a medical report from Dorothea Dix Hospital on defendant's competency to proceed to trial. This is insufficient to support a conclusion that as a matter of law defendant's constitutional rights were violated. This assignment of error is overruled.

[3] The trial court entered a written order denying defendant's motion to suppress several items of physical evidence that the state proposed to introduce. The written order was signed on 13 January 1983 and filed 18 January 1983. Defendant argues that the order is a nullity because it was entered "out of session, out of district and without defendant's consent." The record does not support the argument that the order was "entered" out of the district. It was filed with the Clerk of Superior Court of Chatham County, where the case was pending. If "entered" means "filed," the order was entered in the district. If "entered" means "signed," the record is silent on whether the judge was physically within the district when he signed the order.

In any event, these technicalities are not determinative of the issue. After hearing counsel's arguments on the motion in open court, the trial court decided it, then and there, in open court, during the session and within the judicial district. There were eight items in controversy in the motion to suppress: The trial court specifically held that the results of the nontestimonial order—a blood sample, head hair, pubic hair, and saliva—were admissible. Next, the trial court denied defendant's motion to suppress defendant's shirt and the tire from defendant's car. Last, the court denied defendant's motion to suppress the red rug and

hair from it. Thus it appears from the transcript that the trial judge ruled on each of the objects of the motion to suppress at the time of trial. He later reduced his ruling to writing, signed the order, and filed it with the clerk.

The holding of this Court in *State v. Boone*, 310 N.C. 284, 311 S.E. 2d 552 (1984), is not controlling on the issue. In *Boone*, the trial judge did not make a ruling on the motion to suppress in open court which was recorded as a part of the proceedings. The trial judge in *Boone* left the district and, after the session expired, wrote, signed, and mailed to the clerk the order denying the motion to suppress. Nothing in the trial transcript or record indicated that the trial judge had made his decision on the motion at any time in open court during the session. Here, the trial judge passed on each part of the motion to suppress in open court as it was argued.

State v. Richardson, 295 N.C. 309, 245 S.E. 2d 754 (1978), controls the issue in the case at bar. In *Richardson*, the trial judge announced his ruling in open court on a motion to suppress and later filed his written order with findings of fact and conclusions of law. The time that the written order was made was not disclosed by the record. The Court held that defendant had failed to show any prejudice from the delay in the entry of the written order. *See State v. Boone, supra; State v. Williams*, 34 N.C. App. 386, 238 S.E. 2d 195 (1977). Where the trial judge makes the determination after a hearing, as in this case, he must set forth in the record his findings of fact and conclusions of law. N.C. Gen. Stat. § 15A-977(d), (f) (1983). Findings and conclusions are required in order that there may be a meaningful appellate review of the decision. The statute does not require that the findings be made in writing at the time of the ruling. Effective appellate review is not thwarted by the subsequent order. Defendant has not shown prejudice from the failure of the trial court to make the findings at the time that the rulings were made during the suppression hearing. *State v. Richardson, supra*; N.C. Gen. Stat. § 15A-1443(a). The assignment of error is meritless.

In his brief, the defendant argues only that the red rug was erroneously allowed into evidence over his motion to suppress. He has, thereby, waived his objection to the remaining evidence which was the subject of his motion. N.C.R. App. P. 28(a).

[4] Defendant argues with respect to the rug that the search warrant was defective and that his wife, Gilda, did not have authority to consent to a search of the trunk of his automobile. We are not required to consider the consent argument as we find the search warrant in this case to be valid.

The trial court held the warrant to be invalid because there was no showing of probable cause in the affidavit. The affidavit of detective Henry J. Shamburger stated that "one red rug used in an [sic] rape charge is in a white over red Dodge Charger two door vehicle with bucket seat and no wheel covers." Further, "[t]hat in the Statement of victim an [sic] red rug was taking [sic] from the trunk and used in the Commission of the Crime. and rug was placed back inside trunk of the Car."

On voir dire, the evidence showed that Gay Phillips, a female officer with the Chatham County Sheriff's Department, interviewed the rape victim at Duke Hospital. The child told her about defendant taking the rug out of the trunk of the car, raping her upon it, and replacing it in the trunk. Ms. Phillips repeated this statement to Officer Shamburger shortly thereafter, and he proceeded to use it in the affidavit. N.C.G.S. 15A-244(3) requires that the affidavit contain a statement of facts and circumstances establishing probable cause to believe that the items are in the place to be searched. This statement may be based upon hearsay evidence. The officer making the affidavit may do so in reliance upon information reported to him by other officers in the performance of their duties. *State v. Vestal*, 278 N.C. 561, 180 S.E. 2d 755 (1971), *cert. denied*, 414 U.S. 874 (1973); *State v. Banks*, 250 N.C. 728, 110 S.E. 2d 322 (1959). Probable cause is concerned with probabilities, the practical considerations of everyday life upon which reasonable and prudent men act. *Brinegar v. United States*, 338 U.S. 160, 93 L.Ed. 1879 (1949). Observations of fellow officers engaged in the same investigation are plainly a reliable basis for a warrant applied for by one of their number. *United States v. Ventresca*, 380 U.S. 102, 13 L.Ed. 2d 684 (1965).

The affidavit in this case is clearly within the holdings of *Ventresca* and *Vestal*. The trial court improperly held the search warrant to be invalid. The red rug was properly admitted into evidence.

[5] Defendant next contends that the trial court erred in failing to summarize the evidence in its charge to the jury. The trial judge is not required to state the evidence except to the extent necessary to explain the application of the law to the evidence. N.C. Gen. Stat. § 15A-1232 (1983). He is not required to recapitulate the evidence but is only required to summarize enough to allow him to explain and apply the appropriate rules of law. *State v. Adcox*, 303 N.C. 133, 277 S.E. 2d 398 (1981).

The evidence in this case was plain and direct. That Angela had been raped was without question; the issue was, who did it? Defendant's evidence indicated that he thought Angela's stepfather was the perpetrator. The defense of defendant was that Angela was untruthful and that he was drunk at the time. As noted above, when cross-examined about specific facts of the rape, defendant consistently and equivocably answered, "Not as I know of."

The trial judge instructed the jury, in part, as follows:

> Now, the testimony in this case tends to show that on August 20th or August the 21st, 1982, that Angela Horner was nine years old. That she's nine years old today. That on August 20th, August 21st, 1982, that the defendant, James Horner, was 30 years old. That he's 30 years old today. That if you believe the testimony as to the ages of Angela Horner and James Horner, then you would find that at the time of the alleged offense Angela Horner was a child of 12 years or less in age and that James Horner was 12 years or more in age and was 4 or more years older than Angela Horner.
>
> So finally, I charge you that as to the first alleged offense if you find from the evidence beyond a reasonable doubt that on or about August the 20th or August the 21st, 1982, the defendant, James Horner, engaged in vaginal intercourse with Angela Horner and at that time Angela Horner was a child of 12 years or less and that the defendant, James Horner, was of the age of 12 years or more and was 4 or more years older than Angela Horner, it would be your duty to return a verdict of guilty of rape in the first degree.
>
> . . . .

So I would finally charge you as to the second alleged offense that if you find from the evidence beyond a reasonable doubt that on or about August the 21st, 1982, that the defendant, James Horner, engaged in vaginal intercourse with Angela Horner and that at that time Angela Horner was a child of 12 years or less and that the defendant James Horner, was of the age of 12 years or more and was 4 or more years older than Angela Horner, it would be your duty to return a verdict of guilty of first degree rape on this alleged offense.

. . . .

Now, ladies and gentlemen, you have heard the evidence and the arguments of counsel for the State and counsel for the defendant. Now, I have not summarized all of the evidence in the case or recapitulated all of the evidence in the case because I'm not required to do that as such. I'm only required to mention the evidence so as to apply the law to the evidence, but it is your duty to remember all of the evidence whether it has been called to your attention or not; and if your recollection of the evidence differs from that from mine or that of the Assistant District Attorney or from that of the defense attorney, you're to rely solely upon your recollection of the evidence in your deliberations.

After the jury retired, the following took place:

COURT: All right. At this time, going to ask you, Miss Scouten, and you, Mr. Messick, if before sending the verdict forms into the jury, are there any additional requests that either of you would like me to consider submitting to the jury? Are there any corrections in the charge that you would like to call to my attention or any other matters that you feel might be necessary at this particular time for me to consider concerning the charge?

MISS SCOUTEN: State has nothing, Your Honor.

MR. MESSICK: No, sir.

COURT: All right. O.K. All right.

[6] Rule 10(b)(2) of the North Carolina Rules of Appellate Procedure requires that a party object to the jury charge before the

jury retires to consider its verdict. Failure to do so waives any such objection. *State v. Hewett*, 295 N.C. 640, 247 S.E. 2d 886 (1978); *State v. Hartley*, 39 N.C. App. 70, 249 S.E. 2d 453 (1978), *cert. denied*, 296 N.C. 738 (1979). A party may waive statutory or constitutional provisions by express consent or conduct inconsistent with a purpose to insist upon it. *State v. Gaiten*, 277 N.C. 236, 176 S.E. 2d 778 (1970). As a corollary to this rule, in order for an appellant to assert such right on appeal, the issue must have been presented to the trial court. *State v. Parks*, 290 N.C. 748, 228 S.E. 2d 248 (1976). *Accord Edelman v. California*, 344 U.S. 357, 97 L.Ed. 387 (1953).

[7] Defendant urges us to apply the "plain error rule" in this case. *State v. Odom*, 307 N.C. 655, 300 S.E. 2d 375 (1983). This we refuse to do under the facts of this case, particularly in the light of the trial judge's invitation to counsel for further instructions. *State v. Best*, 265 N.C. 477, 144 S.E. 2d 416 (1965).

This is not to say that the court's charge was a model to be followed. To the contrary, the better practice is to give the jury a sufficient summary of the evidence to enable it to understand the court's application of the law to the evidence. The summary in this case approaches the irreducible minimum. We find no prejudicial error in the court's instructions.

[8] Finally, defendant contends that he was entitled to have the lesser included offense of an attempt to commit first-degree rape. N.C. Gen. Stat. § 14-27.6 (1981). The record does not contain evidence to support a charge of a lesser included offense. Therefore, it was not error to refuse to submit such charge to the jury. *State v. Williams*, 275 N.C. 77, 165 S.E. 2d 481 (1969). Angela testified to a completed act of vaginal intercourse. Defendant's testimony in denying that he had sexual intercourse with her by "Not as I know of" does not support a charge of an attempt to commit rape. A mere denial of the charges by defendant does not entitle the defendant to the submission of a lesser included offense. *See generally State v. Carson*, 296 N.C. 31, 249 S.E. 2d 417 (1978) (defendant relied on alibi); *State v. Patton*, 45 N.C. App. 676, 263 S.E. 2d 796 (1980). The assignment of error is overruled.

No error.

STATE OF NORTH CAROLINA v. JAMES CHARLES BOONE

No. 29PA83

(Filed 2 February 1984)

1. **Judgments § 2.1; Searches and Seizures § 43— denial of motion to suppress evidence—order entered after session and in another district**

An order denying defendant's pretrial motion to suppress seized evidence was a nullity where it was signed after the close of the session at which the motion was heard, was signed outside the county and district in which defendant was being tried, and was entered out of session. Therefore, when the defendant renewed his motion to suppress, it was encumbent upon the new judge to consider the motion anew and conduct a hearing thereon pursuant to G.S. 15A-977. Although no cases have construed G.S. 15A-101(4)(a), which governs "entry of judgment" in criminal cases, it is the better practice for the judge to announce his ruling in open court and direct the clerk to note the ruling in the minutes of the court rather than for a judge to mail his ruling to the clerk, and then allow the clerk to notify the respective parties of the judge's decision.

2. **Narcotics § 4.6— instructions as to knowledge of possession**

In a prosecution for the felonious manufacturing of a controlled substance (marijuana) and the felonious possession of more than one ounce of marijuana, the trial court erred in instructing the jury that defendant could be found guilty of possessing marijuana if he had reason to know that what he possessed was marijuana since under the circumstances of the case, the court should have instructed the jury that the defendant is guilty only in the event he knew the marijuana was in the trunk of his automobile and that if he was ignorant of that fact, and the jury should so find, they should return a verdict of not guilty. The instruction cited by the trial court was consistent with the North Carolina Pattern Jury Instructions; however, there was no basis for this instruction and this instruction should not be used in charging the jury in criminal cases regarding possession of a controlled substance.

ON discretionary review of the decision of the Court of Appeals, reported at 59 N.C. App. 730, 297 S.E. 2d 920 (1982), granting defendant a new trial because of the trial court's error in refusing to conduct a hearing on defendant's renewed motion to suppress evidence before trial. Judgment was entered at the 2 July 1981 Session of Superior Court, ONSLOW County, the *Honorable James R. Strickland, Judge* Presiding. Heard in the Supreme Court 14 September 1983.

Defendant was charged in bills of indictment, proper in form, with the felonious manufacturing of a controlled substance (marijuana) and the felonious possession of more than one ounce of

marijuana, both violations of the Controlled Substances Act, G.S. § 90-86 *et seq.* Defendant entered pleas of not guilty to both charges. A jury found defendant guilty of felonious possession of more than one ounce of marijuana in violation of G.S. § 90-95. The trial court sentenced defendant to imprisonment for a maximum term of twenty-four months and a minimum term of eighteen months. The Court of Appeals granted defendant a new trial. This Court allowed the State's petition for discretionary review on 8 March 1983.

Rufus L. Edmisten, Attorney General, by Dennis P. Myers, Assistant Attorney General, for the State-appellant.

Jeffrey S. Miller, for the defendant-appellee.

FRYE, Justice.

The State seeks to have the Court of Appeals' decision granting defendant a new trial reversed because it "appears likely to be in conflict with one or more prior decisions" of this Court and the Court of Appeals. For the reasons stated in this opinion, we find that the Court of Appeals correctly applied the law of this State, and therefore, we affirm the decision of the Court of Appeals.

The State's evidence tended to show the following: On 13 February 1981, a number of police officers, acting pursuant to a valid search warrant, were searching a place known as the Old Langley Farm near Jacksonville, in Onslow County. The search led to the seizure of a substantial amount of marijuana and other items. As SBI Agent A. R. Stevens was leaving the scene of the search with a truck load of confiscated goods, he noticed a vehicle driven by the defendant approaching the farm. Defendant stopped the vehicle and began to back up at a high rate of speed along the dirt road leading to the farm.

Agent Stevens pursued the vehicle and motioned for the defendant to pull over. Defendant pulled over and he and the other passengers of the car were asked to return to the farm. Defendant and the other passengers of the car, one of whom was Tommy Johnson, a reputed drug dealer, returned to the farm, although they were not placed under arrest.

After returning to the farm, defendant was asked by Deputy Sheriff Gibson, if he (Gibson) could examine the trunk of defendant's car. After defendant opened the trunk, Gibson observed some clear plastic containers, with greenish-brown vegetable matter in them, sticking out of the edge of a duffel bag in the trunk. The duffel bag was seized, and the defendant was placed under arrest. It was later determined that the duffel bag contained approximately ten pounds of marijuana.

Defendant's pre-trial motion to suppress the marijuana discovered in his car was heard by Judge Elbert S. Peel, Jr., on 16 and 18 June 1981 at a Criminal Session of Superior Court, Onslow County, which is located in the Fourth Judicial District. During the afternoon of 18 June, Judge Peel allowed counsel for both parties to present "case law" to him in chambers. It is unclear whether Judge Peel made a formal ruling denying defendant's motion to suppress in chambers. Judge Peel, through an affidavit, states that his recollection is that counsel for the defendant was informed of his ruling in chambers but he could not swear to it. In any event, Judge Peel readily admits that his ruling was not made in open court. Defendant's counsel states that he was not informed of the judge's ruling until sometime after the "in chambers" discussion. Judge Peel signed the Order denying defendant's motion to suppress evidence on 25 June 1981 in Williamston, North Carolina, Martin County, which is located in the Second Judicial District. The original of the Order was mailed to the clerk of court, Onslow County, on that same day and copies were also mailed to counsel for the State and the defendant. The Order was received by the clerk on 27 June 1981.

At trial, before Judge Strickland, defendant renewed his motion to suppress, contending that Judge Peel's Order denying his motion to suppress was invalid. Judge Strickland denied defendant's motion to suppress without conducting a suppression hearing.

I.

[1] Defendant contends and the Court of Appeals agreed that Judge Strickland committed reversible error by failing to conduct a new suppression hearing because Judge Peel's Order denying defendant's motion to suppress was a nullity since it "was signed after the session at which the motion was heard was closed and it

was signed outside of the district and outside of the county in which defendant was being tried." *State v. Boone*, 59 N.C. App. 730, 732, 297 S.E. 2d 920, 921 (1982). We agree with the decision of the Court of Appeals.

The general rule concerning judgments and orders is as follows:

> [J]udgments and orders substantially affecting the rights of parties to a cause pending in the Superior Court at a term must be made in the county and at the term when and where the question is presented, and our decisions on the subject are to the effect that, except by agreement of the parties or by reason of some express provision of law, they cannot be entered otherwise, and assuredly not in another district and without notice to the parties interested.

State v. Humphrey, 186 N.C. 533, 535, 120 S.E. 85, 87 (1923). In prior and subsequent cases, this rule has been stated in various forms, and it has been consistently applied in both criminal and civil cases. *See State v. Saults*, 299 N.C. 319, 261 S.E. 2d 839 (1980); *Baker v. Varser*, 239 N.C. 180, 79 S.E. 2d 757 (1954); *State v. Alphin*, 81 N.C. 566 (1879). We still adhere to this rule today.

In *Alphin*, this Court stated that the judge had no power to make an order granting a new trial after the expiration of the term and that such an order was a nullity and should be stricken from the record. *Alphin*, 81 N.C. at 567-68. Additionally, in *Saults*, this Court held that an order denying a new trial was void where the parties did not consent to the entry of an order out of term, out of session, out of county, and out of the district where the hearing was being held. *Saults*, 299 N.C. at 325, 261 S.E. 2d at 842-43. Read together, *Alphin* and *Saults* stand for the proposition that an order of the superior court, in a criminal case, must be entered during the term, during the session, in the county and in the judicial district where the hearing was held.

Applying the aforementioned general rule and the holdings of this Court in criminal cases pertaining to the entry of orders in the superior court to the instant case, it is clear that the Order entered by Judge Peel was null and void and of no legal effect.

Pursuant to our power to take judicial notice of the assignment of trial judges to hold court, *Baker v. Varser*, 239 N.C. 180,

79 S.E. 2d 757 (1954), we take judicial notice of the following: During the Spring Session 1981 (January 5 to June 29) Judge Peel was assigned to the Fourth Judicial District and he was assigned to hold the 15 June 1981 Criminal Session of Superior Court, Onslow County. This criminal session was scheduled to last one week unless all of the court's business was not disposed of at that time, in which case Judge Peel was statutorily authorized to continue the session until all of the court's business had been completed. *See* G.S. § 15-167. This criminal session of court was adjourned by Judge Peel on 18 June 1981.

In light of the fact that Judge Peel signed the Order denying defendant's motion to suppress on 25 June 1981, in Williamston, North Carolina, Martin County, which is located in the Second Judicial District, it is quite clear that Judge Peel's Order was signed out of session, out of county, and out of district and, therefore, was null and void and of no legal effect. Thus, when the defendant renewed his motion to suppress, it was incumbent upon Judge Strickland to consider the motion anew and conduct a hearing thereon pursuant to G.S. § 15A-977. His failure to do so constitutes error.

The result reached in this case is not affected by the two arguments advanced by the State to uphold the validity of Judge Peel's Order. First, the State argues that defendant did not object to the procedures employed in the instant case at any time, although he had plenty of opportunities to do so. Suffice it to say that defendant did object to the validity of the Order entered by Judge Peel immediately prior to his trial on the felony charges. We also note that in *Saults*, this Court considered *ex mero motu* the question of the trial court's authority to enter an order out of session although the defendant did not raise any question about it on appeal. *Saults*, 299 N.C. at 324-25, 261 S.E. 2d at 842-43. Jurisdictional questions which relate to the power and authority of the court to act in a given situation may be raised at any time. *See Askew v. Tire Co.*, 264 N.C. 168, 141 S.E. 2d 280 (1965).

Secondly, the State argues that "the case law does not support the proposition that the signing of an order out of term and out of district renders such order a nullity without regard to whether the [d]efendant is prejudiced thereby," citing *State v. Richardson*, 295 N.C. 309, 245 S.E. 2d 754 (1978) and *State v.*

Williams, 34 N.C. App. 386, 238 S.E. 2d 195 (1977). In both of those cases it appears that the trial judge announced his ruling on the motion to suppress during the session when it could be entered in the court's records by the clerk, although the findings of fact and conclusions of law supporting the decision were made and the orders signed at a later time. Thus the parties were immediately aware of the judge's decision although the formal findings supporting that decision were subsequently entered. Thus the court, in each case, considered whether this delay in dictating the findings of fact and conclusions of law was prejudicial. *Richardson*, 295 N.C. at 319-20, 245 S.E. 2d at 761-62; *Williams*, 34 N.C. App. at 388, 238 S.E. 2d at 196. In the instant case, there is nothing in the record to support a finding that Judge Peel announced his ruling on the motion to suppress at any time during the session or that any record of a decision was made until after the session had ended. Thus the critical decision, the ruling of the court—contained in the Order denying the motion to suppress—was not made, in the instant case, until after the session had ended. That Order being null and void and of no legal effect, *Saults*, 299 N.C. at 325, 261 S.E. 2d at 842-43; *Alphin*, 81 N.C. at 567-68, the question of prejudice to the defendant is never reached.

We also note that the Order in the instant case was *entered* out of session. G.S. § 15A-101, Definitions,[1] provides in pertinent part as follows:

> (4a) Entry of Judgment.—Judgment is entered when sentence is pronounced. Prayer for judgment continued upon payment of costs, without more, does not constitute entry of judgment.

Judge Peel did not announce his ruling on the motion to suppress in open court. Instead, he signed an order denying the motion and mailed it to the clerk and counsel for the State and the defendant. Therefore, at the very earliest, Judge Peel's Order was not entered until 27 June 1981, when the clerk received the Order and apparently filed it and mailed notice of its filing to counsel for both parties. However, as noted above, the session had been adjourned by Judge Peel on 18 June 1981. Accordingly, it is abun-

1. Although G.S. § 15A-101(4a) does not specifically apply to orders, we believe that the same rule should apply to judgments and orders.

dantly clear that Judge Peel's Order, in addition to being *signed* out of session, out of county, and out of district, was also *entered* out of session. For all of the foregoing reasons, we have concluded that Judge Peel's Order was null and void.

Our research has not revealed any cases which have construed G.S. § 15A-101(4a), which governs "entry of judgment" in criminal cases. However, we find Rule 58 of the North Carolina Rules of Civil Procedure sufficiently analogous to provide guidance in this area. In pertinent part, Rule 58 provides as follows:

. . . .

> In other cases where judgment is rendered in open court, the clerk shall make a notation in his minutes as the judge may direct and such notation shall constitute the entry of judgment for the purposes of these rules. The judge shall approve the form of the judgment and direct its prompt preparation and filing.
>
> In cases where judgment is not rendered in open court, entry of judgment for the purposes of these rules shall be deemed complete when an order for the entry of judgment is received by the clerk from the judge, the judgment is filed and the clerk mails notice of its filing to all parties. The clerk's notation on the judgment of the time of mailing shall be prima facie evidence of mailing and the time thereof.

Although we realize that there are situations where it would be more convenient for a judge to mail his ruling to the clerk, and then allow the clerk to notify the respective parties of the judge's decision, we are convinced that the better practice, in criminal cases, is for the judge to announce his rulings in open court and direct the clerk to note the ruling in the minutes of the court. When the judge's ruling is not announced in open court, the order or judgment containing the ruling must be signed and filed with the clerk in the county, in the district and during the session when and where the question is presented. These rules serve to protect the interests of the defendant, the State, and the public, by allowing all interested persons to be informed as to when a judgment or order has been rendered in a particular matter. Since many rights relating to the appeals process are "keyed" to

the time of "entry of judgment," it is imperative that the judge's decisions become part of the court's records and that all interested persons know the exact date on which judgment is entered. This purpose is served by this Court's holding today.

II.

[2] The defendant next assigns as error the following portion of the judge's charge:[2]

> Now, Ladies and Gentlemen of the Jury, I charge that for you to find the defendant guilty of possessing marijuana, a controlled substance with the intent to sell and/or deliver it, the State must prove two things beyond a reasonable doubt. First, that the defendant knowingly possessed marijuana. *And the defendant, and in that connection, the defendant knew or had reason to know that what he possessed was marijuana and marijuana is a controlled substance.* (Emphasis added.)

The State notes, quite correctly, that this instruction is taken from the North Carolina Pattern Jury Instructions. As the defendant notes, this portion of the pattern jury instruction is allegedly based on the Court of Appeals' decision in *State v. Stacy*, 19 N.C. App. 35, 197 S.E. 2d 881 (1973). However, in that case, the Court of Appeals rejected a similar request for instruction to the jury and held that under the evidence in that case: "the court should have instructed the jury that the defendant is guilty only in the event he knew the package contained heroin and that if he was ignorant of that fact, and the jury should so find, they should return a verdict of not guilty." *Id.* at 38, 197 S.E. 2d at 882-83. We agree with defendant, therefore, that *Stacy* does not support the purported instruction contained in the North Carolina Pattern Jury Instructions—Criminal 260.10, footnote 1 (May 1980 Replacement), that if the defendant had reason to know that what he possessed was a controlled substance, the jury should find him guilty of knowing possession.

In *State v. Elliott*, 232 N.C. 377, 61 S.E. 2d 93 (1950), the defendant was convicted of unlawful possession and transporta-

2. Although this assignment of error was not addressed by the Court of Appeals, we consider it appropriate to address it here since the same question may arise again on retrial of this case.

tion of illicit intoxicating liquor. The State's evidence disclosed that the Sheriff found a five-gallon jug containing nontax-paid liquor partially concealed in a grass bag in the back seat of defendant's car. One Riddick was in the back seat and defendant and his brother were in the front seat, defendant's brother being on the driver's side. The defendant testified that he and his brother had picked up Riddick who was walking along the road with a bag on his back but denied any knowledge that the bag contained intoxicating liquor. Justice Barnhill, writing for a unanimous Court, stated the applicable law as follows:

> A person is presumed to intend the natural consequences of his act. *S. v. Phifer*, 90 N.C. 721; *S. v. Barbee*, 92 N.C. 820; *S. v. Davis*, 214 N.C. 787, 1 S.E. 2d 104; *Warren v. Insurance Co.*, 217 N.C. 705, 9 S.E. 2d 479. Hence, ordinarily, where a specific intent is not an element of the crime, proof of the commission of the unlawful act is sufficient to support a verdict. *S. v. Davis, supra.* It follows that the State made out a *prima facie* case when it offered testimony tending to show that there was a jug containing four gallons of liquor on the automobile then in the possession of and being operated by defendants.
>
> Nothing else appearing, it would not be necessary for the court, in the absence of a prayer, to make reference in its charge to guilty knowledge or intent. *Scienter* is presumed. "The presumption, however, is not conclusive; it is evidence only so far as to prove a *prima facie* case in respect to the intent." *S. v. Barbee, supra.*
>
> Here the appellant specifically pleads want of knowledge of the presence of liquor on the automobile and offered evidence in support of that plea. He thereby raised a determinative issue of fact. Indeed, it was the only controverted issue in the trial. Thus, under the circumstances of this case, guilty knowledge on the part of the appellant is an essential element of the crimes charged, and the law in respect thereto becomes a part of the law of the case which should be explained and applied by the court to the evidence in the cause. *S. v. Welch, ante*, 77.
>
> . . . .

> The appellant admits that he owned the automobile which was being operated by his brother with his consent and in his presence, and that the sheriff found the liquor on his car. Thereby, he admits in effect that he was transporting liquor, though he says he was not aware of the fact at the time. Thus the instruction of the court on the law overlooks the contention of the defendant and the evidence in support thereof and cuts the ground from under him on his defense. *Non constat* he was transporting liquor, he is not guilty of the offense charged unless he had knowledge the liquor was on his automobile. A general intent to commit the act charged is essential. *S. v. Welch, supra.*
>
> *Under the circumstances of this case the court should have instructed the jury that the defendant is guilty only in the event he knew the liquor was on his automobile and that if he was ignorant of that fact, and the jury should so find, they should return a verdict of not guilty.* (Emphasis added.)

Elliott, 232 N.C. at 378-79, 61 S.E. 2d at 95.

In *State v. Neel*, 8 Or. App. 142, 493 P. 2d 740 (1972), the defendant was charged with the possession of marijuana after two bags of marijuana were found in the trunk of the defendant's automobile. The trial court instructed the jury that if the defendant had possession of the marijuana and "had reason to believe" that the bag contained a narcotic drug or dangerous drug, then the defendant could be found guilty as charged. On appeal, the Oregon Court of Appeals reversed and remanded the case to the trial court, holding that the state must establish that the defendant had actual knowledge of the nature of the items he was charged with possessing before the defendant could be convicted of illegal possession. *Id.* at 147, 493 P. 2d at 742. A number of courts in other states have also held that actual knowledge of the presence of the narcotic on the part of a defendant is an essential ingredient of the offense of possession of narcotics. *See, e.g., People v. Gory*, 28 Cal. 2d 450, 170 P. 2d 433 (1946); *Duran v. People*, 145 Colo. 563, 360 P. 2d 132 (1961); *People v. Mack*, 12 Ill. 2d 151, 145 N.E. 2d 609 (1957). *See generally* Annotation, 91 A.L.R. 2d 810 (1963).

In the instant case, defendant admitted that the seized marijuana was found in the trunk of his automobile, but he denied any

knowledge of the fact that the marijuana was there. Defendant testified that he went to the home of Tommy Johnson and helped him change tires on Johnson's car; that a duffel bag was placed in the trunk of his car at the request of Tommy Johnson when there was not enough room in the trunk of Johnson's car for two big tires and the duffel bag; that Johnson did not show defendant what was in the bag; and, that defendant did not own the bag nor did he know what was in it. Thus, defendant has raised a determinative issue of fact—whether he knew that the marijuana was in the trunk of his car. Such being the case, this Court is presented with a situation substantially similar to *Elliott*. Therefore, we apply the same principles enunciated in *Elliott* and hold that the trial court erred in instructing the jury that defendant could be found guilty of possessing marijuana if he had reason to know that what he possessed was marijuana. Under the circumstances of this case, the court should have instructed the jury that the defendant is guilty only in the event he knew the marijuana was in the trunk of his automobile and that if he was ignorant of that fact, and the jury should so find, they should return a verdict of not guilty. *Elliott*, 232 N.C. at 379, 61 S.E. 2d at 95.[3]

Having carefully considered the statutes and case law related thereto, we have concluded that there is no basis for the instruction cited in the North Carolina Pattern Jury Instructions—Criminal 260.10, footnote 1 (May 1980 Replacement), and this instruction should not be used in charging the jury in criminal cases regarding possession of a controlled substance.

This Court's criticism of the Pattern Jury Instruction in question, N.C.P.I.—Crim. 260.10, footnote 1, does not alter the methods of proving knowledge on the part of a defendant. Knowledge is a mental state and may be proved by the conduct and statements of the defendant, by statements made to him by others, by evidence of reputation which it may be inferred had

3. It should be noted that this holding refers to the ultimate fact to be found by the jury and should not be confused with the *quantum* or quality of evidence required to prove knowledge. As stated by the Oregon Court of Appeals in *State v. Neel*, 8 Or. App. 142, 493 P. 2d 740 (1972): "We are aware that seldom can direct evidence be produced that the accused had actual knowledge of a given fact. However, knowledge may be inferred from circumstances, and a jury can be so instructed." *Id.* at 149, 493 P. 2d at 743.

come to his attention, and by circumstantial evidence from which an inference of knowledge might reasonably be drawn. *State v. Foster*, 293 N.C. 674, 239 S.E. 2d 449 (1977); *State v. Ham*, 224 N.C. 128, 29 S.E. 2d 449 (1944); *Hill v. Moseley*, 220 N.C. 485, 17 S.E. 2d 676 (1941); *State v. Mincher*, 178 N.C. 698, 100 S.E. 339 (1919); *State v. Glaze*, 24 N.C. App. 60, 210 S.E. 2d 124 (1974); *State v. Hamlet*, 15 N.C. App. 272, 189 S.E. 2d 811 (1972).

For the reasons hereinabove stated, we find no error in the decision of the Court of Appeals reversing the decision of the Superior Court and granting defendant a new trial, and therefore, the decision of the Court of Appeals is affirmed.

Affirmed.

STATE OF NORTH CAROLINA v. DON ORLANDO LATTIMORE

No. 414A83

(Filed 2 February 1984)

1. **Criminal Law § 138— attempted robbery with a firearm—aggravating factor that defendant induced others to participate supported by evidence**

The evidence in a prosecution for second degree murder and robbery with a firearm amply supported the aggravating factor that defendant induced another to participate in the attempted armed robbery or that defendant occupied a position of leadership. G.S. 15A-1340.4(a)(1)(a). The fact that the State accepted the other person's plea to accessory after the fact should not exclude this factor from consideration since it is the role of defendant in inducing others to participate or in assuming a position of leadership and not the role of the "participant" that is emphasized by this aggravating factor.

2. **Criminal Law § 138— attempted robbery with a firearm—aggravating factor of pecuniary gain improperly considered**

In a prosecution for robbery with a firearm and second degree murder, the trial court erred in finding in aggravation that the offense was committed for pecuniary gain since there was no evidence that the defendant was paid or hired to commit the offense.

3. **Criminal Law § 138— attempted armed robbery—aggravating factor that victim killed improperly considered**

In a prosecution for attempted robbery with a firearm and second degree murder, the trial court erred in considering as an aggravating factor for the attempted robbery with a firearm conviction that the victim of the armed robbery was killed. G.S. 15A-1340.4(a)(1)(o).

4. Criminal Law § 138— failure to find voluntary acknowledgment of wrongdoing as mitigating factor—error

Upon request, the trial judge erred in failing to find as a factor in mitigation that prior to his arrest or at an early stage of the criminal process, defendant voluntarily acknowledged wrongdoing in connection with the offense to a law enforcement officer. G.S. 15A-1340.4(a)(2)(l).

5. Criminal Law § 138— aggravating factor of pecuniary gain improperly found

In a sentencing hearing on a second degree murder conviction, the trial judge erred in finding as an aggravating factor that the offense was committed for pecuniary gain since there was no evidence that defendant was hired or paid.

6. Criminal Law § 138— aggravating factor of use of deadly weapon improperly considered

In sentencing upon a conviction of second degree murder, the trial judge erred in finding as an aggravating factor that the defendant used a deadly weapon at the time of the crime since when the facts justify an inference of malice arising only 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.

7. Criminal Law § 138— aggravating factor that presumptive sentence fails to do justice to seriousness of crime improperly considered

The trial judge erred in finding as an aggravating factor, upon conviction of second degree murder, that the presumptive sentence "does not do substantial justice to the seriousness of the crime" since the seriousness of the crime was fully considered by the legislature in establishing the presumptive sentence.

8. Criminal Law § 134.4— failure to consider youthful offender statute error

In prosecutions for attempted robbery with a firearm and second degree murder, the trial judge erred in failing to follow the mandate of G.S. 15A-1340.4(a) by failing to either sentence the defendant as a committed youthful offender or make a "no benefit" finding.

BEFORE *Freeman, Judge,* at the 7 March 1983 Criminal Session of Superior Court, ROWAN County, following pleas of guilty, defendant was sentenced to forty years imprisonment for attempted robbery with a firearm at the expiration of which he was to serve a life sentence for second degree murder. Since both sentences exceed the presumptive term for the offenses, defendant appeals from the life sentence pursuant to N.C. Rules of Appellate Procedure 4(d), as authorized by G.S. § 15A-1444(a1) and (d) (Cum. Supp. 1981). Motion to bypass the Court of Appeals on the attempted robbery conviction was allowed 15 August 1983. Heard in the Supreme Court 7 November 1983.

By his own testimony, the defendant admitted entering the Pantry Convenience Store shortly before midnight on 2 June 1982. He picked up a bag of potato chips and gave the clerk, Marlene McNeely, a ten dollar bill. As Ms. McNeely opened the cash register, the defendant pointed a gun at her and said "this is a stickup." The victim told the defendant to leave. Defendant fired the gun at the floor. Ms. McNeely then appeared to reach down under the counter. The defendant shot her in the face. She died before reaching the hospital. Defendant's transportation to and from the scene of the crime was provided by Jeffrey McNeair. Defendant, in his first statement to law enforcement authorities, implicated McNeair in the planning and execution of the robbery. At trial, defendant testified that McNeair neither planned nor participated in the offenses; that McNeair dropped the defendant off in front of the Pantry and then left to visit a friend; that defendant was able to flag down McNeair some distance from the Pantry after the robbery; and that McNeair then assisted defendant in his escape. McNeair's statement to the police corroborated the defendant's trial testimony in most of the essential details, although he indicated that he knew, prior to dropping defendant off at the Pantry, that defendant intended to commit an armed robbery.

Rufus L. Edmisten, Attorney General, by Evelyn M. Coman and Charles M. Hensey, Assistant Attorneys General, for the State.

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

FRYE, Justice.

Defendant brings forward numerous assignments of error, most of which have merit and entitle defendant to a new sentencing hearing. Pursuant to our recommendation in *State v. Ahearn*, 307 N.C. 584, 300 S.E. 2d 689 (1983), the trial judge made separate findings regarding aggravating and mitigating circumstances for each offense. We will therefore discuss defendant's assignments of error separately as they relate to each offense.

I. Attempted Robbery With a Firearm

As statutory aggravating factors the trial judge found that:

1. The defendant induced others to participate in the commission of the offense or occupied a position of leadership or dominance of other participants.

2. The offense was committed for pecuniary gain.

As additional written findings of factors in aggravation, the trial judge found that:

The victim of the attempted armed robbery was killed and the defendant has a substantial criminal history of a serious nature.

The trial judge found no factors in mitigation.

[1] Defendant contends that the trial court erred in aggravating his sentence for attempted armed robbery "on the ground that the defendant induced others to participate in the attempted robbery or occupied a position of leadership or dominance of other participants because the evidence showed that the defendant was the only participant in the attempted robbery." We disagree. Although co-defendant Jeff McNeair pleaded guilty only to accessory after the fact to robbery, the evidence at the sentencing hearing, including McNeair's statement to police, supports this finding in aggravation.

McNeair stated that he spent the evening prior to the attempted robbery playing basketball with the defendant. On the way home the defendant told McNeair that "he needed some money before he went to Court, that he needed to hit something, which means to rob something, break into something." As they passed the Pantry, the defendant indicated that it "ought to be an easy one to rob." McNeair drove past the Pantry at defendant's request because "there were three or four cars there." He turned his car around and let the defendant out in front of the Pantry and then left to visit a friend. McNeair saw the defendant conceal a gun "in the front left side of his pants" as he walked in front of the car. McNeair's friend was not at home and as he passed by the railroad tracks near the Pantry, he heard the defendant call out to him. Learning that the defendant had attempted to rob the Pantry and had shot the clerk, McNeair nevertheless aided the defendant in his escape. This evidence is clearly sufficient to support a finding that defendant induced McNeair to participate in

the attempted robbery or that defendant occupied a position of leadership. G.S. § 15A-1340.4(a)(1)(a).

Defendant contends, however, that by accepting McNeair's plea to accessory after the fact, the State conceded that McNeair "was not involved in the actual commission of the offenses and was not aware of the commission of the crimes until after they had occurred." Defendant's contention places the emphasis on the wrong party. The focus of G.S. § 15A-1340.4(a)(1)(a) is not on the role of the "participants" in the crime, but on the role of the defendant in inducing others to participate or in assuming a position of leadership. Here the evidence fully supports the trial court's finding that defendant occupied a position of leadership which resulted in McNeair's involvement in the crimes. This assignment of error is overruled.

[2] Defendant next contends that the trial judge erred in finding in aggravation that the offense was committed for pecuniary gain. We agree. It is well-settled law now that, under the Fair Sentencing Act, in order to find this factor in aggravation, there must be evidence that the defendant was paid or hired to commit the offense. *State v. Abdullah*, 309 N.C. 63, 306 S.E. 2d 100 (1983). *See State v. Benbow*, 309 N.C. 538, 308 S.E. 2d 647 (1983); *State v. Thompson*, 309 N.C. 421, 307 S.E. 2d 156 (1983); *State v. Jones*, 309 N.C. 214, 306 S.E. 2d 451 (1983).

[3] Finally, defendant assigns as error the additional finding in aggravation that the victim of the attempted armed robbery was killed. We agree.

G.S. § 15A-1340.4(a)(1)(o) specifically prohibits, as an aggravating factor, the use of convictions for offenses "joinable, under G.S. Chapter 15A, with the crime or crimes for which the defendant is currently being sentenced." To permit the trial judge to find as a non-statutory aggravating factor that the defendant *committed* the joinable offense would virtually eviscerate the purpose and policy of the statutory prohibition.

[4] Defendant requested that the trial judge find as a factor in mitigation that prior to arrest or at an early stage of the criminal process, he voluntarily acknowledged wrongdoing in connection with the offense to a law enforcement officer. G.S. § 15A-1340.4 (a)(2)(l). Defendant is entitled to this finding upon resentencing.

Defendant, in his first statement, admitted that he entered the Pantry with the intent to rob it and that he shot the clerk, although he also maintained that he did so at the insistence of McNeair and that the shooting was accidental. As we recently stated in *State v. Graham*, 309 N.C. 587, 591, 308 S.E. 2d 311 (1983):

> 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.

II. SECOND DEGREE MURDER

In support of a sentence in excess of the presumptive sentence for this offense, the trial judge found in aggravation that:

1. The offense was committed for pecuniary gain.

2. The defendant was armed with or used a deadly weapon at the time of the crime.

As additional factors in aggravation, the trial judge found that:

(a) The offense was committed during the course of an armed robbery and the defendant has a substantial criminal history of a serious nature.

(b) The presumptive sentence does not do substantial justice to the seriousness of the crime.

[5] We agree with defendant that, in the absence of evidence that defendant was hired or paid, the trial judge erred in finding as an aggravating factor that this offense was committed for pecuniary gain. *State v. Abdullah*, 309 N.C. 63, 306 S.E. 2d 100 (1983).

[6] Likewise, the trial judge erred in finding, as an aggravating factor, that the defendant used a deadly weapon at the time of the crime. In *State v. Blackwelder*, 309 N.C. 410, 306 S.E. 2d 783 (1983), we adopted a *per se* rule that when the facts justify an inference of malice arising only 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. The rule is applicable to both convictions or pleas in first or second degree murder cases where malice is an essential element. *Id.; See State v. Taylor*, 309 N.C. 570, 308 S.E. 2d 302 (1983).

With respect to the additional aggravating factor that the murder was committed during the course of an armed robbery, we adopt the reasoning and holding as discussed in Part I of this opinion and therefore find error. Logic dictates that G.S. § 15A-1340.4(a)(1)(o) prohibits the trial court from finding in aggravation that defendant committed a joinable offense.

[7] The trial judge also erred in finding as an additional aggravating factor that the presumptive sentence "does not do substantial justice to the seriousness of the crime." We have held that the seriousness of a crime was fully considered by the legislature in establishing the presumptive sentence. *State v. Blackwelder*, 309 N.C. 410, 306 S.E. 2d 783; *State v. Chatman*, 308 N.C. 169, 301 S.E. 2d 71 (1983).

Finally, based on his statement to law enforcement officers prior to his arrest, defendant is entitled to a finding in mitigation that he voluntarily acknowledged wrongdoing in connection with the offense of second degree murder. *State v. Graham*, 309 N.C. 587, 308 S.E. 2d 311 (1983).

III. Committed Youthful Offender Status

[8] Defendant contends that he is entitled to a new sentencing hearing for both offenses because he was nineteen years old at the time of his convictions and "the court failed to sentence the defendant as a committed youthful offender or find on the record that he would not benefit from such a commitment."

G.S. § 15A-1340.4(a) provides in pertinent part that:

> If the convicted felon is under 21 years of age at the time of conviction and the sentencing judge elects to impose an active prison term, the judge must either sentence the felon as a committed youthful offender in accordance with Article 3B of Chapter 148 of the General Statutes and subject to the limit on the prison term provided by G.S. 148-49.14, or make a "no benefit" finding as provided by G.S. 148-49.14 and impose a regular prison term.

We find nothing on the record to indicate compliance with this mandate. The trial court erred in failing to make a "no benefit" finding and for this reason, and for those enunciated above, the cases must be remanded for resentencing. *State v. Bracey*, 303 N.C. 112, 277 S.E. 2d 390 (1981); *State v. Rupard*, 299 N.C. 515, 263 S.E. 2d 554 (1980).

Case No. 82-CRS-6833 remanded for resentencing.

Case No. 82-CRS-6834 remanded for resentencing.

STATE OF NORTH CAROLINA EX REL. UTILITIES COMMISSION, THE TOWN OF TARBORO AND ELECTRICITIES OF NORTH CAROLINA v. VIRGINIA ELECTRIC AND POWER COMPANY AND POLYLOK CORPORATION

No. 280A83

(Filed 2 February 1984)

1. **Electricity § 2.6— electricity to user outside city limits—municipality's right to continue to provide**

A municipality has the exclusive right to provide electricity to a user outside its city limits when the user desires to discontinue receiving electric service from the municipality and to receive it instead from an electric supplier if its service was initially, has been, and is "within reasonable limitations" as that term is used in G.S. 160A-312.

2. **Electricity § 2.3— dispute between municipality and electric supplier—inapplicability of statute**

The statute delineating the right of an electric customer to choose from which "electric supplier" it will purchase electricity, G.S. 62-110.2(b)(5), is inapplicable to a dispute between a municipality and an electric supplier.

3. **Electricity § 2.6— city's electric service as being "within reasonable limitations"**

A municipality's service of electricity to a corporate user outside its city limits was initially, has been and is "within reasonable limitations" as a matter of law where the user's plants and the city limits were approximately one mile apart when the service was begun; the user's plants are not in an area assigned to any electric supplier; the municipality has always maintained an acceptable level of service to the user's area and it is ready, willing and able to continue providing such service to the user; and the municipality has now extended its city limits to encompass the corporate user.

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

APPEAL from a decision by a divided panel of the North Carolina Court of Appeals. 62 N.C. App. 262, 302 S.E. 2d 642 (1983). *See* N.C. Gen. Stat. § 7A-30(2) (1981).

Taylor, Brinson & Marrow by Herbert H. Taylor, Jr., and Z. Creighton Brinson, for plaintiff appellant Town of Tarboro.

Spruill Lane Carlton McCotter & Jolly by J. Phil Carlton & Ernie K. Murray, for plaintiff appellant ElectriCities.

Edward S. Finley, Jr. (of counsel: Edward S. Finley, Jr. & Edgar M. Roach, Jr., Hunton & Williams), for defendant appellee Virginia Electric and Power Company.

Sanford, Adams, McCullough & Beard by Charles C. Meeker & Nancy H. Hemphill, for defendant appellee Polylok Corporation.

EXUM, Justice.

[1] The sole issue raised by this appeal is whether a municipality has the exclusive right to provide electricity to a user outside its city limits when the user desires to discontinue receiving electric service from the municipality and to receive it instead from an electric supplier. We conclude the municipality does have such an exclusive right if its service was initially, has been, and is "within reasonable limitations," as that term is used in N.C. Gen. Stat. § 160A-312 (1982). On the facts here, we conclude the municipality's service meets the "reasonable limitations" standard.

I.

Because the dominant question in the proceedings below involved a question of law, the parties stipulated to most of the relevant facts. We summarize briefly.

Polylok Corporation and its subsidiary Polylok Finishing Corporation [hereinafter Polylok] began requiring electric service in 1970 and 1973, respectively, to plants approximately one mile from the Town of Tarboro's city limits. At those times Tarboro, a municipal corporation created and existing under the laws of North Carolina and located in Edgecombe County, at Polylok's request extended its electric lines beyond its corporate limits[1] to

1. Tarboro now has extended its corporate limits to encompass both corporations by annexation, approved by the General Assembly, effective 30 June 1983.

Polylok's plants. Since these times and during these present proceedings, both corporations have received all their electricity from Tarboro. Polylok's premises are not located wholly or partly within any area assigned to any electric supplier. *See* N.C. Gen. Stat. § 62-110.2(c) (1982). These premises are not located wholly within 300 feet of the lines of any electric supplier or partially within 300 feet of the lines of two or more electric suppliers. *Id.* § 62-110.2(b).

Polylok notified Tarboro by letter dated 12 August 1982 of its intention to begin receiving its electricity, as of 1 January 1983, from Virginia Electric and Power Company (Vepco), a Virginia corporation and public utility entitled to transact business in North Carolina. Vepco is an electric supplier. *See* N.C. Gen. Stat. § 62-110.2(a)(3). Tarboro challenged Polylok's decision to switch its source of electricity and Vepco's desire to supply electricity to Polylok before the North Carolina Utilities Commission. ElectriCities of North Carolina, a voluntary, nonprofit association of municipalities which provide electricity, moved and was allowed to intervene as a party plaintiff.

The Commission, in a 4-3 decision, granted Tarboro's motion for summary judgment. Vepco and Polylok appealed, and a divided panel of the Court of Appeals reversed. 62 N.C. App. 262, 302 S.E. 2d 642 (1983). Plaintiffs appeal to this Court as a matter of right. We now reverse.

II.

The parties, the Commission and the Court of Appeals have assumed this case requires an interpretation of N.C. Gen. Stat. § 62-110.2(b)(5). That subsection provides:

> Any premises initially requiring electric service after April 20, 1965, which are not located wholly within 300 feet of the lines of any electric supplier and are not located partially within 300 feet of the lines of two or more electric suppliers may be served by any electric supplier which the consumer chooses, unless such premises are located wholly or partially within an area assigned to an electric supplier . . ., and any electric supplier not so chosen by the consumer shall not thereafter furnish service to such premises.

The Commission interpreted this section as precluding Vepco from providing electricity to Polylok because Polylok chose Tarboro at the time it initially required service. The Court of Appeals disagreed, holding that section 62-110.2(b)(5) conferred no right on Tarboro to provide electricity because, as a municipality, it was not an "electric supplier" within the meaning of the statute.

[2] We conclude section 62-110.2(b)(5) has no application to this case. This section only delineates the right of an electric customer to choose from which "electric supplier" it will purchase electricity. A municipality is not an electric supplier. *Domestic Electric Service, Inc. v. Rocky Mount*, 285 N.C. 135, 143, 203 S.E. 2d 838, 842 (1974). *See Lumbee River Electric Membership Corporation v. Fayetteville*, 309 N.C. 726, 309 S.E. 2d 209 (1983). Section 62-110.2(b)(5) deals solely with one aspect of the rights between two or more electric suppliers and has no applicability to this dispute between a municipality and an electric supplier. Nothing in the 1965 Electric Act, codified at N.C. Gen. Stat. §§ 160A-331 to 160A-338, and 62-110.1 to 62-110.2, empowers or restricts municipalities in the operation of their electric systems outside their corporate limits. Section 160A-312 provides the sole authority for and "restriction upon municipalities furnishing electric service outside corporate limits . . . ." *Lumbee River*, 309 N.C. at 733, 309 S.E. 2d at 214 (slip op. at 9).[2]

[1] Hence, we proceed to analyze the application of section 160A-312 to the facts herein. That section provides, in pertinent part, that a municipality

> shall have authority to acquire, construct, establish, enlarge, improve, maintain, own, operate, and contract for the operation of any or all of the public enterprises as defined in this Article to furnish services to the city and its citizens [and] may acquire, construct, establish, enlarge, improve, maintain, own, and operate any public enterprise outside its corporate limits, within reasonable limitations . . . .

2. We note that neither the parties, Commission, nor Court of Appeals had the benefit of our recent decision in *Lumbee River Electric Membership Corporation v. Fayetteville* (decided 6 December 1983) during any of these proceedings. Oral argument in the instant case followed argument in *Lumbee River* by merely one month and preceded the decision in that case by two months.

Id.[3] As our decision in *Lumbee River* indicates, this provision vests municipalities with a right to serve potential new customers outside its corporate limits so long as this extension of service is "within reasonable limitations." *Lumbee River*, slip op. at 14. *Accord Domestic Electric*, 285 N.C. at 143-44, 203 S.E. 2d at 843. Therefore, we need only determine whether Tarboro's service of electricity to Polylok was initially, has been, and is "within reasonable limitations."[4]

In both *Domestic Electric* and *Lumbee River*, we analyzed the factors to be considered in deciding whether a town's furnishing of electric service outside its corporate limits met the "within reasonable limitations" requirement. This requirement "does not refer solely to the territorial extent of the venture but embraces all facts and circumstances which effect the reasonableness of the venture." *Domestic Electric*, 285 N.C. at 144, 203 S.E. 2d at 844 (*quoting Public Service Company of North Carolina v. Shelby*, 252 N.C. 816, 823, 115 S.E. 2d 12, 17 (1960)). We amplified this analysis in *Lumbee River*, noting there that determinative factors beyond geography include the "level of current service in the area . . . particularly the immediate vicinity of the potential customer, and the readiness, willingness, and ability of [the city] to serve the potential customer." Slip op. at 16.

[3] We feel the facts here clearly chart our course. Geographically, Polylok's plants and Tarboro's former city limit were initially and have remained reasonably close. Polylok's plants are not in an area assigned to any electric supplier. Tarboro's history of providing electric service satisfactorily to Polylok strongly indicates that it has always maintained an acceptable level of service to Polylok's area and that it is ready, willing, and able to continue providing such service to Polylok. The annexation, which took ef-

3. For the purposes of this section, a "public enterprise" includes electric power generation, transmission, and distribution systems. N.C. Gen. Stat. § 160A-311(1) (1982).

4. We recognize, of course, that the furnishing of electric service to an area subsequently annexed must be carried out pursuant to N.C. Gen. Stat. § 160A-331 to 160A-338. *See* N.C. Gen. Stat. § 62-110.2(e) (1982). Tarboro offered to stipulate that the pending annexation, which had not taken effect when these proceedings were instituted, would have no effect on the decision in this case. Vepco refused this stipulation. We express no opinion as to the effect of the annexation itself on the rights of the parties under these provisions.

fect on 30 June 1983, persuasively suggests that Tarboro's extension of electric service to Polylok was and is "within reasonable limitations." We conclude, on these facts, that Tarboro's decision to provide electric service to Polylok in 1970 and 1973 at Polylok's request was "within reasonable limitations" as a matter of law. Its continuation of that service has been and is now "within reasonable limitations." Tarboro, therefore, has the exclusive right to continue this service. The desire of its customer, Polylok, to discontinue the service has not diminished this right.

Thus, for the reasons stated, we agree with the Commission's decision. Accordingly, the judgment of the Court of Appeals is

Reversed.

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

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

A.M.E. ZION CHURCH v.
UNION CHAPEL A.M.E. ZION CHURCH

No. 552P83.

Case below: 64 N.C. App. 391.

Petition by defendants for discretionary review under G.S. 7A-31 denied 2 February 1984.

CITY OF WILMINGTON v. PIGOTT

No. 568P83.

Case below: 64 N.C. App. 587.

Petition by defendants for discretionary review under G.S. 7A-31 denied 2 February 1984.

DOLBOW v. HOLLAND INDUSTRIAL

No. 592P83.

Case below: 64 N.C. App. 695.

Petition by defendants for discretionary review under G.S. 7A-31 denied 2 February 1984.

KIRKS v. KIRKS

No. 602P83.

Case below: 65 N.C. App. 221.

Petition by defendant for discretionary review under G.S. 7A-31 denied 2 February 1984. Notice of appeal dismissed 2 February 1984.

McCLURE v. McCLURE

No. 549P83.

Case below: 64 N.C. App. 318.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 2 February 1984.

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

MISENHEIMER v. MISENHEIMER

No. 368PA83.

Case below: 62 N.C. App. 706.

Petition by plaintiff for discretionary review under G.S. 7A-31 allowed 2 February 1984.

NEWS & OBSERVER v. STATE; CO. OF WAKE v. STATE; MURPHY v. STATE

No. 1PA84.

Case below: 65 N.C. App. 576.

Petition by defendant for discretionary review under G.S. 7A-31 allowed 2 February 1984.

ROPER v. J. P. STEVENS & CO.

No. 620P83.

Case below: 65 N.C. App. 69.

Petition by defendants for discretionary review under G.S. 7A-31 denied 2 February 1984.

SASSER v. BECK

No. 601P83.

Case below: 65 N.C. App. 170.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 2 February 1984.

STATE v. ALEXANDER

No. 585P83.

Case below: 65 N.C. App. 221.

Petition by defendant for discretionary review under G.S. 7A-31 denied 2 February 1984.

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

STATE v. HINNANT

No. 636P83.

Case below: 65 N.C. App. 130.

Petition by defendant for writ of certiorari to North Carolina Court of Appeals denied 2 February 1984.

STATE v. LANGLEY

No. 587P83.

Case below: 64 N.C. App. 674.

Petition by defendant for discretionary review under G.S. 7A-31 denied 2 February 1984.

STATE v. PROCTOR

No. 324P83.

Case below: 62 N.C. App. 233.

Petition by defendant for discretionary review under G.S. 7A-31 denied 2 February 1984.

STATE v. SIMMONS

No. 596P83.

Case below: 64 N.C. App. 727.

Petition by defendant for discretionary review under G.S. 7A-31 denied 2 February 1984.

STATE v. SMITH

No. 614P83.

Case below: 65 N.C. App. 222.

Petition by defendant for discretionary review under G.S. 7A-31 denied 2 February 1984.

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

STATE v. SUMMERFORD

No. 10P84.

Case below: 65 N.C. App. 519.

Petition by defendant for discretionary review under G.S. 7A-31 denied 2 February 1984. Motion by Attorney General to dismiss appeal for lack of substantial constitutional question allowed 2 February 1984.

STATE v. TAYLOR

No. 434P83.

Case below: 63 N.C. App. 364.

Petition by defendant Taylor for discretionary review under G.S. 7A-31 denied 2 February 1984. Motion by Attorney General to dismiss appeal for lack of substantial constitutional question allowed 2 February 1984.

HAYDEN B. RENWICK v. THE NEWS AND OBSERVER PUBLISHING COMPANY, D/B/A THE RALEIGH TIMES

HAYDEN B. RENWICK v. GREENSBORO NEWS COMPANY D/B/A THE GREENSBORO DAILY NEWS AND RECORD

No. 412A83

(Filed 6 March 1984)

1. **Rules of Civil Procedure § 12— function of motion to dismiss**

The function of a motion to dismiss under G.S. 1A-1, Rule 12(b)(6) is to test the law of a claim and not the facts which support the claim, and the allegations of the complaint are taken as true for the limited purpose of testing its sufficiency.

2. **Rules of Civil Procedure § 12— dismissal of claim for relief**

A claim for relief should not be dismissed unless it affirmatively appears that the plaintiff is entitled to no relief under any state of facts which could be presented in support of the claim.

3. **Libel and Slander §§ 14.1, 14.2— words susceptible of two interpretations—words actionable per quod—insufficiency of complaint**

Plaintiff's complaints failed to bring an editorial within the second class of libel since it was not alleged that the editorial is susceptible of two meanings, one defamatory, and that the defamatory meaning was intended and was so understood by those to whom the publication was made. The complaints also failed to bring the editorial within the third class—libel *per quod*—since it was not alleged that the plaintiff suffered special damages.

4. **Libel and Slander § 2— libel per se**

A libel *per se* is a publication by writing, printing, signs or pictures which, when considered alone without innuendo, colloquium or explanatory circumstances: (1) charges that a person has committed an infamous crime; (2) charges a person with having an infectious disease; (3) tends to impeach a person in that person's trade or profession; or (4) otherwise tends to subject one to ridicule, contempt or disgrace.

5. **Libel and Slander § 14.1— libel per se—insufficiency of complaint**

An editorial published by defendants was not subject only to a defamatory interpretation concerning plaintiff and thus was not libelous *per se* where the editorial was not directed toward the plaintiff but criticized the continuing deluge of charges from Washington against the University of North Carolina at Chapel Hill; the thrust of the editorial was to express the opinion that special admissions concessions in effect for blacks at the University contradict and disprove charges from Washington of unfair discrimination against minorities; the only direct mention of the plaintiff, the Associate Dean of the College of Arts and Sciences at Chapel Hill, occurred in the second paragraph of the editorial, which stated that the "latest barrage" of charges from

Washington was based on a 1978 newspaper article written by plaintiff; the editorial stated direct opinions in a robust manner concerning a controversial public issue and took to task unnamed persons who have expressed contrary opinions; and the editorial did not indicate directly or by implication that the plaintiff was "an extremist, a liar and irresponsible in his profession" as alleged by the plaintiff.

6. Privacy § 1— false light invasion of privacy not recognized

A separate tort of false light invasion of privacy will not be recognized in this jurisdiction. Rather, a plaintiff must recover in such situations, if at all, in an action for libel or slander.

Justice MEYER concurring in part and dissenting in part.

Justice EXUM dissenting in part and concurring in part.

Justice FRYE dissenting.

APPEAL of right under G.S. 7A-30(2) by the defendants from a decision of a divided panel of the Court of Appeals, 63 N.C. App. 200, 304 S.E. 2d 593 (1983), reversing judgments for the defendants entered by *Judge John C. Martin* on March 3, 1982, in Superior Court, ORANGE County. Heard in the Supreme Court November 7, 1983.

Kennedy, Kennedy, Kennedy & Kennedy, by Annie Brown Kennedy, Harvey L. Kennedy and Harold L. Kennedy, III, for the plaintiff appellee.

Sanford, Adams, McCullough & Beard, by H. Hugh Stevens, Jr., for the defendant appellant, The News and Observer Publishing Company.

Smith, Moore, Smith, Schell & Hunter, by Richard W. Ellis and Alan W. Duncan, for the defendant appellant, Greensboro News Company.

MITCHELL, Justice.

The question before us for review in this consolidated appeal is whether the plaintiff's complaints state a claim upon which relief can be granted against either or both defendants for either libel or invasion of privacy. We hold that the plaintiff's complaints fail to state a claim against either defendant on either theory.

The plaintiff, Hayden B. Renwick, is Associate Dean of the College of Arts and Sciences at the University of North Carolina

at Chapel Hill. He has been employed by the University since 1969. On April 22, 1981, *The Raleigh Times* published an editorial entitled "And He Calls It Bias?". The same editorial was reprinted on April 26, 1981, in *The Greensboro Daily News and Record* in a commentary section entitled "Around The State" under the title "Discrimination?". The complete text of the editorial as printed in both instances was as follows:

> Some of the continuing deluge of charges from Washington against the University of North Carolina at Chapel Hill—many obviously unfounded—are so ridiculous they only widen the gulf between reason and resentment as the state seeks to create better racial relations.
>
> The latest barrage is based on allegations by Hayden Renwick, Associate Dean of the College of Arts and Sciences at Chapel Hill, in a 1978 newspaper article. Renwick, formerly in charge of minority admissions, said between 1975 and 1978 about 800 black students had been denied admission.
>
> Yet Collin Rustin, the minority admissions director since 1975, flatly denies the charge. Furthermore, the special admission concessions in effect for blacks also give the lie to charges of unfair discrimination against minorities.
>
> According to Rustin, every black student who meets the minimum standard combined score of 800 on the Scholastic Aptitude Test and has a 1.6 predicated grade point average is AUTOMATICALLY admitted. The exception would be if the applicant had not taken high school subjects required for admission.
>
> That's discrimination? When the 800 required is only half the maximum possible score of 1,600? When the average SAT score for other, competitive students admitted to last fall's freshman class at Carolina was between 1,070 and 1,080? When those competitive students admitted were in the top five percent of their high school graduating classes? When only 4,800 of 11,500 applicants clamoring to get in were admitted?
>
> It has taken North Carolinians years to adjust to the necessity to grant some minority applicants, because of their disenfranchised background, special concessions in admis-

sions. This gives them a chance to prove that their academic deficiencies are only temporary, not permanent.

But extremists who belittle and criticize these concessions—which, indeed seem here so excessive they do nothing for the student or the quality of education—should be publicly rebuffed.

The fact that, according to a 1979 faculty committee report, only 36 blacks have been denied access to UNC between 1975 and 1979—compared to 6,700 competitive students turned away in one season—attests to UNC's yeoman efforts to make minorities welcome on campus. How long highly qualified whites denied admission will tolerate this reverse discrimination without taking the university to court is undoubtedly affected by irresponsible charges such as this one.

After requesting in writing a retraction of the editorials by the defendants and having received no retraction, the plaintiff filed separate complaints against each defendant alleging libel *per se* and invasion of privacy. The defendants, The News and Observer Publishing Company, which publishes *The Raleigh Times*, and Greensboro News Company, which publishes *The Greensboro Daily News and Record*, each filed a motion to dismiss under Rule 12(b)(6) of the Rules of Civil Procedure for failure to state a claim upon which relief could be granted. The trial court entered judgments on March 3, 1982, granting each defendant's motion and dismissing the plaintiff's actions for failure to state a claim. The cases were consolidated for purposes of appeal. A divided panel of the Court of Appeals held that the trial court had erred and reversed. We reverse the holding of the Court of Appeals.

[1, 2] The function of a motion to dismiss under Rule 12(b)(6) is to test the law of a claim and not the facts which support the claim. *Snyder v. Freeman*, 300 N.C. 204, 266 S.E. 2d 593 (1980). The allegations of the complaint are taken as true for the limited purpose of testing its sufficiency. *Presnell v. Pell*, 298 N.C. 715, 260 S.E. 2d 611 (1979). A claim for relief should not be dismissed unless it affirmatively appears that the plaintiff is entitled to no relief under any state of facts which could be presented in support of the claim. *Id.* Bearing these principles in mind, we turn to

a determination of whether the plaintiff's complaints in these two cases state claims entitling the plaintiff to relief.

I.

Libel

Three classes of libel are recognized under North Carolina law.

> They are: (1) publications obviously defamatory which are called libel *per se*; (2) publications susceptible of two interpretations one of which is defamatory and the other not; and (3) publications not obviously defamatory but when considered with innuendo, colloquium, and explanatory circumstances become libelous, which are termed libels *per quod*.

Arnold v. Sharpe, 296 N.C. 533, 537, 251 S.E. 2d 452, 455 (1979). As we have previously stated:

> When an unauthorized publication is libelous *per se*, malice and damage are presumed from the fact of publication and no proof is required as to any resulting injury. The law presumes that general damages actually, proximately and necessarily result from an unauthorized publication which is libelous *per se* and they are not required to be proved by evidence since they arise by inference of law, and are allowed whenever the immediate tendency of the publication is to impair plaintiff's reputation, although no actual pecuniary loss has in fact resulted.
>
> In an action upon a publication coming within the second class, that is, a publication which is susceptible of two interpretations, one of which is defamatory, it is for the jury to determine under the circumstances whether the publication is defamatory and was so understood by those who saw it.
>
> In publications which are libelous *per quod* the innuendo and special damages must be alleged and proved.

Flake v. Greensboro News Co., 212 N.C. 780, 785, 195 S.E. 55, 59 (1938) (citations omitted).

[3] The plaintiff's complaints in these cases failed to bring the editorial complained of within the second class of libel, since it

was not alleged that the editorial is susceptible of two meanings, one defamatory, and that the defamatory meaning was intended and was so understood by those to whom the publication was made. *Id.*; *Wright v. Commercial Credit Company, Inc.*, 212 N.C. 87, 89, 192 S.E. 844, 845 (1937). The complaints failed to bring the editorial within the third class—libel *per quod*—since it was not alleged that the plaintiff suffered special damages. *Flake v. Greensboro News Co.*, 212 N.C. at 785, 195 S.E. at 59. In fact, the plaintiff's counsel stated with commendable candor and accuracy during oral arguments before this Court that these were actions for libel *per se* or not actions for libel at all. Therefore, we are concerned here only with the law relative to libel *per se*. We must determine whether the editorial is defamatory *per se*. If it is not, the defendants were entitled to judgments ordering dismissal of the plaintiff's claims for relief for libel. *Id.*

[4] Under the well established common law[1] of North Carolina, a libel *per se* is a publication by writing, printing, signs or pictures which, when considered alone without innuendo, colloquium or explanatory circumstances: (1) charges that a person has committed an infamous crime; (2) charges a person with having an infectious disease; (3) tends to impeach a person in that person's trade or profession; or (4) otherwise tends to subject one to ridicule, contempt or disgrace. *Flake v. Greensboro News Co.*, 212 N.C. at 787, 195 S.E. at 60. It is not always necessary that the publication involve an imputation of crime, moral turpitude or immoral conduct. *Arnold v. Sharpe*, 296 N.C. at 537, 251 S.E. 2d at 455. "But defamatory words to be libelous *per se* must be susceptible of *but one meaning* and of such nature that *the court* can presume *as a matter of law* that they tend to disgrace and degrade the party or hold him up to public hatred, contempt or ridicule, or cause him

1. As we base our holding that the defendants were entitled to dismissal of the plaintiff's purported claims for libel *per se* exclusively upon the law of libel of this State, we need not decide whether the plaintiff is a public figure such as to bring into play the constitutional limitations on state libel actions first announced in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). Therefore, we do not consider whether the plaintiff is a public figure either by reason of his position or by reason of having thrust himself to the forefront of a public controversy in order to influence its resolution. *See generally Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), *cert. denied*, --- U.S. ---, 103 S.Ct. 1233, 75 L.Ed. 2d 467 (1983). For the same reason we neither reach nor consider the several defenses based on First Amendment principles which the defendants contend apply.

to be shunned and avoided." *Flake v. Greensboro News Co.*, 212 N.C. at 786, 195 S.E. at 60 (emphasis added).

The initial question for the court in reviewing a claim for libel *per se* is whether the publication is such as to be subject to only one interpretation. *Oates v. Wachovia Bank & Trust Co.*, 205 N.C. 14, 16, 169 S.E. 869, 871 (1933). If the court determines that the publication is subject to only one interpretation, it then "is for the court to say whether that signification is defamatory." *Id.* It is only after the court has decided that the answer to both of these questions is affirmative that such cases should be submitted to the jury on a theory of libel *per se*.

[5] We turn then to the question whether the editorial published and republished by the defendants is susceptible of but one interpretation, which is defamatory when considered alone without innuendo or explanatory circumstances. We find that it is not. The worst that could be said of the editorial is that it is "reasonably susceptible of a defamatory meaning." 63 N.C. App. at 213, 304 S.E. 2d at 601. However, we find the editorial, at the very least, equally susceptible of a nondefamatory interpretation. Therefore, it could not be libelous *per se*. *Flake v. Greensboro News Co.*, 212 N.C. at 786, 195 S.E. at 60; *Oates v. Wachovia Bank & Trust Co.*, 205 N.C. at 16-17, 169 S.E. at 871.

In determining whether publications are susceptible of only one meaning, and that a defamatory meaning, so as to be libelous *per se*:

> The principle of common sense requires that courts shall understand them as other people would. The question always is how would ordinary men naturally understand the publication . . . . The fact that supersensitive persons with morbid imaginations may be able, by reading between the lines of an article, to discover some defamatory meaning therein is not sufficient to make them libelous.
>
> In determining whether the article is libelous *per se* the article alone must be construed, stripped of all insinuations, innuendo, colloquium and explanatory circumstances. The article must be defamatory on its face "within the four corners thereof."

Flake v. Greensboro News Co., 212 N.C. at 786-87, 195 S.E. at 60 (citations omitted).

In each of his complaints against the defendants, the plaintiff specifically complained that in the editorial in question:

> plaintiff is reported as having said in a 1978 newspaper article that between 1975 and 1978 about 800 black students had been denied admission. That said statement is false. That the entire article . . . gives the impression that the plaintiff is an extremist, a liar and is irresponsible in his profession.

We do not think such allegations can find support in the editorial of which the plaintiff complains.

The editorial giving rise to this appeal when viewed "within the four corners thereof" and as ordinary people would understand it simply is not directed toward the plaintiff. Instead, it criticizes "the continuing deluge of charges from Washington against the University of North Carolina at Chapel Hill." The thrust of the editorial is to express the opinion that special admissions concessions in effect for blacks at the University contradict and disprove *charges from Washington* of unfair discrimination against minorities. In fact, the only direct mention of the plaintiff occurs in the second paragraph of the editorial, which states that the "latest barrage" of charges *from Washington* is based on a 1978 newspaper article written by him. The editorial states direct opinions in a robust manner concerning a controversial public issue and takes to task unnamed persons who have expressed contrary opinions. It does not indicate directly or by implication that the plaintiff is "an extremist, a liar and irresponsible in his profession," as alleged by the plaintiff.

We do not find the editorial to be "of such nature that the court can presume as a matter of law that [it tends] to disgrace and degrade the party or hold him up to public hatred, contempt or ridicule, or cause him to be shunned and avoided." *Flake v. Greensboro News Co.*, 212 N.C. at 786, 195 S.E. at 60. Although every defamation must be false, not every falsehood is defamatory. Here, neither the statement that the defendant wrote such

a 1978 newspaper article nor the characterization of that article are defamatory even if they are untrue.[2]

The majority in the Court of Appeals concluded that the editorial charged that the plaintiff was irresponsible and:

> ordinary men would naturally understand the editorial to imply or insinuate that plaintiff's statistics regarding the number of blacks denied admission to UNC between 1975 and 1979 were either knowingly and intentionally false, or the result of gross incompetence in the conduct of plaintiff's profession.

63 N.C. App. at 211-12, 304 S.E. 2d at 600. We have concluded, on the other hand, that the most obvious and natural meaning to be accorded the editorial in question does not tend to defame the plaintiff. Certainly, the editorial at worst is susceptible of two interpretations one of which is defamatory and the other not. When a publication is susceptible of two interpretations, one defamatory and the other not, it will not support an action for a libel of the first class—a libel based upon a publication obviously defamatory which is libel *per se*. *Arnold v. Sharpe*, 296 N.C. at 537, 251 S.E. 2d at 455. As previously pointed out, the plaintiff's complaints failed to allege any class of libel other than libel *per se*. The trial court correctly dismissed the plaintiff's complaints for failure to state a claim for libel upon which relief could be granted. That part of the opinion of the Court of Appeals to the contrary on this issue must be reversed.

II.

Invasion of Privacy

[6] In each of the cases giving rise to this appeal the plaintiff alleged as a second claim for relief that the editorials published by the defendants "placed the plaintiff in a false light before the public and constituted an invasion of the plaintiff's privacy." The trial court entered judgments allowing the defendants' motions to

2. No article written by the plaintiff has been made a part of the record on appeal. The defendants urge us to take judicial notice of the article contending that it was published in *The Chapel Hill Newspaper*, September 17, 1978, p. 3-C, and is a matter of public knowledge. We have chosen in our discretion not to take judicial notice of any such article.

dismiss these claims. The Court of Appeals was of the opinion that the complaint stated a valid claim for relief for false light invasion of privacy. 63 N.C. App. at 241, 304 S.E. 2d at 617. We will not expand the tort of invasion of privacy recognized in this jurisdiction to include "false light" invasions of privacy. We reverse the Court of Appeals on this issue.

The existence of a right of privacy recognizable in law appears to have originated in a law review article by Samuel D. Warren and his law partner Louis D. Brandeis, later to become a Justice of the Supreme Court of the United States, which was published in the Harvard Law Review in 1890. Warren and Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193 (1890). Warren and his wife, the daughter of Senator Bayard of Delaware, were among the social elite of Boston. This was during the era of "yellow journalism," and the newspapers of Boston were specializing in articles embarrassing to "blue bloods."

> The matter came to a head when the newspapers had a field day on the occasion of the wedding of a daughter, and Mr. Warren became annoyed. It was an annoyance for which the press, the advertisers and the entertainment industry of America were to pay dearly over the next seventy years.

Prosser, *Privacy*, 48 Calif. L. Rev. 383 (1960). The article by Warren and Brandeis had a profound and almost immediate impact and "has come to be regarded as the outstanding example of the influence of legal periodicals upon the American law." *Id.*

The tort of invasion of privacy is now recognized, in one or more of its forms, in a majority of jurisdictions. *See generally*, W. Prosser, Handbook of the Law of Torts, §§ 117, 118 (4th Ed. 1971). It is generally recognized that:

> The right of privacy, as an independent and distinctive legal concept has two main aspects: (1) the general law of privacy, which affords a tort action for damages resulting from an unlawful invasion of privacy, and (2) the constitutional right of privacy which protects personal privacy against unlawful governmental invasion.
>
> The general law of the right of privacy, as a matter of tort law, is mainly left to the law of the states . . . .

Annotation, *Supreme Court's Views As To The Federal Legal Aspects Of The Right Of Privacy*, 43 L.Ed. 2d 871, 875-76. A review of the current tort law of all American jurisdictions reveals cases identifying at least four types of invasion of four different interests in privacy: (1) appropriation, for the defendant's advantage, of the plaintiff's name or likeness; (2) intrusion upon the plaintiff's seclusion or solitude or into his *private affairs*; (3) public disclosure of embarrassing *private* facts about the plaintiff; and (4) publicity which places the plaintiff in a false light in the public eye. *See* W. Prosser, Handbook of the Law of Torts § 117 (4th Ed. 1971) (emphasis added).

This Court was first called upon to consider a claim for invasion of privacy in *Flake v. Greensboro News Co.*, 212 N.C. 780, 195 S.E. 55 (1938). In that case we were concerned, as were the courts of all jurisdictions when considering the early cases, primarily "with the question whether the right of privacy existed at all, and gave little or no consideration to what it would amount to if it did." W. Prosser, Handbook of the Law of Torts § 117 at 804 (4th Ed. 1971).

In *Flake* we held that a right of privacy existed and for the first time held that an invasion of privacy by the appropriation of a plaintiff's photographic likeness for the defendant's advantage as a part of an advertisement constitutes a tort giving rise to a claim for relief recognizable at law. Although *Flake* involved overtones of "false light" publicity, we neither reached nor decided the precise question presented by the plaintiff here—whether publicity by a defendant which places a plaintiff in a false light before the public gives rise to a claim for which relief can be granted upon a theory of invasion of privacy. We now hold that such facts do not give rise to a claim for relief for invasion of privacy. A plaintiff must recover in such situations, if at all, in an action for libel or slander.

In *Flake*, we specifically noted that questions surrounding the right of privacy involved "a relatively new field in legal jurisprudence. In respect to it the courts are plowing new ground and before the field is fully developed unquestionably perplexing and harassing stumps and runners will be encountered." *Flake v. Greensboro News Co.*, 212 N.C. at 790, 195 S.E. at 62-63. We also specifically noted that the question of the extent to which a

newspaper may publish information concerning an individual "necessarily involves a consideration of the constitutional right of free speech and of a free press." *Id.* We now have the advantage of almost a half century of cases decided subsequent to *Flake* in this and other jurisdictions for our consideration in deciding whether to recognize a separate tort of false light invasion of privacy in addition to the torts of libel and slander already well recognized in this jurisdiction. Our continuing "consideration of the constitutional right of free speech and of a free press" guaranteed by the First Amendment to the Constitution of the United States, as well as a proper interest in judicial efficiency, leads us to reject the concept of a separate tort of false light invasion of privacy.

Two basic concerns argue against the recognition of a separate tort of false light invasion of privacy. First, any right to recover for a false light invasion of privacy will often either duplicate an existing right of recovery for libel or slander or involve a good deal of overlapping with such rights. Second, the recognition of a separate tort of false light invasion of privacy, to the extent it would allow recovery beyond that permitted in actions for libel or slander, would tend to add to the tension already existing between the First Amendment and the law of torts in cases of this nature.

Some commentators have specifically expressed concerns as to whether a tort of false light invasion of privacy would overwhelm existing laws of libel and slander. *See* Wade, *Defamation and the Right of Privacy*, 15 Vand. L. Rev. 1093 (1962). It has often been recognized that claims for false light invasion of privacy and claims for libel or slander are at least very similar and that many of the same considerations apply to each type of claim. *See e.g.* Restatement (Second) of Torts §§ 652 E, F, G (1977); Hill, *Defamation and Privacy under the First Amendment*, 76 Colum. L. Rev. 1205, 1207 (1976); Lusky, *Invasion of Privacy: A Clarification of Concepts*, 72 Colum. L. Rev. 693 (1972); Warren and Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193 (1890).

As early as 1960 one respected authority pointed out that:

> The false light cases obviously differ from those of intrusion, or disclosure of private facts. The interest protected is clearly that of reputation, with the same overtones of mental

> distress as in defamation. There is a resemblance to disclosure; but the two differ in that one involves truth and the other lies, one private or secret facts and the other invention. Both require publicity. There has been a good deal of overlapping of defamation in the false light cases, and apparently either action, or both, will very often lie. The privacy cases do go considerably beyond the narrow limits of defamation, and no doubt have succeeded in affording a needed remedy in a good many instances not covered by the other tort.
>
> It is here, however, that one disposed to alarm might express the greatest concern over where privacy may be going. The question may well be raised, and apparently still is unanswered, whether this branch of the tort is not capable of swallowing up and engulfing the whole law of public defamation; and whether there is any false libel printed, for example, in a newspaper, which cannot be redressed upon the alternative ground. If that turns out to be the case, it may well be asked, what of the numerous restrictions and limitations which have hedged defamation about for many years, in the interest of freedom of the press and the discouragement of trivial and extortionate claims? Are they of so little consequence that they may be circumvented in so casual and cavalier a fashion?

Prosser, *Privacy*, 48 Calif. L. Rev. 383, 400-401 (1960).

An answer was not long in coming to at least some of the questions raised by Dean Prosser. In cases decided prior to 1964, occasional concern had been expressed about the potential of claims for invasion of privacy to conflict with First Amendment rights of free speech and press. *See e.g. Flake v. Greensboro News Co.*, 212 N.C. at 790, 195 S.E. at 63. In 1964, the Supreme Court of the United States decided *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) which held that the First Amendment itself imposes limitations upon state claims for libel or slander. In 1967, the Supreme Court decided *Time, Inc. v. Hill*, 385 U.S. 374 (1967) which extended First Amendment protections *at least* as stringent as those required by *Sullivan* to defendants in cases for false light invasion of privacy. *See* Restatement (Second) of Torts § 652E comment d (1977). "By this decision, and others which followed it, the two branches of invasion of privacy which turn on

publicity were taken over under the Constitutional Privilege. The other two, however, are pretty clearly not." W. Prosser, Handbook of the Law of Torts § 118 at 827 (4th Ed. 1971).

In those jurisdictions recognizing the tort of false light invasion of privacy, the false light need not necessarily be a defamatory light. *See* Zolich, *Laudatory Invasion of Privacy,* 16 Clev. Marsh. L. Rev. 532, 540 (1967). In many if not most cases, however, the false light is defamatory and an action for libel or slander will also lie. W. Prosser, Handbook of the Law of Torts, § 117 at 813 (4th Ed. 1971).

We believe that we will:

> create a grave risk of serious impairment of the indispensable service of a free press in a free society if we saddle the press with the impossible burden of verifying to a certainty the facts associated in news articles with a person's name, picture or portrait, *particularly as related to nondefamatory matter.*

Time, Inc. v. Hill, 385 U.S. 374, 389 (1967) (emphasis added). This is especially true since plaintiffs in actions for invasions of privacy are entitled to nominal damages and in some cases to injunctive relief—*a prior restraint*—without allegation or proof of special damages. *Flake v. Greensboro News Co.,* 212 N.C. at 792, 195 S.E. at 64.

The conditions which led Warren and Brandeis to argue almost a century ago for a separate tort of invasion of privacy have at least to some extent subsided. Most modern journalists employed in print, television or radio journalism now receive formal training in ethics and journalism entirely unheard of during the era of "yellow journalism." As a general rule journalists simply are more responsible and professional today than history tells us they were in that era. Our recognition of these facts is entitled to some weight in deciding the question before us, even though we are completely aware that nothing in the First Amendment mandates that members of the news media be responsible or professional. As regards this, however, we cannot improve upon the statement of James Madison that:

> Some degree of abuse is inseparable from the proper use of every thing, and in no instance is this more true than in that of the press.
>
> It has accordingly been decided . . . that it is better to leave a few of its noxious branches to their luxuriant growth, than by pruning them away, to injure the vigor of those yielding the proper fruits.

4 Elliot's Debates on the Federal Constitution 571 (1876 Ed.).

Given the First Amendment limitations placed upon defamation actions by *Sullivan* and upon false light invasion of privacy actions by *Hill*, we think that such additional remedies as we *might* be required to make available to plaintiffs should we recognize false light invasion of privacy claims are not sufficient to justify the recognition in this jurisdiction of such inherently constitutionally suspect claims for relief. Additionally, the recognition of claims for relief for false light invasions of privacy would reduce judicial efficiency by requiring our courts to consider two claims for the same relief which, if not identical, would not differ significantly.

We reject the notion of a claim for relief for false light invasion of privacy in this jurisdiction. The trial court correctly dismissed the plaintiff's claims based upon this theory for failure to state a claim upon which relief could be granted.

The opinion of the Court of Appeals, holding that the trial court erred in dismissing the plaintiff's claims for relief for failure to state a claim upon which relief could be granted within the meaning of Rule 12(b)(6), is reversed. The cases comprising this consolidated appeal are remanded to the Court of Appeals for further remand to the Superior Court, Orange County, for reinstatement of the judgments entered by the trial court dismissing the plaintiff's claims against these defendants.

Reversed and remanded.

Justice MEYER concurring in part and dissenting in part.

At the outset I hasten to say that, for the reasons stated by the majority, I agree that the complaint fails to allege a libel of

the first class—a libel *per se*. Nor does it allege a libel of the second class as plaintiff did not allege that the editorial is susceptible of two meanings, one defamatory, and that the defamatory meaning was intended and was so understood by those to whom the publication was made. The complaint likewise fails to allege a cause of action for a libel of the third class—libel *per quod*—since it was not alleged that the plaintiff suffered special damages. While certain allegations of the complaint might be interpreted to allege special damages, the complaint refers to those allegations as supporting only a libel *per se*. Further, plaintiff conceded during oral argument that the complaint alleges libel *per se*, *i.e.*, a libel of the first class, or no libel at all.

I dissent from that portion of the majority opinion which addresses the issue of the false light invasion of privacy cause of action. Specifically, I do not agree with the majority opinion in its result on this issue—that no cause of action for false light invasion of privacy exists in this State, nor with the reasoning which guided the majority to that result. While there is indeed some overlapping in our existing action for libel *per quod* and false light invasion of privacy, they are not and should not be exclusive each of the other.

The distinctions between the defamation (libel and slander) and invasion of privacy torts are often blurred. While the interest protected in defamation actions is one's reputation or good name, the interest protected in invasion of privacy actions is often characterized as one's right to privacy or, simply stated, one's right to be let alone. In false light actions it is not necessary that the publication be defamatory or that special damages be alleged. Whereas truth is an absolute defense in the defamation actions, it is not in the invasion of privacy actions, except in the false light cases. This is so because, in privacy actions, it is not just the inaccuracy of the matter published which is of concern but the mere fact that the matter is published.

Our courts have long recognized a cause of action for invasion of privacy. *Flake v. Greensboro News Co.*, 212 N.C. 780, 195 S.E. 55 (1938); *Brown v. Boney*, 41 N.C. App. 636, 255 S.E. 2d 784, *disc. rev. denied*, 298 N.C. 294, 259 S.E. 2d 910 (1979); *Barr v. Telephone Co.*, 13 N.C. App. 388, 185 S.E. 2d 714 (1972). While I cannot agree with the statement of the Court of Appeals that

these are "false light" cases, they are indeed invasion of privacy cases.

A number of state and federal courts have recognized actions for false light invasion of privacy. *See Dodrill v. Arkansas Democrat Co.*, 265 Ark. 628, 590 S.W. 2d 840 (1979), *cert. denied, Little Rock Newspapers, Inc. v. Dodrill*, 444 U.S. 1076, 62 L.Ed. 2d 759 (1980); *Goodrich v. Waterbury Republican-American, Inc.*, 188 Conn. 107, 448 A. 2d 1317 (1982); *Harrison v. Washington Post Co.*, 391 A. 2d 781 (App. D.C. 1978); *Winegard v. Larsen*, 260 N.W. 2d 816 (Iowa 1977); *Froelich v. Adair*, 213 Kan. 357, 516 P. 2d 993 (1973); *McCall v. Courier-Journal & Louisville Times Co.*, 623 S.W. 2d 882 (Ky. 1981), *cert. denied*, 456 U.S. 975, 72 L.Ed. 2d 849 (1982); *McCormack v. Oklahoma Publishing Co.*, 613 P. 2d 737 (Okla. 1980).

The elements of a false light invasion of privacy claim though variously stated include (1) publication (2) of a false statement concerning the plaintiff which places plaintiff in a false light that would be offensive to a reasonable person in plaintiff's position. The essence of the term "false light" is a major misrepresentation of a person's character, history, activities or beliefs which places that person in an objectionable false position before the party or parties to whom it is communicated.

The Restatement has significantly tightened the elements by requiring that the false statement be "material," that the matter be "highly offensive" rather than simply "offensive," and that the actor know the material published is false or that the publication was made in reckless disregard as to the falsity of the material. *See* Restatement (Second) of Torts § 652E; *see also* False Light: Invasion of Privacy? 15 Tulsa Law Journal 113 (1979).

Plaintiff's claim is consistent with Restatement (Second) of Torts § 652E, entitled "Publicity Placing a Person In False Light," which provides:

> One who gives publicity to a matter concerning another that places the other before the public in a false light is subject to liability to the other for invasion of his privacy, if (a) the false light in which the other was placed would be highly offensive to a reasonable person, and (b) the actor had knowledge of or

> acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.

The Court of Appeals in *Renwick* related the following concerning false light invasion of privacy:

> For liability to attach under Section 652E, it is essential that the matter publicized be untrue, although it is not necessary for the matter to be defamatory. Section 652E, Comment b. It is sufficient if the matter published attributes to the plaintiff characteristics, conduct or beliefs that are false so that he is portrayed before the public in a false position. *Id.; Brown v. Boney, supra,* at 648, 255 S.E. 2d at 791. An action for defamation and a claim for false light invasion of privacy, however, are closely allied and the same considerations apply to each. *Cibenko v. Worth Publishers, Inc.*, 510 F. Supp. 761 (D.N.J. 1981); Hill, Defamation and Privacy under the First Amendment, 76 Colm. L. Rev. 1205, 1207 (1976). It is for the Court to determine whether the communication in question is capable of bearing a particular meaning which is highly offensive to a reasonable person. *Cibenko, supra* at 766.

63 N.C. App. at 240, 304 S.E. 2d at 617.

I agree with the Court of Appeals that so much of the editorial as is contained in the complaint is reasonably capable of conveying the offensive meaning or the innuendo ascribed by the plaintiff as the basis for his invasion of privacy claim.

A cause of action for both false light invasion of privacy and libel may be joined in the same action. *See Varnish v. Best Medium Publishing Co.*, 405 F. 2d 608 (2nd Cir. 1968). However, there can be but one recovery for any particular publication. Restatement (Second) of Torts § 652E, Comment b. *See* 62 Am. Jur. 2d Privacy § 5 (1972).

I do not share the majority's fear of conflict between our recognition of a false light invasion of privacy cause of action and the First Amendment limitations placed upon defamation actions by *Sullivan* and upon false light invasion of privacy actions by *Hill.* For an examination of this problem, *see* "Privacy: The Search for a Standard," 11 Wake Forest L. Rev. 659 (1975). The Court of Appeals has adequately and accurately addressed the is-

sues relating to constitutional privilege in some thirty-three pages of its fifty-four page opinion in this case. The Court of Appeals' treatment of the constitutional issues is both scholarly and convincing. The First Amendment provides no absolute protection for any individual or member of the news media to make false material statements of fact and then to draw defamatory conclusions therefrom.

I agree with the Court of Appeals that the complaint states a valid claim for relief for false light invasion of privacy. 63 N.C. App. at 241, 304 S.E. 2d at 617. I believe that such a cause of action should obtain in North Carolina. I would vote to modify and affirm the decision of the Court of Appeals.

Justice EXUM dissenting in part and concurring in part.

I dissent from the majority's conclusion that these complaints do not state claims for libel *per se*. The editorial on which the complaints are based identify plaintiff as "Associate Dean of the College of Arts and Sciences at Chapel Hill [and] formerly in charge of minority admissions." The editorial then asserts that plaintiff in a 1978 newspaper article said 800 black students had been denied admission to the university between 1975 and 1978. Thereafter, the editorial asserts that plaintiff's 1978 statement was "flatly" denied by the present minority admissions director and that a 1979 faculty committee report showed only 36 blacks to have been denied admission between 1975 and 1979. The editorial ends by a reference to "irresponsible charges *such as this one.*" (Emphasis supplied.) Clearly, the last reference is to plaintiff's statement in his 1978 newspaper article. The entire thrust of the editorial is this: The "latest barrage" of "charges from Washington" is based on plaintiff's 1978 statement regarding black admissions to the university. Plaintiff's 1978 statement is wrong and grossly overstates the number of blacks denied admission. Plaintiff was then in a position to know what the true facts were. Plaintiff's 1978 statement is "irresponsible."

Certainly these assertions in the editorial tend to "impeach" plaintiff in his position as Associate Dean of the College of Arts and Sciences. They also tend to subject him to ridicule, contempt, or disgrace. If the assertions are false and made with malice they constitute libel *per se*.

Plaintiff alleges that insofar as the editorial asserts that he said "between 1975 and 1978 about 800 black students had been denied admission" the editorial is false. He also alleges that the editorial was published by both defendants "with knowledge of [its] falsity or with reckless disregard for the truth, and with actual malice." For purposes of the motion to dismiss the complaint, we must, of course, assume that these allegations are true.

I am satisfied the complaints have alleged a claim for libel *per se.*

I concur in Part II of the majority opinion.

For the foregoing reasons I vote to modify and affirm the decision of the Court of Appeals.

Justice FRYE dissenting.

In this case, the trial court dismissed the plaintiff's claims on the pleadings for failure to state a claim upon which relief could be granted. The Court of Appeals reversed, holding that the complaints give defendants sufficient notice of the nature and basis of plaintiff's claims to enable them to answer and to prepare for trial. I agree with that decision.

A motion to dismiss under Rule 12(b)(6) of the Rules of Civil Procedure for failure to state a claim upon which relief can be granted should not be allowed "unless it affirmatively appears that plaintiff is entitled to no relief under any state of facts which could be presented in support of the claim." *Presnell v. Pell,* 298 N.C. 715, 719, 260 S.E. 2d 611, 613 (1979).

For the reasons stated in Justice Exum's dissenting and concurring opinion as to Part I, I believe that the complaints, taken in their entirety, state a claim for relief for libel *per se.* I also agree with that portion of Justice Meyer's dissenting and concurring opinion which concludes that the complaints state a valid claim for false light invasion of privacy and that such a cause of action should obtain in North Carolina. Accordingly, I would vote to affirm the decision of the Court of Appeals.

STATE OF NORTH CAROLINA v. CHARLES DAVID STANLEY

No. 635A82

(Filed 6 March 1984)

Criminal Law § 135.4— aggravating factor of especially heinous, atrocious, or cruel—insufficiency of evidence to support

In a prosecution for murder in the first degree in which defendant received a death sentence, the trial court erred in permitting the jury to consider whether the murder committed by defendant was "especially heinous, atrocious, or cruel," as those terms are used in G.S. 15A-2000(e)(9). In the instant case, defendant drove his car to the place where his wife, her sister and his stepson were walking; he pulled alongside the curb, pointed his rifle at his wife, and shot her a number of times in rapid succession; he then departed the scene without leaving his car, drove to the Tarboro Police Station, and surrendered. Although the murder was indeed cruel and unpardonable, there was no evidence that defendant inflicted suffering upon the victim, either physically or psychologically, beyond that ordinarily suffered by anyone who is shot to death. Neither was there any evidence of unusual brutality exceeding that normally present in first degree murder. Further, there was no evidence that defendant himself was unusually depraved. Previous cases have made it clear that to submit this aggravating factor to a jury, the capital offense must not be *merely* heinous, atrocious, or cruel; it must be *especially* heinous, atrocious, or cruel. The defendant's acts must be characterized by "*excessive* brutality, or physical pain, psychological suffering, or dehumanizing aspects *not normally present*" in a first degree murder case.

Justice MITCHELL concurring in the result.

Justice MARTIN dissenting.

Justice COPELAND joins in this dissent.

APPEAL of right from a death sentence imposed by *Judge Thomas H. Lee*, presiding at the 4 October 1982 Criminal Session of EDGECOMBE Superior Court. *See* N.C. Gen. Stat. § 7A-30 (1981).

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

Adam Stein, Appellate Defender, by Ann B. Petersen and Malcolm Ray Hunter, Jr., Assistant Appellate Defenders; James R. Glover, Assistant Appellate Defender, Appellate Defender Clinic, for defendant appellant.

EXUM, Justice.

The dispositive issue in this appeal concerns the propriety of permitting the jury to consider whether the murder committed by defendant was "especially heinous, atrocious, or cruel," as those terms are used in N.C. Gen. Stat. § 15A-2000(e)(9). After a careful review of the facts and our prior decisions, we conclude this aggravating factor should not have been submitted to the jury. Since this is the only aggravating circumstance submitted and there is no evidence of any other which could have been submitted, we vacate the judgment imposing a sentence of death and in lieu thereof impose a sentence of life imprisonment.

I.

At the time of her death, the victim, Joyce Stanley, was married to but legally separated from defendant, pursuant to a separation agreement entered in November 1981. They had been married for over nineteen years and had two children, Tracy Garnett Stanley and Hope Denice Stanley. The victim's son (defendant's stepson), James Allen Joyner, had lived with them until his graduation from high school. The Stanleys had lived in Rocky Mount since 1977, when they moved from Baltimore, Maryland. Defendant had retired from work in 1979 under total and permanent disability caused by heart disease and cancers of the nose, ear, and liver.

In mid-March 1982, some six weeks before the murder, the victim caused defendant to be arrested as a result of an incident which occurred in Rocky Mount: When her sister, Sandra Taylor, and the victim arrived at the victim's home, defendant was in a car parked in front of the house. The two women entered the house and watched defendant through the windows. Defendant got out of his car and walked into the yard, carrying a rifle. He was obviously intoxicated. The victim called the police. Defendant dropped the rifle at the corner of the house. When police arrived, they found him in the yard, playing with his dogs.

On 25 April 1982 the victim, her sister, Sandra Taylor, and two of the victim's children, Hope Stanley and James Joyner, left Rocky Mount to visit and have Sunday dinner with the victim's mother, Lottie Pope, in Tarboro. As they drove through Tarboro, they spotted defendant in a car parked at a laundromat some

three blocks from Ms. Pope's house. After they arrived and during the meal, they noticed defendant driving back and forth on the street in front of the house. Defendant passed by the house five or six times.

After the meal, most of the family went to sit on the front porch. The victim, Sandra and James went for a walk. As they started up the sidewalk, with James slightly ahead of his mother and aunt, defendant turned the corner onto the street in front of Ms. Pope's house. Sandra, determined to get the license number of the car so she could call the police, ran out in the street behind defendant's car as he pulled next to the curb. She hollered, "Get the license plate number." As James turned toward the car, Sandra exclaimed, "Oh God, he's got a gun."

Shots rang out. James picked up a brick and ran toward the car, counting seven shots as he covered the 20 to 30 feet to the car. The bullets struck the victim, spinning her around and onto the ground, killing her.

James threw the brick, shattered the windshield, jumped in the passenger's side of the car, and grabbed the gun. With the gun pointing straight up, defendant fired a shot which went through the car's roof. As James forced the gun barrel through the window on the driver's side, Sandra grabbed the gun with her left hand. She beat defendant in the face with her right hand and took the gun out of the car. She turned the gun on defendant and pulled the trigger. The gun clicked but did not fire. Defendant said something to the effect of, "That's all right, I killed the bitch."

Testimony conflicted regarding whether the victim spoke to defendant just before he shot her. Immediately before the first shot, Sandra heard the victim say "Please Stan." She did not, however, mention this fact in her detailed statement given to the police on 28 April 1982. Although James and Hope heard Sandra say, "Oh God, he's got a gun," neither of them heard the victim utter any words before the shooting started. James testified that no one said anything to defendant before the defendant started shooting. Lowell Gunter, Lottie Pope's husband, testified that he heard no one speak to defendant before the shooting.

After the shooting, defendant drove to the Tarboro police station and surrendered.

Defendant was convicted of first degree murder. After presentation of evidence and arguments in the penalty phase of the proceedings, the trial court submitted one aggravating and several mitigating factors[1] to the jury. Upon finding the existence of the one aggravating factor, *i.e.*, that the murder was especially heinous, atrocious, or cruel, and finding no factors in mitigation,[2] the jury recommended that defendant be sentenced to death. The trial court entered judgment accordingly.

II.

Defendant's appeal is directed only to the penalty phase of his trial. He assigns several errors; but the dispositive assignment of error is to the submission of the aggravating factor that the murder "was especially heinous, atrocious, or cruel," as these terms are used in section 15A-2000(e)(9) of our capital punishment statute.

Although we have determined that section 15A-2000(e)(9) is not unconstitutionally vague, *State v. Martin*, 303 N.C. 246, 278 S.E. 2d 214, *cert. denied*, 454 U.S. 933 (1981), the application of this aggravating circumstance to particular cases is sometimes difficult. The propriety of submitting this aggravating factor turns on "the peculiar surrounding facts of the capital offense under consideration." *State v. Pinch*, 306 N.C. 1, 35, 292 S.E. 2d 203, 228, *cert. denied*, 103 S.Ct. 474 (1982).

Not every capital offense is "especially heinous, atrocious, or cruel." *State v. Goodman*, 298 N.C. 1, 24-26, 257 S.E. 2d 569, 585 (1979). Indeed,

> [w]hile we recognize that every murder is, at least arguably, heinous, atrocious, and cruel, we do not believe that this

1. The court submitted the following mitigating factors: (1) Defendant has no significant prior criminal history; (2) defendant committed the murder while under the influence of a mental or emotional disturbance; and (3) defendant lacked the capacity to appreciate the criminality of his conduct. *See* N.C. Gen. Stat. § 15A-2000(f)(1), (2) & (6) (1983).

2. The trial court, pursuant to N.C. Gen. Stat. § 15A-2000(f)(9), also instructed the jury to determine if there were other circumstances which it found to have mitigating value. The jury responded negatively.

> subsection is intended to apply to every homicide. By using the word 'especially' the legislature indicated that there must be evidence that the brutality involved in the murder in question must exceed that normally present in any killing before the jury would be instructed upon this subsection.

Id. The circumstance is appropriate for a "conscienceless or pitiless crime which is unnecessarily torturous to the victim." *Id.; accord, State v. Rook*, 304 N.C. 201, 224, 283 S.E. 2d 732, 747-48 (1981), *cert. denied*, 455 U.S. 1038 (1982).

"A person of ordinary sensibility could fairly characterize almost every murder as being [especially heinous, atrocious, or cruel]." *Godfrey v. Georgia*, 446 U.S. 420, 428-29 (1980). That persons holding precisely this perception might comprise the jury in a capital case highlights the need for caution in tendering this aggravating circumstance to a jury and underscores the critical function served by our review of its submission on appeal. *Id.* This factor must "not become a 'catch-all' provision which can always be employed in cases where there is no evidence of other aggravating circumstances." *Goodman*, 298 N.C. at 25, 257 S.E. 2d at 585. And when "it is doubtful whether a particular aggravating circumstance should be submitted, the doubt should be resolved in favor of defendant. When 'a person's life is at stake . . . the jury should not be instructed upon one of the [aggravating] statutory circumstances in a doubtful case.' " *State v. Oliver*, 302 N.C. 28, 61, 274 S.E. 2d 183, 204 (1981) (quoting *State v. Goodman*, 298 N.C. at 30, 257 S.E. 2d at 588, and holding that the "especially heinous" factor should not have been submitted in the Hodge murder).

The cases cited above make it clear that to submit this aggravating factor to a jury, the capital offense must not be *merely* heinous, atrocious, or cruel; it must be *especially* heinous, atrocious, or cruel. The defendant's acts must be characterized by "*excessive* brutality, or physical pain, psychological suffering, or dehumanizing aspects *not normally present*" in a first degree murder case. *State v. Blackwelder*, 309 N.C. 410, 414, 306 S.E. 2d 783, 786 (1983). Any murder shocks our conscience. Yet, for us to review the sufficiency of the evidence to support a jury's finding that a particular murder is "especially heinous, atrocious, or cruel," we must harden our perceptions and feelings to the legal

proposition that not all murders may be so characterized. Only after accepting this view may we then differentiate among murders on the basis of their respective brutality, winnowing case by case those which are merely heinous, atrocious or cruel, from those which the jury could find are especially so. It is a grisly duty.

In support of submission of the "especially heinous" circumstance here, the state argues the evidence is sufficient to permit the jury to find: (1) The victim suffered a prolonged, unnecessarily torturous death at the hands of her assailant. (2) She pled for her life before she was shot. (3) Defendant tortured her psychologically immediately before the killing by "stalking" her in his automobile. Similar facts, involving physical and psychological torture and a merciless killing of one begging for his life, have been deemed enough under our prior cases to support a jury's conclusion that the murder was especially heinous, atrocious or cruel.

We have recognized the excessive cruelty and especial heinousness of circumstances in which a victim endured prolonged suffering at the assailant's hands before death. In *Martin*, 303 N.C. at 246, 278 S.E. 2d at 219, the victim was paralyzed from the waist down by the first gunshots. Defendant then, over a 25-minute period, dragged her into another room, beat her with a pistol, threw her repeatedly against a wall, beat her on the head with his fists, and beat her again with the pistol before he finally fired the fatal shots. In *Goodman*, 298 N.C. at 26, 257 S.E. 2d at 585, defendant shot the victim a number of times and cut him repeatedly with a knife. Defendant then placed him, alive, in the trunk of a car where he remained for a number of hours while en route to another county. There defendant removed him from the trunk and shot him twice through the head.

That death is not instantaneous, however, does not alone make a murder especially heinous, atrocious or cruel. In *State v. Hamlette*, 302 N.C. 490, 276 S.E. 2d 338 (1981), defendant shot the victim three times as the victim talked on a public telephone in the parking lot of a store in Roxboro. Defendant had been riding around and drinking beer most of the evening. He shot the victim from behind without any established motive and then fled. The victim lingered for twelve days before ultimately dying because

of the gunshot wounds. This Court concluded that the "especially heinous" aggravating circumstance should not have been submitted to the jury. The Court characterized the murder as "heinous but not 'especially heinous' within the meaning of that term as used in the statute. . . . [I]t was not unnecessarily tortuous [sic] or outrageously wanton or vile. *Contrast State v. Goodman, supra,* and *State v. Johnson,* [298 N.C. 47, 257 S.E. 2d 597 (1979)], *with State v. Oliver and Moore,* 302 N.C. 28, 274 S.E. 2d 183 (1981)." *Id.* at 504, 276 S.E. 2d at 347.

In *State v. Oliver,* 302 N.C. 28, 61, 274 S.E. 2d 183, 204 (1981), the victim of an armed robbery said to his assailants, "Please don't shoot me. Go ahead and take the money." We characterized this statement as being one in which the victim "begged for his life." We said, "With Watts [the victim] pleading for his life defendant . . . mercilessly shot him to death." We concluded that these circumstances were enough to support the jury's finding that the murder was "especially heinous, atrocious or cruel." On the second appeal in *State v. Oliver,* 309 N.C. 326, 307 S.E. 2d 304 (1983), a majority of the Court again concluded that submission of the "especially heinous" aggravating factor was proper. The Court then characterized the murder of the pleading victim as one "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." *Id.* at 346, 307 S.E. 2d at 318. The Court in *Oliver II* relied on circumstances present in the case other than the victim's having pleaded "Please don't shoot me." The Court said:

> 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.

Id. at 347, 307 S.E. 2d at 319 (footnote omitted).

The question before us is whether the evidence is sufficient to permit a jury to find, as the state argues, that the victim here (1) suffered a prolonged, unnecessarily torturous death as in *Martin* and *Goodman*; (2) begged for her life before being "mercilessly shot . . . to death" under circumstances evidencing the infliction of psychological torture and an unusually depraved defendant as in *Oliver*, or (3) was psychologically tortured by being "stalked" by defendant before he killed her.

When we determine, in criminal cases, whether the evidence of defendant's guilt of a particular offense is sufficient to be submitted to the jury, we apply the following rules:

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

State v. Powell, 299 N.C. 95, 99, 261 S.E. 2d 114, 117 (1980). When the evidence is so viewed, there must be " 'substantial evidence of all material elements of the offense' in order to create a jury question on defendant's guilt or innocence." *State v. Locklear*, 304 N.C. 534, 538, 284 S.E. 2d 500, 502 (1981) (quoting *State v. Jones*, 303 N.C. 500, 504-05, 279 S.E. 2d 835, 838 (1981)). The United States Supreme Court has articulated the test of the sufficiency of evidence in a criminal case as being whether, "after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (emphasis original). This Court, in turn, has

said that " '[s]ubstantial evidence' is that amount of relevant evidence that a reasonable mind might accept as adequate to support a conclusion." *State v. Cox*, 303 N.C. 75, 87, 277 S.E. 2d 376, 384 (1981). The state's evidence must do more than raise merely a suspicion or conjecture as to the existence of the necessary elements of the charged offense. *State v. LeDuc*, 306 N.C. 62, 75, 291 S.E. 2d 607, 615 (1982).

We think this same approach to the evidence should be used in determining whether the evidence is sufficient to support a finding by the jury of certain essential facts which, in turn, would support its conclusion that a first degree murder was especially heinous, atrocious, or cruel.

Taking this approach, we are satisfied the evidence here is insufficient. It leaves the existence of the facts essential to support the ultimate conclusion in a state of conjecture and surmise. The evidence shows defendant fired nine shots at the victim, all in rapid succession, from an automobile which he never left. He inflicted no other injuries. According to the pathologist, the lethal wound, which entered the victim's back and lacerated the aorta, rendered her unconscious within minutes. Though death was not instantaneous, the victim did not linger and suffer for any prolonged period before death. There is no evidence that defendant intended that his wife suffer a prolonged, torturous death, or that she in fact suffered a prolonged, torturous death. The only reasonable inference to be drawn from the evidence is that defendant intended her death to be as instantaneous as he could make it. That she might have remained conscious for a matter of minutes after being shot does not distinguish this case from the ordinary death-by-shooting cases. *See Hamlette*, 302 N.C. 490, 276 S.E. 2d 338 (where the victim lingered twelve days after being shot).

There is evidence that the victim said "Please Stan" sometime before she was shot. This evidence does not support a reasonable inference that the victim was mercilessly shot to death while begging for her life. What the words "Please Stan" might have referred to remains in the realm of conjecture and surmise. The words could have been uttered in an effort to get defendant to leave the area before the victim was aware that defendant intended to shoot her. The words also could have been uttered with

reference to some other momentary conflict between the victim and her estranged husband. Likewise, the evidence does not support a reasonable inference that defendant, who never left his car, heard these words uttered by the victim who was standing on the curb. Since no eyewitness other than Sandra Taylor heard this utterance, it is not reasonable to infer that defendant heard it. Neither is there any evidence which supports an inference that defendant boasted after the shooting, as did the defendant in *Oliver II*, that he had killed someone begging for his life and "kind of liked the idea of it." 309 N.C. at 347, 307 S.E. 2d at 319. The evidence is simply that defendant stated immediately after the shooting, "that's all right, I killed the bitch." Thereafter, he immediately drove to the Tarboro Police Department and surrendered. When advised that he was charged with the first degree murder of his wife, defendant said he did not know he had killed her and, if he had known, he would have killed himself.

Finally, there is no evidence from which it could be reasonably inferred that defendant "stalked" his victim, torturing her psychologically before the shooting. The evidence shows simply that defendant drove past the house, where the victim was located, several times. The victim and her family, knowing of defendant's presence in the area, nevertheless went outside the house "for a walk." Obviously they were not being tortured psychologically by defendant's actions in driving back and forth in front of the house. At no time before the shooting did defendant threaten the victim or any of her family. Rather, he shot the victim suddenly, nine times in rapid succession, and she died shortly thereafter.

The murder here was indeed cruel and unpardonable, as is every unlawful, deliberate taking of human life. But there is no evidence that defendant inflicted suffering upon the victim, either physically or psychologically, beyond that ordinarily suffered by anyone who is shot to death. Neither is there any evidence of unusual brutality exceeding that normally present in first degree murder. There is no evidence that defendant himself was unusually depraved.

The Georgia Supreme Court has reached the same result on quite similar facts in *Phillips v. State*, 250 Ga. 336, 297 S.E. 2d 217 (1982). Phillips was convicted of the first degree murder of his estranged wife who was in the process of obtaining a divorce that

Phillips did not want. The Georgia Supreme Court recited the facts as follows:

> Phillips related to friends shortly before the murder that his life was in a mess and that if his wife did not return to him, he would probably kill her. On the morning of the murder, Phillips went to the school where his wife worked to discuss a bill for attorney fees of $150. He left, but returned later that morning, carrying, on a hanger, clothes that she had left behind when she moved out. Inside the clothes, Phillips had concealed a .22 rifle suspended from a coat hanger. When his wife entered the hall to speak to Phillips, she apparently saw the gun, because she screamed "Oh, no!" before Phillips fired 5 times in rapid succession. He grabbed her and shook her, then left.

Id. at 339, 297 S.E. 2d at 220. Less than an hour after the murder Phillips surrendered himself at the sheriff's office. A physician who conducted the autopsy testified that the deceased "had been shot 4 times: in the right shoulder, the left ear, the back, and the left side of the head; she lived at least 5 minutes from the onset of the injuries." *Id.* at 340, 297 S.E. 2d at 220.

The Georgia Supreme Court concluded that the evidence did not support submission of its statutory aggravating circumstance that the "offense of murder was outrageously and wantonly vile, horrible and inhuman in that it involved torture to the victim and depravity of mind on the part of the defendant." The Georgia Court said:

> Torture may be found where the victim is subjected to serious physical, sexual, or psychological abuse before death. *Hance v. State*, [245 Ga. 856, 268 S.E. 2d 339 (1980)]. Depravity of mind may be found where the victim is subjected to serious psychological abuse before death, or to mutilation, serious disfigurement, or sexual abuse after death. Ibid.
>
> Here it is undisputed that there was no sexual abuse and that the victim died after Phillips left. Thus, the trial court's finding of torture and depravity of mind must rest upon serious physical or psychological abuse before death.

> The state argues that, since Mrs. Phillips suffered pain and anticipated the prospect of death, she suffered serious physical and psychological abuse before death. Such an interpretation of § (b)(7) would allow the trier of fact to find § (b)(7) in almost every murder case. We cannot so broadly construe 'physical' or 'psychological' abuse.

Id. at 340-41, 297 S.E. 2d at 221 (footnote omitted).

This case is very nearly controlled by *Godfrey v. Georgia*, 446 U.S. 420 (1980), which establishes a constitutionally mandated limit beyond which aggravating factors like our "especially heinous" factor may not be submitted. Both here and in *Godfrey*, defendant murdered his estranged wife. Each victim had obtained warrants against her husband shortly before the murders. Court appearances resulting from these charges were imminent in each case. Even the manner of the killings are similar. In *Godfrey*, defendant

> got out his shotgun and walked with it down the hill from his home to the trailer where his mother-in-law lived [and where his wife was staying]. Peering through a window, he observed his wife, his mother-in-law, and his 11-year-old daughter playing a card game. He pointed the shotgun at his wife through the window and pulled the trigger. The charge from the gun struck his wife in the forehead and killed her instantly. He proceeded into the trailer, striking and injuring his fleeing daughter with the barrel of the gun. He then fired the gun at his mother-in-law, striking her in the head and killing her instantly.
>
> [Defendant] then called the local sheriff's office, identified himself, said where he was, explained that he had just killed his wife and mother-in-law, and asked that the sheriff come and pick him up.

Id. at 425. In the instant case, defendant drove his car to the place where his wife, her sister and his stepson were walking. He pulled alongside the curb, pointed his rifle at his wife, and shot her a number of times in rapid succession. He departed the scene without leaving his car, drove to the Tarboro police station, and surrendered.

Defendant in *Godfrey*, like defendant here, was sentenced to death by reason of the jury's determination that one statutory aggravating factor existed. In *Godfrey* the jury determined, under the language of the Georgia sentencing statute, that the murder "was outrageously or wantonly vile, horrible and inhuman." *Id.* at 426. The Georgia Supreme Court affirmed the death sentence asserting simply that the verdict was "factually substantiated." *Id.* at 432. The United States Supreme Court concluded that in so doing, the Georgia Supreme Court had unconstitutionally construed the "outrageously vile" aggravating factor in the Georgia sentencing statute. The Court said:

> The petitioner's crimes cannot be said to have reflected a consciousness materially more 'depraved' than that of any person guilty of murder. His victims were killed instantaneously. They were members of his family who were causing him extreme emotional trauma. Shortly after the killings, he acknowledged his responsibility and the heinous nature of his crimes. These factors certainly did not remove the criminality from the petitioner's acts. But, as was said in *Gardner v. Florida*, 430 U.S. 349, 358, 51 L.Ed. 2d 393, 97 S.Ct. 1197, it 'is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion.'
>
> That cannot be said here. There is no principled way to distinguish this case, in which the death penalty was imposed, from the many cases in which it was not. Accordingly, the judgment of the Georgia Supreme Court insofar as it leaves standing the petitioner's death sentences is reversed, and the case is remanded to that court for further proceedings.

Id. at 433 (footnote omitted).

We recognize the difference in language in the Georgia "outrageously vile" factor and our own "especially heinous" factor. But the essence of the Georgia aggravating factor and our own, as we have interpreted it in earlier cases, is the same. The Georgia statute mentions expressly "torture to the victim and depravity of mind . . . of the defendant." *Phillips v. State*, 250 Ga. at 338, 297 S.E. 2d at 220. Interpreting our "especially heinous" factor, we have said that it connotes a "conscienceless or

pitiless crime which is unnecessarily torturous to the victim." *State v. Goodman*, 298 N.C. 1, 25, 257 S.E. 2d 569, 585 (1979), *quoting with approval State v. Dixon*, 283 So. 2d 1 (Fla. 1973), *cert. denied*, 416 U.S. 943 (1974). We have approved a jury instruction defining the factor as follows:

> You are instructed that the words 'especially heinous, atrocious or cruel' means extremely or especially or particularly heinous or atrocious or cruel. You're instructed that 'heinous' means extremely wicked or shockingly evil. Atrocious means marked by or given to extreme wickedness, brutality or cruelty, marked by extreme violence or savagely fierce. It means outrageously wicked and vile. 'Cruel' means designed to inflict a high degree of pain, utterly indifferent to or enjoyment of the suffering of others.

Id. The circumstance "does not arise in cases in which death was immediate and in which there was no unusual infliction of suffering upon the victim." *Rook*, 304 at 226, 283 S.E. 2d at 747. Submission of the circumstance is appropriate "when there is evidence of excessive brutality, beyond that normally present in any killing . . . ." *Pinch*, 306 at 34, 292 S.E. 2d at 228. "A conscienceless and pitiless murder inflicting psychological torture" upon the victim qualifies for the "especially heinous" factor. *Oliver II*, 309 N.C. at 346, 307 S.E. 2d at 318. The Court in *Oliver II* also thought it significant that defendant had boasted after the crime that he had murdered someone begging for his life and "kind of liked the idea of it"—a boast which demonstrates an unusual depravity of mind. Thus, both the Georgia factor and ours apply to those murders which are particularly painful or torturous to the victim, either psychologically or physically, or which demonstrate an unusual depravity of mind on the part of the defendant beyond that normally present in first degree murder.

Further, in *Eddings v. Oklahoma*, 455 U.S. 104, 109, n. 4 (1982), a majority of justices noted that the application of the Oklahoma "heinous, atrocious or cruel" factor in that case most likely violated *Godfrey*. In *Proffitt v. Wainwright*, 685 F. 2d 1227 (11th Cir. 1982), *modified on other grounds*, 706 F. 2d 311 (11th Cir.), *cert. denied*, 52 U.S.L.W. 3423 (U.S. Nov. 28, 1983) (No. 83-113), the court applied *Godfrey* to Florida's "heinous, atrocious or cruel" factor and found that Florida had unconstitutionally ap-

plied that factor under the reasoning of *Godfrey*. In both *Oliver II* and *State v. Rook*, 304 at 225-26, 283 S.E. 2d at 747-48, this Court analyzed the application of the "especially heinous" factor in light of the decision in *Godfrey*.

We conclude that it was error in this case to submit the "especially heinous" aggravating factor.

Since there is no evidence in the case to support any aggravating circumstance, we must overturn the sentence of death and in lieu thereof impose a sentence of life imprisonment. N.C. Gen. Stat. § 15A-2000(d)(2); *State v. Silhan*, 302 N.C. 223, 271, 275 S.E. 2d 450, 483 (1981). Accordingly, the judgment below imposing a sentence of death is vacated and defendant is hereby sentenced to a term of imprisonment for the remainder of his natural life. Defendant is entitled to credit for any time spent in confinement as a result of these charges before the date of this judgment. *See State v. Bondurant*, 309 N.C. 674, 309 S.E. 2d 170 (1983). The Superior Court of Edgecombe County shall issue an amended commitment in accordance with this judgment. *See State v. Jackson*, 309 N.C. 26, 305 S.E. 2d 703 (1983).

Defendant assigns and we find no error in the guilt-innocence phase of his trial.

Guilt-Innocence Phase: No error.

Sentencing Phase: Death sentence vacated; sentence of life imprisonment imposed.

Justice MITCHELL concurring in the result.

I find most of the reasoning and arguments advanced by Justice Martin in his dissent to be correct. If we were construing the statute in isolation, I would be compelled to join him. I concur in the result reached by the majority, however, solely because I am unable to distinguish satisfactorily this case from *Godfrey v. Georgia*, 446 U.S. 420 (1980), which establishes a constitutionally mandated limit on aggravating factors to be considered in capital cases.

Justice MARTIN dissenting.

I cannot concur in the conclusion that the evidence was insufficient to submit the aggravating circumstance that the killing was especially heinous, atrocious, or cruel. The question before us is whether, as a matter of law, there is sufficient evidence to submit the issue to the jury for its determination. In making this decision, we must view the evidence in the light most favorable to the state, discrepancies and contradictions are disregarded, the state's evidence is taken as true, and the state is entitled to every inference of fact that may be reasonably deduced therefrom. *State v. Lester*, 294 N.C. 220, 240 S.E. 2d 391 (1978); *State v. Witherspoon*, 293 N.C. 321, 237 S.E. 2d 822 (1977). The defendant's evidence, unless favorable to the state, is not to be considered in deciding the question. *State v. Earnhardt*, 307 N.C. 62, 296 S.E. 2d 649 (1982). If there is substantial evidence of each element of the issue under consideration, the issue must be submitted to the jury for its determination. *State v. Roseman*, 279 N.C. 573, 184 S.E. 2d 289 (1971). If the evidence only raises a suspicion or conjecture as to the existence of the fact to be found, the issue should not be submitted. *State v. Cutler*, 271 N.C. 379, 156 S.E. 2d 679 (1967).

Chief Justice Stacy stated the applicable rule as follows:

> [I]f there be any evidence tending to prove the fact in issue, or which reasonably conduces to its conclusion as a fairly logical and legitimate deduction, and not merely such as raises a suspicion or conjecture in regard to it, the case should be submitted to the jury.

State v. Johnson, 199 N.C. 429, 431, 154 S.E. 730, 731 (1930).

The majority fails to properly apply the rule. Rather, it analyzes the evidence in the light most favorable to the defendant. This is demonstrated by the following excerpts from its opinion:

> 1. "[D]efendant fired nine shots *at* the victim . . . ." (Emphasis added.) In the light most favorable to the state, defendant hit Joyce with each of the nine bullets. The medical doctor testified she was shot nine times, leaving eleven wounds in her body.

2. "[T]he lethal wound . . . rendered her unconscious within minutes." True, but in the view most favorable to the state, Joyce experienced the pain of each of the nine bullets entering her body. The medical doctor testified that she was conscious during the entire incident.

3. "There is no evidence that defendant intended that his wife suffer a prolonged, torturous death . . . ." In the light most favorable to the state, the circumstantial evidence indicates that defendant intended his wife, Joyce, to suffer, not die instantaneously. Although he shot her nine times, striking her in various parts of her body, she remained conscious for several minutes. The doctor testified she was conscious during the entire incident. Immediately after the killing, the defendant laughed and said, "That's all right. I killed the bitch." Furthermore, defendant's intention is not relevant as to whether there is sufficient evidence to submit the issue to the jury.

4. "The words ["Please, Stan"] also could have been uttered with reference to some other momentary conflict between the victim and her estranged husband." I assume that the majority is indicating that Joyce Stanley, under these circumstances—with defendant pointing a gun out of the car window at her—meant "Please, Stan, go pay the light bill." True, the jury could so find, but applying the rule as we are bound to do, the logical inference is: "Please, Stan, don't kill me."

5. "[T]he evidence does not support a reasonable inference that defendant, who never left his car, heard these words uttered by the victim who was standing on the curb." In the light most favorable to the state, the inference is that defendant did hear the plea, but ignored it, and proceeded to gun down Joyce Stanley. Joyce was ten to twelve feet from Stanley at the time.

6. "Since no eyewitness other than Sandra Taylor heard this utterance, it is not reasonable to infer that defendant heard it." This infers that numerous persons were in the area of the killing. Only one other witness, Joyce's son, James, was in the immediate vicinity. Other persons were on the porch of a house some distance from the street. In the light

most favorable to the state, since Sandra heard what Joyce said, the defendant also heard it. He was only ten to twelve feet from her.

7. "Neither is there any evidence which supports an inference that defendant boasted after the shooting . . . that he had killed someone begging for his life . . . ." True, he did not use those words. Whether he was boasting when he laughed and said "That's all right. I killed the bitch," was for the jury.

8. "[T]he victim did not linger and suffer for any prolonged period before death." The medical doctor testified that Joyce was conscious during the entire incident. The mortal wound ruptured the main blood vessel from the heart, causing Joyce to bleed to death internally. She was conscious for several minutes before she died, according to the doctor. Several minutes can be a prolonged or extended period of time, depending upon what is happening and whose point of view is being considered. The time in question may have passed very quickly for defendant, but agonizingly slow and painful for Joyce before she mercifully slipped into unconsciousness. Joyce was not killed instantaneously. Having been shot nine times, the inference most favorable to the state is that she did indeed suffer.

9. "The victim and her family, knowing of defendant's presence in the area, nevertheless went outside the house 'for a walk.' Obviously they were not being tortured psychologically by defendant's actions . . . ." Actually, Sandra testified that they went into the street to get the license number on defendant's car. James did say, "We *were* all going out for a walk." (Emphasis added.) Defendant's arrival altered their intentions. They then resolved to get the license number. Again, discrepancies in the evidence are to be disregarded.

Other examples may be found in the opinion, the point being that the majority abandoned the proper rule with respect to the issue. It resolved all the evidence in the light most favorable to the defendant.

Moreover, it appears that the majority seeks to perform the task of the jury and make the determination of whether the killing was in fact especially heinous, atrocious, or cruel. The majority states: "Only after accepting this view may we then differentiate among murders on the basis of their respective brutality, winnowing case by case those which are merely heinous, atrocious or cruel, from those which the jury could find are especially so. It is a grisly duty." Our duty on the issue presently before us is not to "differentiate among murders" with respect to the heinousness of the crime. That task is properly our duty when we undertake a proportionality review. N.C. Gen. Stat. § 15A-2000(d)(2) (1983). Here, we have only to determine if there is sufficient evidence to submit the issue to the jury. *State v. Oliver*, 309 N.C. 326, 307 S.E. 2d 304 (1983).

The author of the majority opinion expresses concern that jurors of "ordinary sensibility" might characterize almost every murder as especially heinous, atrocious, or cruel. He urges us to consider this in determining the issue before us in this case. Our speculation as to how a jury would answer an issue has no proper place in our determination of whether the issue should be submitted to the jury. Nevertheless, there are at least three safeguards to protect the administration of justice from this possibility that troubles the majority: (1) Jurors may be examined on voir dire with respect to this question and removed from the jury in proper instances. (2) The trial court must instruct the jury with respect to the issue, and nothing else appearing, we assume that the jury follows such instructions. (3) This Court may correct such a result, either by finding error in the jury selection, the court's jury instructions, or upon proportionality review, as the circumstances of a case may require.

In passing, I note that in two places the majority appears to be limiting the key factor on this issue to the *brutality* of the murder: "The defendant's acts must be characterized by more brutality than is inherent in every murder"; "differentiate among murders on the basis of their respective brutality." Of course, brutality is a factor to be considered, along with the facts of the killing and the entire set of circumstances surrounding the killing. But it is not conclusive. *State v. Oliver, supra*, 309 N.C. 326, 307 S.E. 2d 304 (1983). The correct standard is expressed in *State v. Pinch*, 306 N.C. 1, 292 S.E. 2d 203, *cert. denied*, 74 L.Ed. 2d 622

(1982). The aggravating circumstance " 'does not arise in cases in which death was immediate and in which there was no unusual infliction of suffering upon the victim.' " *Id.* at 34, 292 S.E. 2d at 228 (citation omitted). It 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 torturous to the victim." *Id. See State v. Rook*, 304 N.C. 201, 283 S.E. 2d 732 (1981), *cert. denied*, 455 U.S. 1038 (1982); *State v. Goodman*, 298 N.C. 1, 257 S.E. 2d 569 (1979).

The majority relies heavily upon *Godfrey v. Georgia*, 446 U.S. 420 (1980). Setting aside the question of whether the language in the Georgia statute, "outrageously or wantonly vile, horrible and inhuman," means the same as "especially heinous, atrocious, or cruel," I do note that the Georgia statute is written in the conjunctive, evidently requiring the jury to find that the crime was vile *and* horrible *and* inhuman, whereas our statute is written in the disjunctive, only requiring that the killing be especially heinous, *or* especially atrocious, *or* especially cruel. Moreover, the cases are factually different. In *Godfrey*, both victims were killed instantly upon being shot once. Joyce remained conscious for several minutes after the first shot struck her, and was shot eight more times. The victims in *Godfrey* did not speak; Joyce said "Please, Stan," arguably pleading for her life. After the killing, Godfrey said nothing at the scene; Stanley laughed and said to Joyce's sister and son, "That's all right. I killed the bitch." Defendant fired nine shots into Joyce; Godfrey only shot each victim once. Godfrey evidently shot his first victim from ambush; Stanley drove back and forth in front of the house where Joyce was visiting her mother. He did this five or six times, arguably causing apprehension to Joyce and her family. I do not find *Godfrey* controlling.

The evidence, when considered in accordance with the rule set out above, supports the following facts and inferences:

1. Joyce was shot nine times with a rifle. From this, it can be reasonably inferred that the killing was unusually brutal.

2. She remained conscious as each shot struck her and for some time thereafter.

3. Joyce bled to death internally.

4. It can be reasonably inferred from these three facts that Joyce suffered both physical and mental pain and anguish before she lapsed into unconsciousness.

5. Before the shooting, Joyce saw defendant drive back and forth in front of the house five or six times. In an effort to get defendant's car license number, Joyce, Sandra, and James went down to the street, and defendant turned the corner into the street they were on. From this, it can be reasonably inferred that Joyce suffered apprehension as to her safety.

6. Joyce was killed in the presence of her family.

7. After the gun was taken from Stanley, he laughed and said, "That's all right. I killed the bitch." From this, it can be reasonably inferred that defendant had no remorse and that the killing was pitiless or conscienceless. It was not until defendant was talking to the officers that he said he "loved his wife."

8. After Sandra said, "Oh God, he's got a gun", Joyce, some ten or twelve feet from defendant, said "Please, Stan." Defendant then shot her. From this, it can be reasonably inferred that Joyce, understanding the danger she was facing, was pleading for her life. It also supports the conclusion that the killing was pitiless or conscienceless.

I cannot find as a matter of law that the evidence is insufficient to submit this issue to the jury for its determination. Joyce's death was not immediate, and the evidence supports the inference that she endured unusual suffering by reason of being shot nine times before she became unconscious. The evidence is sufficient for the jury to find that the killing was excessively brutal, beyond that normally present in a killing, and that it was conscienceless, pitiless, or unnecessarily torturous to Joyce Stanley and therefore especially heinous, atrocious, or cruel. *State v. Pinch, supra*, 306 N.C. 1, 292 S.E. 2d 203, *cert. denied*, 74 L.Ed. 2d 622 (1982). The jury under proper instructions remains free to reject or find the circumstance. *State v. Cherry*, 298 N.C. 86, 257 S.E. 2d 551 (1979), *cert. denied*, 446 U.S. 941 (1980). Certainly, in resolving the question of law as to whether this ag-

gravating circumstance should be submitted to the jury, it is not our province to consider how the jury should have answered the issue. That is the proper function of the jury under proper instructions from the trial court. What the outcome of this case would be on proportionality review is not before us, as we have not reached that stage of the proceedings. The evidence supporting the jury's finding that the murder was especially heinous, atrocious, or cruel goes far beyond mere speculation or conjecture and was properly submitted to the jury.

Justice COPELAND joins in this dissent.

STATE OF NORTH CAROLINA v. REMBERT WAYNE STANLEY

No. 209A83

(Filed 6 March 1984)

1. Criminal Law § 98.2— exemption of witnesses from sequestration order

In a prosecution for rape of defendant's six-year-old stepdaughter, the trial judge did not abuse his discretion when he permitted a social services worker and a juvenile officer who testified for the State to remain in the courtroom during the child's testimony while ordering that all other persons, including defense witnesses, remain outside the courtroom. G.S. 15A-1225.

2. Criminal Law § 165— failure to object to remarks by court

By failing to object at trial, defendant waived his right to challenge remarks made by the trial judge concerning his excusal of two State's witnesses from a sequestration order.

3. Criminal Law § 87.1— six-year-old rape victim—leading questions

The trial court did not improperly permit the prosecutor to ask a six-year-old rape victim leading questions to establish the essential elements of the rape since (1) many of the questions at issue were not leading in that they did not suggest the proper response, and (2) it was within the discretion of the trial court to permit leading questions of a six-year-old witness concerning sexual matters.

4. Criminal Law § 73— exclusion of hearsay testimony

In a prosecution for rape of defendant's six-year-old stepdaughter, cross-examination of the victim as to whether her mother did not want defendant to come back called for hearsay testimony and was properly excluded.

5. Criminal Law § 89.2— instruction on corroborating evidence—no expression of opinion

The trial court did not express an opinion on the evidence in instructing the jury that testimony was "offered and admitted for the sole purpose of corroborating or strengthening the testimony of [the victim] if you find that it does or tends to do so."

6. Rape and Allied Offenses § 4.2— competency of expert medical testimony

In a prosecution for the rape of a six-year-old child, an expert in pediatrics who had twice examined the child was properly permitted to testify that the child's unusually large vaginal opening was "compatible with penetration of the vagina." Further, testimony by an expert in obstetrics regarding the size of the victim's vagina and the generally accepted means whereby venereal warts such as those he observed on the victim are transmitted was well within the bounds of permissible medical expert testimony.

7. Rape and Allied Offenses § 4— six-year-old rape victim—competency of testimony by schoolteacher

In a prosecution for rape of a six-year-old child, testimony by the child's schoolteacher that the child did not do well in the beginning of the 1982 school year but noticeably began to improve by the middle of October and is a good, average student was competent with respect to the condition of the child during the period of time she was physically examined and questioned after defendant was arrested in September 1982.

8. Rape and Allied Offenses § 5— sufficiency of evidence of penetration

There was sufficient evidence of penetration to require submission to the jury of a charge of first degree rape of a six-year-old child where the child testified directly, unequivocally, and knowingly that defendant had sexual intercourse with her; her testimony was corroborated by her statements to other witnesses; medical expert testimony confirmed the compatability of the child's testimony with her physical condition; and any contradictions or ambiguities in the record regarding penetration have to do with the question of degree only and not with whether penetration occurred.

9. Criminal Law § 173— remark by trial court—invited error

In this prosecution for the rape of defendant's stepdaughter, the trial judge's remark that he was excluding evidence concerning defendant's relationship with a certain female "except as it relates to his relationship with his wife, which, of course, also is not on trial in this particular case," made in response to a question by defense counsel, if error, was invited error of which defendant cannot complain. Further, defendant failed to show that he was prejudiced by such remark.

10. Rape and Allied Offenses § 4— warrants against defendant by victim's mother—exclusion not prejudicial

In a prosecution of defendant for the rape of his stepdaughter, the trial court did not commit prejudicial error in the exclusion of defendant's testimony regarding prior warrants taken out against him by his stepdaughter's mother.

State v. Stanley

ON appeal from judgment entered by *Thornburg, J.*, at the 13 December 1982 Criminal Session of Superior Court, MACON County. Heard in the Supreme Court 12 December 1983.

Defendant was charged in an indictment proper in form with rape in the first degree of Christy Marie Deal, a female child under twelve years of age, the defendant being over the age of twelve and more than four years older than Christy Marie Deal.

Defendant is the stepfather of the child. At the time of the events in question, Easter of 1982, Christy Deal was living with her mother, Carolyn Stanley, her brother, and defendant in Otto, North Carolina.

At trial, defendant's motions to dismiss at the close of the state's evidence, at the close of all evidence, and after the verdict, were denied. The jury having returned its verdict of guilty of rape in the first degree, Judge Thornburg imposed the mandatory sentence of life imprisonment.

Upon defendant's affidavit of indigency, on 16 December 1982 Judge Thornburg appointed attorneys Steven E. Philo and David C. Spivey as counsel on appeal.

Rufus L. Edmisten, Attorney General, by Daniel C. Oakley, Special Deputy Attorney General, for the State.

Steven E. Philo and David C. Spivey for defendant.

MARTIN, Justice.

Attorneys for the defendant have raised seventeen issues on appeal, based on twenty-two assignments of error. We have examined the entire record on appeal. For reasons which follow, we find that this defendant received a fair trial, free of prejudicial error.

In this opinion, assignments of error will be grouped together where clarity dictates; further facts in the case will be related as relevant issues are considered.

Defendant's first two assignments of error concern the following decision and comments by Judge Thornburg immediately after the jury had been impaneled, just prior to the calling of the first witness:

THE COURT: All right. Do you plan to call the young girl?

MR. CABE: Yes, your Honor.

THE COURT: All right. All persons in the courtroom other than the mother of this child, and the defendant, and the immediate law enforcement officers involved in the trial of the case will have to leave the courtroom until this testimony is concluded. So everyone in the courtroom, whether you're a witness or whatever your position is, you'll have to leave. That includes all family members other than the child's mother.

MR. PHILO: Does that include the witnesses for the State, also?

THE COURT: That includes everybody. I think they're all leaving.

MR. PHILO: Your Honor, we'd like to put it in the record we object to that.

THE COURT: Let the record reflect that the defendant objects to the court permitting the DDS officer and the juvenile court officer who were instrumental in the preparation of the case and at the request of the State are necessary to the handling of the examination of this witness remain in the courtroom. The objection is overruled. Exception for the defendant.

[1] Defendant argues that the trial judge "singled out the State for a special privilege," in violation of N.C.G.S. 15A-1225, when he permitted two of the state's corroborating witnesses who later testified to remain in the courtroom during Christy Deal's testimony, while excluding one of defendant's chief witnesses who also later testified. Furthermore, defendant argues, it was error for the trial judge to comment in the presence of the jury that the two witnesses for the state were "law enforcement officers . . . instrumental in the preparation of the case." This comment improperly bolstered the later testimony of these witnesses and also gave more credence to the child's testimony, prejudicing the defendant, in violation of N.C.G.S. 15A-1222 and -1232.

We find each of these contentions to be meritless.

With respect to the sequestration of witnesses at this trial, the pertinent statute provides:

> Upon motion of a party the judge may order all *or some* of the witnesses other than the defendant to remain outside of the courtroom until called to testify, except when a minor child is called as a witness the parent or guardian may be present while the child is testifying even though his parent or guardian is to be called subsequently.

N.C. Gen. Stat. § 15A-1225 (1983) (emphasis added). It is well settled that this practice is discretionary with the judge and is not a matter of right. *State v. Mason*, 295 N.C. 584, 248 S.E. 2d 241 (1978), *cert. denied*, 440 U.S. 984 (1979); *State v. Cross*, 293 N.C. 296, 237 S.E. 2d 734 (1977); *State v. Taylor*, 280 N.C. 273, 185 S.E. 2d 677 (1972); 1 Brandis on North Carolina Evidence § 20 (1982). A ruling on this matter is therefore not reviewable on appeal absent a showing of an abuse of discretion. *State v. Woods*, 307 N.C. 213, 297 S.E. 2d 574 (1982); *State v. Royal*, 300 N.C. 515, 268 S.E. 2d 517 (1980); *State v. Mason*, *supra*.

Defendant has neither argued nor shown abuse of discretion by the trial court, nor do we find it from the record. The statute allows the trial judge to exclude "all or some" of the witnesses. We find no error in the trial court's decision to permit Wanda Cook, Macon County Department of Social Services worker, and juvenile officer Gene Ledford to remain in the courtroom during the testimony of Christy Deal.

That the trial judge made the ruling on his own motion, rather than upon motion of counsel, is of no moment. The trial judge has this discretionary power in the absence of the statute. *Lee v. Thornton*, 174 N.C. 288, 93 S.E. 788 (1917) (Chief Justice Clark giving a thorough review of the question).[1] The judge's power to control the progress and, within the limits of the adversary system, the shape of the trial has long included the broad power to sequester witnesses before, during, and after their testimony. *Geders v. United States*, 425 U.S. 80, 47 L.Ed. 2d 592 (1976); *Holder v. United States*, 150 U.S. 91, 37 L.Ed. 1010 (1893).

1. Effective 1 July 1984, N.C.G.S. 8C-1, Rule 615, will become effective, codifying, *inter alia*, the authority of the court to make the sequestration order of its own motion. 1983 N.C. Sess. Laws ch. 701, § 3.

[2] With regard to the propriety of the trial judge's references to the witnesses excused from the sequestration, we note that the one objection made at trial to the court's order went clearly and solely to the decision to allow Cook and Ledford to remain in the courtroom. No objection was made to the court's subsequent explanatory comments. The alleged impropriety should have been brought to the judge's attention at trial. "He who would save his rights must be reasonably prompt and diligent in asserting them." *State v. Randall*, 170 N.C. 757, 762, 87 S.E. 227, 229 (1915). Defendant has waived his right to challenge these remarks on appeal. *State v. Jones*, 303 N.C. 500, 279 S.E. 2d 835 (1981); *State v. Monk*, 291 N.C. 37, 229 S.E. 2d 163 (1976); *State v. McAllister*, 287 N.C. 178, 214 S.E. 2d 75 (1975). Furthermore, defendant has failed to argue or demonstrate any prejudice. *State v. Jones*, 278 N.C. 259, 179 S.E. 2d 433 (1971); N.C. Gen. Stat. § 15A-1443(a) (1983).

[3] Defendant's third and fourth assignments of error are concerned with the trial testimony of Christy Marie Deal. At the time of this trial, the child was six years old. A series of introductory questions and answers about details of her schooling, living arrangement, and persons to whom she had spoken about this case showed that this witness understood questions put to her and could answer these questions. Defendant argues that having established her ability to so testify, there was no further justification for the leading questions then addressed to this witness. Direct evidence of defendant's criminal activity was provided by this sole witness, argues defendant, by way of improper leading questions which were used to establish the essential elements of the crime for which he was charged.

Examples of the challenged testimony follow:

Q. What did Rembert say to you?

A. He told me to go get my clothes off.

. . . .

Q. Did you take your clothes off?

A. Yeah.

Q. And where did you go?

A. I went in Mama's room.

Q. How was Rembert dressed at that time, Christy?

A. Just a T-shirt and he didn't have on no more clothes on.

Q. When you went into the bedroom, where did you go in the bedroom, Christy?

A. I got in the bed.

. . . .

Q. How were you laying?

A. I was laying on my back.

Q. Now, Christy, what happened at that time?

A. He put his thing in my—he put his thing way up in my pee.

Q. Now, what is your pee, Christy?

A. In front.

Q. Christy, would you step down, please?

A. (Witness complies.)

Q. Right here. Now, when you refer to your pee, Christy, what—would you point out with your hand what you mean?

A. (Indicating.) My pee hole.

Q. When he did that, Christy, did it hurt?

A. Yeah.

Q. When you say his thing, Christy, what do you mean?

A. His thing what he pees through.

. . . .

Q. After that was over, Christy, what did Rembert tell you?

A. He told me to go in the bathroom to wipe the blood off, and so I got a wash rag to wipe the blood off. And so he brought my clothes to me and he told me to get a napkin so I wouldn't get any blood on my panties.

. . . .

Q. Now, Christy, where was your mother during this time?

A. At work.

. . . .

Q. Before you went outside, Christy, did Rembert tell you anything else?

A. He told me not to tell anybody or he'd do it again.

. . . .

Q. Christy, has Rembert ever done this thing to you before?

A. Yeah.

A leading question is generally defined as one which suggests the desired response and may frequently be answered yes or no. *State v. Britt*, 291 N.C. 528, 231 S.E. 2d 644 (1977); *State v. Greene*, 285 N.C. 482, 206 S.E. 2d 229 (1974); 1 Brandis, *supra*, § 31. We note that, by definition, the question must suggest the proper response; it is not leading simply because it may be answered yes or no. *State v. Britt, supra; State v. Watkins*, 283 N.C. 504, 196 S.E. 2d 750 (1973). Examining the direct testimony of Christy Deal in its entirety, we find that in virtually no instance did the questioner suggest the proper response.

We note, furthermore—and defendant concedes—that questions which are clearly leading are often necessary and permitted on direct examination when the witness "has difficulty in understanding the question because of immaturity, age, infirmity or ignorance or where . . . the inquiry is into a subject of delicate nature such as sexual matters." *State v. Greene, supra*, 285 N.C. at 492, 206 S.E. 2d at 236. Here the trial judge was concerned with a six-year-old child as a prosecuting witness and with unnatural sexual acts. In any event, rulings by the trial court on the use of leading questions are discretionary and reversible only for abuse of discretion. *State v. Smith*, 290 N.C. 148, 226 S.E. 2d 10, *cert. denied*, 429 U.S. 932 (1976); *State v. Payne*, 280 N.C. 150, 185 S.E. 2d 116 (1971) (and cases cited therein).

Defendant's assignments of error are overruled.

[4] By his fifth assignment of error, defendant contends that the trial court erred in refusing to allow Christy Deal to testify on cross-examination regarding the relationship of her mother, Carolyn Stanley, to the defendant. The questions involved hearsay and were incompetent. For example: "Your Mama doesn't want him to come back, though, does she?" "Your Mama told you she didn't want him to come back?"

Defendant argues that "[t]he excluded testimony was necessary so that Defendant could argue to the jury a reason as to why the child would lie." We note that the record reveals ample support by evidence received elsewhere during the trial for defendant's argument regarding Mrs. Carolyn Stanley's behavior toward him. Even though defendant argues that the testimony was necessary to his defense, evidence must be competent before it is admissible. The testimony was hearsay and not admissible. This assignment is overruled.

[5] At trial, the state offered testimony of three witnesses in corroboration of the chief prosecuting witness, Christy Deal. As each witness testified, the trial judge cautioned the jury as follows: "Members of the jury, this evidence is offered and admitted for the sole purpose of corroborating or strengthening the testimony of the witness Christy Deal, if you find that it does or tends to do so. It may not be considered by you for any other purpose."

Defendant argues that these instructions were improper in that they required the jury to conclude that Christy Deal's testimony had been strengthened even if the evidence of corroboration in the jury's mind was so slight it would reject it.

There is no merit to this contention.

The quoted instruction did not improperly express an opinion on the evidence to the jury. To the contrary, the instruction made it quite clear that it is for the jury to decide whether the evidence in fact corroborated the witness. 1 Brandis, *supra*, § 52; *State v. Alston*, 307 N.C. 321, 298 S.E. 2d 631 (1983); *State v. Lester*, 294 N.C. 220, 240 S.E. 2d 391 (1978). The instructions adequately defined the function of corroborative testimony. *State v. Rogers*, 299 N.C. 597, 264 S.E. 2d 89 (1980); *State v. Case*, 253 N.C. 130, 116 S.E. 2d 429 (1960).

At no time did defendant object at trial to these instructions as improper or incomplete. He cannot be heard now to so complain. *State v. Lee*, 248 N.C. 327, 103 S.E. 2d 295 (1958) (court in its charge did not explain difference between substantive and corroborative evidence; no grounds for exception where no request for such instruction had been made).

We further note that defendant had, and took full advantage of, his opportunity to cross-examine each of the corroborating witnesses.

This assignment is overruled.

[6] Defendant's next three assignments of error concern the expert opinion testimony of Dr. Frederick Berger and Dr. Joseph Williams.

Dr. Berger, having been accepted by the court with no objections as an expert in the field of pediatrics, testified in part as follows:

> On September 20, 1982, I saw Christy Marie Deal at my office. Her mother was with her and, I believe, her aunt. I did a physical examination on Christy. I did a complete physical examination basically starting from the head and working down to the toes and examining essentially all of the examinable parts of the body. I examined the pubic area of Christy. I observed her vaginal opening was larger than a child her age, and I also observed some condyloma or venereal warts located around her anus. Venereal warts are wart-like growths which are flesh colored to pinkish to purplish which may occur singly, they may occur in clusters, and they are located around the genital areas, around the penis, around the vagina, around the rectum, and are believed by the most recent work that has been done in the 70's and 80's to be sexually transmitted.

When asked whether he had an opinion as to whether or not Christy's vagina had been penetrated, Dr. Berger answered, over defendant's objection: "I believe that the large opening which is extremely unusual in one her age is compatible with penetration of the vagina."

On cross-examination, Dr. Berger acknowledged that at the time of his examination of Christy, he found no trauma around either the rectum or the vagina. He noted:

> I chose not to instrument her twice because I wanted her evaluated by an obstetrician. . . . If an adult penetrates a female's vagina and the penis goes all the way up into the vagina I would expect to see either lacerations or scars if the penetration had been all the way up to the cervix. When that occurs for the first time I would expect there to be a ripping and tearing within the vagina.

Dr. Joseph Williams, accepted by the court with no objections by defendant as an expert in the field of obstetrics and gynecology, did conduct a pelvic examination of the child. Dr. Williams testified, with no objections, that as a result of his examination, he found evidence of vaginal penetration as well as venereal or perineal warts. His internal examination of Christy did not reveal significant intravaginal scarring. Over defendant's objection, Dr. Williams went on to testify that the size of Christy Deal's vagina when compared to that of another six year old, was "grossly enlarged." Dr. Williams was then asked the following:

> Q. Doctor, do you know how venereal warts or perineal warts, as you've described them, are transmitted?
>
> MR. PHILO: Objection.
>
> THE COURT: Overruled.
>
> THE WITNESS: It's generally accepted that they're usually transmitted sexually.

Defendant argues that Dr. Berger's opinion testimony regarding vaginal penetration of the child and Dr. Williams's testimony regarding her vaginal size and the transmission of venereal warts were erroneously admitted by the trial court.

In each instance, claims defendant, the opinion lacked a proper foundation: There had been no internal examination to substantiate Dr. Berger's vaginal penetration opinion; Dr. Williams had never testified that he had examined or studied other six-year-old females as a basis for his opinion as to Christy's comparative vaginal size; finally, his testimony regarding the transmission of

venereal warts was not based on his personal knowledge of the child but on what "usually occurs."

We reject defendant's argument. It is well settled that a physician who is properly qualified as an expert may offer an opinion as to whether the victim in a rape prosecution has been penetrated and whether internal injuries have been caused thereby. *State v. Starnes*, 308 N.C. 720, 304 S.E. 2d 226 (1983); *State v. Galloway*, 304 N.C. 485, 284 S.E. 2d 509 (1981); *State v. Atkinson*, 278 N.C. 168, 179 S.E. 2d 410, *death sentence vacated*, 403 U.S. 948 (1971). Dr. Berger's opinion with regard to vaginal penetration was entirely proper. Dr. Berger had twice examined the child; his opinion testimony limited as it was to "the compatibility" of the size of her vagina with possible penetration did not exceed the bounds of his examination, attempting neither to opine about the exact nature nor the cause of the penetration.

We also find that Dr. Williams's testimony regarding the size of Christy's vagina and the generally accepted means whereby venereal warts such as those he observed on the child are transmitted was well within the bounds of permissible medical expert testimony. The proper analysis has been summarized by this Court as follows, and governs this issue:

> We conclude, therefore, that in determining whether expert medical opinion is to be admitted into evidence the inquiry should be not whether it invades the province of the jury, but whether the opinion expressed is really one based on the special expertise of the expert, that is, whether the witness because of his expertise is in a better position to have an opinion on the subject than is the trier of fact. The test is as stated in *State v. Powell, supra*, 238 N.C. at 530, 78 S.E. 2d at 250, whether the "opinion required expert skill or knowledge in the medical or pathologic field about which a person of ordinary experience would not be capable of satisfactory conclusions, unaided by expert information from one learned in the medical profession."

State v. Wilkerson, 295 N.C. 559, 568-69, 247 S.E. 2d 905, 911 (1978).

Dr. Williams's "personal knowledge," or lack thereof, of the specific cause of this child's venereal warts was not the subject

of the question put to him at trial, nor, in any event, is it determinative of the admissibility of his testimony. *See State v. Wade*, 296 N.C. 454, 251 S.E. 2d 407 (1979); *State v. DeGregory*, 285 N.C. 122, 203 S.E. 2d 794 (1974). *See generally* 1 Brandis, *supra*, § 136.

These assignments of error are overruled.

[7] Defendant next assigns as error the trial court's admission, over his objection, of the testimony of Ms. Edith Parkerson, Christy Deal's first grade schoolteacher at the time of this trial. In the course of a very brief series of questions and answers, this witness testified that at the beginning of the school year, around 12 August 1982, Christy "seemed like a shy little girl"; that "she didn't do well in the beginning," as far as her grades were concerned; that the child noticeably began to improve by about the middle of October and is a "good, average student."

Defendant argues that this testimony is not relevant to the issues before the court and that its admission was prejudicial: "To a jury panel naturally expecting to see evidence of psychological damage in a sexually abused child, and with nothing else appearing, such evidence would have a great impact . . . ."

In examining Ms. Parkerson's testimony, we disagree with both of defendant's conclusions.

When defendant was arrested in September, Christy was physically examined and intensively questioned, and this case was brought to trial. This witness's testimony was relevant with respect to the condition of Christy during this period of time.

> [I]t is not required that the evidence bear directly on the question in issue, and it is competent and relevant if it is one of the circumstances surrounding the parties, and necessary to be known to properly understand their conduct or motives, or to weigh the reasonableness of their contentions.

Bank v. Stack, 179 N.C. 514, 516, 103 S.E. 6 (1920).

Counsel's questions to this witness were proper. Parkerson's responses in no sense were capable of creating undue sympathy or prejudice to defendant. On the contrary, the teacher's observations could be interpreted as benefiting defendant. The child was portrayed basically as a quite normal first-grader.

This assignment of error has no merit.

[8] Defendant's next three assignments of error go to the question of the sufficiency of the evidence and the propriety of the trial court's refusal to dismiss the case at the close of the state's evidence, at the close of all the evidence, and after the return of the verdict. He argues that "[t]aking the State's evidence, even in the best of all possible lights, there was insufficient, substantial evidence in the present case to establish penetration of the vagina and to require submission of the case to the jury."

We do not so read the record in this case.

Christy Marie Deal testified directly, unequivocally, and knowingly that defendant had sexual intercourse with her. Her testimony was corroborated by her statements as recalled by trial witnesses Kathy Burkhart, Wanda Cook, and Carolyn Stanley. Medical expert testimony confirmed the compatibility of the child's testimony with her physical condition.

Any contradictions or ambiguities in this record regarding the essential element of penetration have to do with the question of degree only, not with whether penetration occurred. The slightest penetration of the sexual organ of the female by the sexual organ of the male is all that is required to prove vaginal intercourse. *State v. Sneeden*, 274 N.C. 498, 164 S.E. 2d 190 (1968); *State v. Jones*, 249 N.C. 134, 105 S.E. 2d 513 (1958).

The evidence is thus clear and unequivocal as to each essential element of the crime of rape in the first degree as set forth in N.C.G.S. 14-27.2 and as to defendant's being the perpetrator of the offense. *State v. Earnhardt*, 307 N.C. 62, 296 S.E. 2d 649 (1982); *State v. Roseman*, 279 N.C. 573, 184 S.E. 2d 289 (1971).

The motions to dismiss were properly denied.

Defendant next assigns as error rulings and comments of the trial court made in the course of defendant's own testimony. Brief relevant portions of the testimony follow:

> Q. Now, did you go anywhere else with Linda Jones?
>
> MR. CABE: Objection.
>
> THE COURT: Sustained.

Q. On the 13th, did you go anywhere else with Linda Jones?

MR. CABE: Objection.

THE COURT: Sustained.

Q. When did you next see Linda Jones?

MR. CABE: Objection.

THE COURT: Sustained.

MR. PHILO: Your Honor, we'd like to get these answers into the record.

THE COURT: Put them in after you've finished with this witness. Just make a list of what you want to ask about Linda Jones.

MR. PHILO: Sir, are you excluding all evidence relative to her or—

THE COURT: I'm excluding all evidence relevant to his association with Linda Jones except as it relates to his relationship with his wife, which, of course, also is not on trial in this particular case.

[9] Defendant objects, first, to the explanatory comment of the trial judge referring to "his relationship with his wife which, of course, also is not on trial in this particular case." This, he argues, was "a severe expression of the trial court's opinion not only as to this particular piece of testimonial evidence, but also an opinion as to the Defendant's main line of defense." Secondly, defendant says this same line of defense—that Carolyn Stanley induced Christy Deal to implicate him because of her "maniacal tendencies of jealousy" toward defendant—was improperly restricted by trial court rulings excluding his testimony regarding Carolyn's past efforts to use criminal process to control him. The excluded testimony was, he claims, relevant, competent, and admissible evidence.

These arguments must fail.

The decision of the trial judge to exclude irrelevant testimony relating to defendant's association with Linda Jones was entirely proper.

The remark by the trial judge was made in response to a question by defendant's counsel. If error, it was invited error of which defendant cannot complain. *Brittain v. Blankenship*, 244 N.C. 518, 94 S.E. 2d 489 (1956). Furthermore, it does not necessarily follow that every ill-advised comment by a trial judge which may tend to impeach a witness is so harmful as to constitute reversible error. *State v. Brady*, 299 N.C. 547, 264 S.E. 2d 66 (1980). Any such comment must be considered in light of all the facts and attending circumstances disclosed by the record. Whether defendant was deprived of a fair trial by the challenged remark must ultimately be determined by what was said and its probable effect upon the jury. The burden of showing prejudice is, of course, on the appellant. *State v. Faircloth*, 297 N.C. 388, 255 S.E. 2d 366 (1979); *State v. Arnold*, 284 N.C. 41, 199 S.E. 2d 423 (1973); N.C. Gen. Stat. § 15A-1443(a) (1983). The assignment of error is overruled.

[10] For these same reasons, we find no prejudicial error in the trial court's exclusion of defendant's testimony regarding prior warrants taken out against defendant by Carolyn Stanley.

The trial judge's determination that this line of questioning exceeded the bounds of relevance or that the questions themselves were improperly leading, clearly does not present reversible error.

Defendant's remaining two assignments of error concern the trial court's denial of his motions for appropriate relief based upon the verdict being contrary to the weight of the evidence and the insufficiency of the evidence. For reasons dealt with elsewhere in this opinion, these assignments are overruled.

No error.

STATE OF NORTH CAROLINA v. FREDERICK WAYNE THOMAS

No. 308A83

(Filed 6 March 1984)

1. Criminal Law § 34.5— evidence of another offense—properly admitted to show identity of defendant

In a prosecution for a first-degree sexual offense in violation of G.S. 14-27.4, the trial court did not err in admitting the testimony of a witness which tended to show the defendant's commission of a separate offense since (1) defendant relied upon a defense of alibi, thus putting his identity in issue, and (2) the two offenses were sufficiently similar as to "provide a reasonable inference that the same person committed both offenses." In both cases, the victim was a young boy traveling alone and on foot; in both cases the assault took place during non-daylight hours; the assailant in each case first casually greeted his victim prior to forcing himself upon the victim; both attacks took place on a grassy bank; and during the course of both attacks, the assailant said to each victim something to the effect of "be quiet and I won't hurt you"; the prosecuting witness described his assailant as a "jogger" and the other witness testified that he heard defendant "jogging up behind him"; the attack on the prosecuting witness was decidedly sexual in nature, and given the other witness's testimony that defendant was trying to pull his pants off, there was at least a reasonable inference that, had the other witness not fought back, the encounter would have culminated in a sexual assault.

2. Constitutional Law § 46— denial of motion to withdraw as counsel—failure to demonstrate prejudice

Defendant failed to demonstrate that the denial of defense counsel's motion to withdraw, on the grounds that he had represented one of the State's potential witnesses in an unrelated matter and that he had advised the potential witness's mother concerning the incident about which he was to testify at trial, resulted in prejudice to him.

3. Criminal Law § 75.11— confession—invoking right to counsel—subsequent waiver initiated by defendant

In a prosecution for a first-degree sexual offense where defendant was questioned, invoked his right to counsel, questioning ceased, and as an officer filled out a warrant for defendant's arrest, the officer remarked to the defendant that he should be sure and tell his attorney he had a chance to help himself and did not do so, such a remark did not amount to interrogation of defendant making defendant's subsequent confession in violation of his Sixth Amendment right to counsel. Five minutes passed before defendant subsequently inquired of the officers as to whether they still wanted him to make a statement at which point the officer replied that it was up to the defendant, and the defendant at that point stated that he would like to give one.

4. Criminal Law § 75.2— finding defendant's confession free and voluntary proper.

The trial court did not err in finding defendant's statement to be voluntary and admissible rather than having been induced by the suggestion of hope or fear implanted in his mind by a statement by an officer that defendant be sure and tell his attorney that he had a chance to help himself but failed to do so.

Justice EXUM dissenting.

ON appeal by defendant from the judgment of *Albright, Judge,* entered at the 16 February 1983 Session of FORSYTH County Superior Court.

Defendant was charged in an indictment, proper in form, with the commission of a first-degree sexual offense in violation of G.S. 14-27.4. He entered a plea of not guilty.

At trial, evidence for the State tended to show:

On 26 May 1982 at approximately 5:30 a.m., Marc Pruitt, aged ten, was delivering papers on his paper route in the Ardmore section of Winston-Salem when a jogger approached him. The jogger, later identified as defendant, at first greeted Pruitt, but then took his towel and put it over Pruitt's mouth. Defendant warned Pruitt not to say anything. He then spread the towel down on a grassy bank and made the boy lie down. Defendant pulled down Pruitt's pants and performed fellatio on him. Defendant made him turn over so that he could lick his buttocks. After a short while, defendant had the boy stand. Defendant said, "Thank you. You don't know how much this has helped me." Defendant then jogged off up the street.

Pruitt reported the incident to his parents who in turn called the police. Pruitt was shown approximately two hundred photographs but could not pick out his assailant as being among them. Subsequently, on 6 August 1982, he was shown six pictures from which he selected defendant's picture.

The State also offered into evidence, over defendant's objection, the testimony of Jerry Makas that he had been assaulted by the defendant on 4 August 1982. When that incident occurred, Makas was fourteen years old. Upon defendant's arrest for the Makas incident, police officers questioned him concerning the Pruitt assault. During the course of that questioning, defendant

gave an inculpatory statement to the officers, which was also offered into evidence at trial.

Defendant elected not to testify, but presented other witnesses whose testimony tended to show that he was at home at the time of the Pruitt assault.

The jury returned a verdict of guilty and defendant was sentenced to life imprisonment. He appealed to this Court as a matter of right pursuant to G.S. 7A-27.

Rufus L. Edmisten, Attorney General, by Daniel C. Oakley, Special Deputy Attorney General, for the State.

William L. Cofer, for defendant appellant.

BRANCH, Chief Justice.

[1] Defendant first assigns as error the admission into evidence of the testimony of Jerry Makas tending to show the defendant's commission of a separate offense. Jerry Makas, testifying on behalf of the State, was permitted to relate an encounter between the defendant and him on 4 August 1982, just over two months after the alleged assault on Marc Pruitt. According to Makas, he was walking to a convenience store on Country Club Road at about 11:15 p.m. when he first saw defendant. Defendant was in a van and drove past Makas several times. Defendant parked the van in front of the convenience store and he and Makas nodded to each other as Makas entered the store. After making his purchase Makas walked back down the hill on Country Club Road. According to Makas, he then heard defendant "jogging up behind [him]." Defendant said, "That's a good way to break your ankle," referring to Makas' walking along the curb. They continued walking until they reached the "bottom of Country Club where the creek is." Makas' account of the ensuing assault was as follows:

> A. . . . he grabbed me and had his hands on my pants, and I grabbed his arms and started kicking him and said, "Let me go," about three or four times. And he said, "All right. You go this way and I'll go that way."

At trial, Makas was shown some pictures depicting his physical condition just after the assault. After he identified the pictures, he was asked how the scratches that appeared on his buttocks

were caused. He responded: "He was trying to get my pants down . . . ." Makas also testified that, during the struggle, defendant said to him: " 'Be quiet. Stay still, and I won't hurt you.' " Makas testified that defendant did not strike him or try to hit him in any way. He testified that, other than scratching his buttocks and pulling him down the hill, the defendant "was just trying to pull [his] pants down."

Defendant contends that the admission of this evidence was error under our well-settled rule that evidence of the commission of another, distinct crime is generally not admissible in a criminal trial. *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. The rule, as we recognized it in *State v. McClain*, is based on the following cogent reasons:

> (1) "Logically, the commission of an independent offense is not proof in itself of the commission of another crime." *Shaffner v. Commonwealth*, 72 Pa. 60, 13 Am. R. 649; *People v. Molineux*, 168 N.Y. 264, 61 N.E. 286, 62 L.R.A. 193. (2) Evidence of the commission by the accused of crimes unconnected with that for which he is being tried, when offered by the State in chief, violates the rule which forbids the State initially to attack the character of the accused, and also the rule that bad character may not be proved by particular acts, and is, therefore, inadmissible for that purpose. *State v. Simborski*, 120 Conn. 624, 182 A. 221; *State v. Barton*, 198 Wash. 268, 88 P. 2d 385. (3) "Proof that a defendant has been guilty of another crime equally heinous prompts to a ready acceptance of and belief in the prosecution's theory that he is guilty of the crime charged. Its effect is to predispose the mind of the juror to believe the prisoner guilty, and thus effectually to strip him of the presumption of innocence." *State v. Gregory*, 191 S.C. 212, 4 S.E. 2d 1. (4) "Furthermore, it is clear that evidence of other crimes compels the defendant to meet charges of which the indictment gives him no information, confuses him in his defense, raises a variety of issues, and thus diverts the attention of the jury from the charge immediately before it. The rule may be said to be an application of the principle that the evidence must be confined to the point in issue in the case on trial." 20 Am. Jur., Evidence,

section 309. See, also, in this connection these North Carolina cases: *S. v. Fowler*, 230 N.C. 470, 53 S.E. 2d 853; *S. v. Beam*, 184 N.C. 730, 115 S.E. 176; *S. v. Fowler*, 172 N.C. 905, 90 S.E. 408.

Id. at 173-74, 81 S.E. 2d at 365-66.

There are, however, several exceptions to the general rule, and one of them, the one relied upon by the State in the instant case, permits evidence of other crimes to be admitted when relevant to identify defendant as "the perpetrator of the crime charged." *Id.* at 175, 81 S.E. 2d at 367. As stated in *McClain*:

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

Id. at 175, 81 S.E. 2d at 367.

Notably, before evidence of other distinct crimes may be admitted under the exception, two requirements must be met. First, the identity of the defendant must be an issue in the case. Thus, when the defendant relies upon the defense of alibi, his identity and presence at the scene of the crime are facts which, along with other elements of the crime, must be proved by the State beyond a reasonable doubt. However, the mere fact that defendant committed another crime, even a similar one, does not *ipso facto* tend to identify him as the perpetrator of the crime charged. The second prong of the exception therefore requires that the circumstances of the two crimes be such as to "tend to show that the crime charged and another offense were committed by the same person." *State v. McClain*, 240 N.C. at 175, 81 S.E. 2d at 367 (1983). As stated by Justice Mitchell in the recent case of *State v. Moore*:

> [B]efore 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. [Citations omitted.] 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.

309 N.C. 102, 106-107, 305 S.E. 2d 542, 545 (1983).

In the instant case, defendant relied upon a defense of alibi, thus putting his identity in issue. *State v. Freeman*, 303 N.C. 299, 278 S.E. 2d 207 (1981). The first test having been met, then, the only question remaining is whether the circumstances of the two offenses were so similar as to "tend to show that the crime charged and another offense were committed by the same person." *State v. McClain*, 240 N.C. at 175, 81 S.E. 2d at 367; *State v. Moore*, 309 N.C. at 106, 305 S.E. 2d at 545.

We find that the two offenses in the instant case are sufficiently similar as to "provide a reasonable inference that the same person committed both offenses." *State v. Moore*, 309 N.C. at 108, 305 S.E. 2d at 546. In both cases, the victim was a young boy travelling alone and on foot. In both cases the assault took place during non-daylight hours. The assailant in each case first casually greeted his victim prior to forcing himself upon the victim. Both attacks took place on a grassy bank; and during the course of both attacks, the assailant said to each victim something to the effect of "Be quiet and I won't hurt you." Marc Pruitt described his assailant as a "jogger." Jerry Makas testified that he heard defendant "jogging up behind him." The attack on Pruitt was decidedly sexual in nature, and, given Makas' testimony that defendant was trying to pull his pants off, there is at least a reasonable inference that, had Makas not fought back, the encounter would have culminated in a sexual assault. In both cases, the assailant did not attempt to hit or strike his victim; and in both cases, the assailant left his victim by running "back up" the street.

In the light of the numerous similarities between these two offenses, we hold that the trial court did not err in admitting the testimony of Jerry Makas concerning defendant's assault upon him. *See 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); *State v. Greene*, 294 N.C. 418, 241 S.E. 2d 662 (1978); *State v. McClain*, 282 N.C. 357, 193 S.E. 2d 108 (1972). *Cf. State v. Moore*, 309 N.C. 102, 305 S.E. 2d 542. This assignment is overruled.

[2] Defendant's second assignment of error challenges the trial court's denial of defense counsel's motion to withdraw. The attorney for defendant moved to withdraw on the grounds that he had represented one of the State's potential witnesses, William Edward Russell, in an unrelated matter. Furthermore, defense counsel had advised Russell's mother concerning the very incident about which he was to testify at trial, an incident involving a sexual encounter between the witness and the defendant. After a hearing in chambers, Judge William Z. Wood found as a fact, *inter alia*, that defense counsel had advised defendant of the prior representation. He therefore concluded that "Mr. Cofer's prior representation of a potential State's witness does not create a conflict of interest as a matter of law."

We note at the outset that a motion to withdraw is ordinarily a matter left to the sound discretion of the trial judge and his ruling will not be disturbed absent a showing of abuse. *Jacobs v. Pendel*, 98 N.J. Super. 252, 236 A. 2d 888 (1967).

We do not reach the question of whether the denial of the motion to withdraw constituted an abuse of discretion, since defendant has failed to demons rate that the ruling resulted in prejudice to him. This assignment is overruled.

Defendant next assigns as error the denial of his motion to suppress a written statement made by him to investigating officers. Defendant essentially makes two arguments in support of his assertion of error. First, defendant contends that he was subjected to further questioning after he had invoked his right to counsel, in violation of *Edwards v. Arizona*, 451 U.S. 477 (1981). Second, he contends that his statement was induced by suggestions of hope or fear growing out of a statement made to him by one of the officers to "be sure and tell your attorney that you had the opportunity to help yourself and didn't." In support of the second contention, defendant relies upon our case of *State v. Pruitt*, 286 N.C. 442, 212 S.E. 2d 92 (1975).

After conducting a *voir dire* hearing as to the admissibility of defendant's confession, the trial judge found facts which may be summarized as follows:

Defendant was taken into custody on 5 August 1982 and arrested in connection with another incident. At that time he was

read his rights and indicated he understood them. Sometime after noon on 6 August 1982, Detective Randy Weavil and Officer J. I. Dalton went to the Forsyth County jail, and escorted defendant to City Hall. After advising defendant of his rights, both orally and in writing, the officers proceeded to question defendant in very general terms, informing him in the process that he was being investigated in connection with another case involving a sexual assault on a minor. When the discussion turned to the particulars of the Marc Pruitt case, defendant indicated that he did not want to talk further and that he wanted an attorney. Questioning ceased and the officers transported defendant to the office of the Clerk of Superior Court. While defendant waited nearby, the officers proceeded to obtain a warrant from the Clerk. As Officer Dalton filled out the arrest warrant, he said to defendant, "Be sure to tell your attorney that you had the opportunity to help yourself and didn't." Approximately five minutes later, defendant asked Officer Dalton if he still wanted a statement, to which the officer replied that it was "up to him," and they would take his statement if he wanted to make one. Defendant indicated that he would like to make a statement. The officers escorted defendant back to City Hall, advised defendant of his rights once again, and, after defendant again waived his right to counsel, proceeded to take his statement. The entire process from the officers' initial questioning to the giving of the statement lasted slightly more than an hour.

The trial court specifically found that at the time of questioning, "the officers observed no odor of alcohol about the person of the defendant, nor did they observe or perceive any noticeable impairment either of the mental or physical faculties of the defendant from any source." The court also found that the confession was not induced by Officer Dalton's statement to defendant and that the confession was not made in response to any questioning by the officers. The court concluded that the "statement made by the defendant to Officer Dalton on 6 August 1982 was made freely, voluntarily, and understandingly."

The findings of fact by the trial court are binding upon us if supported by competent evidence in the record. *State v. Johnson*, 304 N.C. 680, 285 S.E. 2d 792 (1982). In the instant case, the pertinent findings are supported by ample evidence and we are therefore bound by them. The court's conclusions of law, however, do

not bind this Court and we may fully review them to determine if they are supported by the finding of facts. *State v. Corley*, 310 N.C. 40, 311 S.E. 2d 540 (1984).

[3] Defendant first argues that his confession should have been excluded under the rule of *Edwards v. Arizona*, 451 U.S. 477 (1981), that "once a suspected criminal invokes his right to counsel, he may not be questioned further until counsel is provided unless the suspected criminal himself initiates the dialogue at which time he may waive his right to have an attorney present." *State v. Franklin*, 308 N.C. 682, 686, 304 S.E. 2d 579, 582 (1983). The question presented on the facts before us, then, is whether or not defendant's confession was the result of questioning or conversation initiated by the officers after defendant had invoked his right to have counsel present, or whether defendant himself voluntarily initiated the dialogue leading to his confession. *Edwards v. Arizona*, 451 U.S. 477 (1981); *State v. Lang*, 309 N.C. 512, 308 S.E. 2d 317 (1983); *State v. Franklin*, 308 N.C. 682, 304 S.E. 2d 579. The trial court found as a fact in this case that Officer Dalton remarked to the defendant that he should be sure and tell his attorney he had a chance to help himself and did not do so. Such a remark, however, did not amount to interrogation of defendant. Furthermore, five minutes passed before defendant "inquired of the officers as to whether they still wanted him to make a statement." Officer Dalton replied that it was up to defendant, and defendant stated he would like to give one. The trial court found that the defendant made this inquiry "of his own volition and not in response to any question asked by officers." We agree, and hold that under the circumstances surrounding the giving of defendant's statement, no violation of defendant's Sixth Amendment right to counsel occurred.

We have recognized that "interrogation is not limited to express questioning by the police," *State v. Ladd*, 308 N.C. 272, 280, 302 S.E. 2d 164, 170 (1983), and that the term also refers to " 'any words or actions on the part of the police . . . *that the police should know are reasonably likely to elicit an incriminating response from the suspect.*' " *Id.* at 281, 302 S.E. 2d at 170 (quoting *Rhode Island v. Innis*, 446 U.S. 291, 301 (1980) and defining "interrogation" under *Miranda*) (emphasis supplied by the *Ladd* Court). Under the circumstances of this case, however, we are unable to conclude that Officer Dalton should have known that his "off-

hand" remark was reasonably likely to provoke defendant into making an incriminating statement. See *State v. Ladd*, 308 N.C. at 281, 302 S.E. 2d at 170 (1983). We therefore hold that defendant's confession was not made in response to interrogation by Officer Dalton, and the "prophylactic rule" of *Edwards v. Arizona* has not been violated. See *State v. Lang*, 309 N.C. 512, 308 S.E. 2d 317 (1983).

[4] Defendant argues as a second ground for this assignment that the confession was involuntary under our rule set forth in *State v. Pruitt*, 286 N.C. 442, 212 S.E. 2d 92 (1975). Defendant contends that his statement was not freely and voluntarily made, but was induced by the suggestion of hope or fear implanted in his mind by Officer Dalton's statement to him.

In *Pruitt*, we held that the defendant's statement was rendered involuntary when induced by an officer's statement that it would be harder on the defendant if he did not cooperate. *Id.* However, as we noted in our recent case of *State v. Corley*, "we specifically pointed out that the statement by the officer that it would be harder on the defendant if he did not cooperate was preceded by other circumstances which tended to provoke fright in the defendant and overbear his will." *Id.* at 47, 311 S.E. 2d at 544-45. In *Corley*, we rejected the notion that *Pruitt* stands for any *per se* rule of exclusion. A majority of the Court in *Corley*, speaking through Justice Mitchell, stated:

> An absolute rule requiring exclusion of statements to law enforcement officers by a defendant in custody and who did not assert his right to counsel has been applied only in those cases in which the officers failed to comply with procedural safeguards required by *Miranda*. In cases in which the requirements of *Miranda* have been met and the defendant has not asserted the right to have counsel present during questioning, no single circumstance may be viewed in isolation as rendering a confession the product of improperly induced hope or fear and, therefore, involuntary. In those cases the court must proceed to determine whether the statement made by the defendant was *in fact* voluntarily and understandingly made, which is the ultimate test of the admissibility of a confession. In determining whether a defendant's statement was in fact voluntarily and understandingly made,

> the court must consider the *totality of the circumstances* of the case and may not rely upon any one circumstance standing alone and in isolation.

Id. at 48, 311 S.E. 2d at 545. (Emphasis in original.)

Applying the "totality of the circumstances" test to the facts before us, we cannot say that the circumstances leading up to and surrounding defendant's confession were such as to overbear his will. In *Pruitt*, unlike the case before us, the police "repeatedly told defendant that they knew that he had committed the crime and that his story had too many holes in it; that he was 'lying' and that they did not want to 'fool around.'" *State v. Pruitt*, 286 N.C. at 458, 212 S.E. 2d at 102. In addition, the officers told defendant in that case that "it would simply be harder on him if he didn't go ahead and cooperate." *Id.* In the instant case, none of the findings supports a claim that the officers threatened defendant or otherwise attempted to frighten or coerce him into confession. All there is in this case is the sole, offhand statement of an officer, which is at best ambiguous. We therefore conclude that the trial court did not err in finding defendant's statement to be voluntary and admissible. This assignment is overruled.

Defendant's remaining assignments are either repetitious, cumulative, or are conceded by him and it is therefore not necessary to address them.

Defendant received a fair trial, free from prejudicial error.

No error.

Justice EXUM dissenting.

In holding that evidence regarding the Makas incident is admissible, the majority applies an exception to the general rule that evidence of other criminal acts is inadmissible. Specifically, the majority relies upon the exception which allows the use of "other crimes" evidence to help establish defendant's identity through a common *modus operandi* in both incidents. The majority properly states this exception but, in my view, misapplies it on the facts before us.

The majority refers to a number of similarities between the two incidents, including the time when each attack occurred, that

the perpetrator in each incident was a "jogger," that both attacks occurred in a grassy area, and that the perpetrator made similar statements to both victims. A closer review of the record dispels the first two of these alleged similarities, and the remaining ones do not support admission of the evidence.

The majority describes the time of both attacks as being similar since they took place during "non-daylight hours." Actually the incident involving Makas occurred at approximately 11:15 p.m. The incident involving Pruitt occurred between 5:30 and 5:45 a.m. Pruitt testified that it was beginning to get light when defendant attacked him. I conclude the two attacks did not occur at similar times.

The majority also relies upon each victim's identification of the perpetrator as a "jogger." Pruitt testified that he first saw defendant when defendant came jogging up the street. Pruitt stated defendant was wearing a T-shirt and cut-off shorts and had a towel around his neck, which defendant used to wipe his forehead as he stopped near Pruitt. Pruitt's testimony clearly identifies the person who attacked him as having been jogging immediately before the attack.

On the other hand, Makas testified that as he was walking along the street toward a convenience store, defendant drove past him in a van. Makas indicated defendant's van passed him three or four times. When Makas approached the convenience store, he noticed defendant sitting in the van in the parking lot. After Makas left the convenience store and began walking back down the road, he heard defendant "jogging" up behind him. When defendant came alongside Makas, they began to walk together along the street. Although Makas used the word "jogging" in describing how he heard defendant approach him, his testimony suggests that defendant merely *ran* from the van at the convenience store in an effort to catch up with Makas, rather than that defendant was actually jogging at the time. Makas did not indicate how defendant was dressed. Officer Hogan, who apprehended defendant shortly after the incident involving Makas, testified that he did not remember how defendant was clothed that night. It seems reasonable to believe that had defendant been dressed for jogging at almost midnight, Officer Hogan might have had a clearer recollection of how he was clothed.

The majority's conclusion that the perpetrator of each incident was a jogger rests, I believe, on unwarranted and unjustifiable extrapolations from the testimony offered below.

Finally, the majority suggests that there were similarities in the place where the two attacks occurred and in the statements made by the perpetrator to each victim. The majority notes that each attack took place in a grassy area. This "similarity" essentially boils down to a recognition that both attacks occurred outside. This fact adds nothing unique to the attacks which suggests that the perpetrator of one is likely to be the perpetrator of the other. Quite simply, the fact that each perpetrator placed his victim in the grass as opposed to the sidewalk or street adds little, if any, support to the contention that the same person committed both offenses.

Likewise, the fact that both victims were told to be quiet and that they would not be hurt does not establish a unique, or even unusual, pattern, or *modus operandi*, of a sex offender. Victims are frequently given such orders both to prevent the perpetrator's detection and to encourage their submission.

The majority, I fear, strains at the facts to make these two incidents seem similar, when the incidents actually are quite dissimilar. Makas described the attack on him as "violent." He said defendant "grabbed him," they struggled and defendant tried to pull his pants down. Makas said, "Let me go," several times and defendant said, "All right. You go this way and I'll go that way." Pruitt, on the other hand, indicated that defendant was not violent toward him, but merely placed a towel around his mouth and carried him to the place where he was sexually abused. I recognize that Pruitt was younger and smaller than Makas. But these facts together with the manner of the assailant's approach and nature of his attacks nevertheless emphasize the dissimilarities, rather than the similarities, of the two incidents.

In short, the two incidents were not sufficiently similar to allow introduction of the evidence of the second incident to identify defendant, by a common *modus operandi*, as the perpetrator of the other incident. Unless the similarities are more striking than they are here, one incident has no probative value on the issue of the perpetrator's identity in the other incident. I believe admission of the Makas incident was error requiring a new trial.

I also dissent from the majority's determination that defendant's confession was admissible.

After defendant had asserted his right to silence and his right to counsel, the officers took defendant to the clerk's office where they proceeded to obtain an arrest warrant. During this procedure Officer Dalton said to defendant, "Be sure to tell your attorney that you had the opportunity to help yourself and didn't." Approximately five minutes later, after a brief exchange between defendant and Officer Dalton, defendant indicated that he would make a statement. His confession followed. Defendant's confession was clearly on this record the product of Officer Dalton's statement. There is nothing in the record to indicate that it could have been the product of anything else.

When a confession follows a promise of leniency, the confession is inadmissible unless it can be shown that the influence of the promise had been entirely dissipated so that the promise did not in fact induce the confession. "[I]f promises or threats have been used, it must be made to appear that their influence has been entirely done away with before subsequent confessions can be deemed voluntary, and therefore admissible." *State v. Drake*, 113 N.C. 625, 628, 18 S.E. 166, 167 (1893) (confession made within hours after arresting officer told defendant it might be easier on him if he made an honest confession; held, confession inadmissible). "A promise of leniency renders a confession involuntary only if the confession is so connected with the inducement as to be the consequence of it." *State v. Pressley*, 266 N.C. 663, 666, 147 S.E. 2d 33, 35 (1966). But "confessions induced by . . . [a] promise of reward are inadmissible." *State v. Richardson*, 295 N.C. 309, 326, 245 S.E. 2d 754, 765 (1978).

Where there is evidence in the case that the influence of a promise of leniency has been dissipated, or "entirely done away with," before the confession was made, then the question of whether the confession was a product of the promise is resolved by considering the "totality of circumstances." *State v. Corley*, 310 N.C. 40, 311 S.E. 2d 540 (1984) (eighteen hours elapsed between promise of leniency and confession; held, confession not induced by promise); *State v. Chamberlain*, 307 N.C. 130, 146, 297 S.E. 2d 540, 550 (1982) (promise made one day; confession given the following day; held, connection between promise and confes-

sion was "so attenuated" that promise did not render confession involuntary).

In the case at bar, defendant's willingness to confess followed Officer Dalton's statement by approximately five minutes. Nothing was shown to have intervened between Dalton's statement and defendant's confession. Until Dalton's statement was made, defendant had insisted on his right to silence and his right to counsel. There is nothing in the case to indicate that the influence of Dalton's statement had been dissipated or "entirely done away with" before defendant's confession was made. As a matter of law defendant's confession was the product of Dalton's statement. No issue arises in this case as to the causal relationship between the statement and the confession. There is no occasion for the application of the "totality of circumstances" approach used in *Corley* and *Chamberlain.*

Defendant's confession being the product of Officer Dalton's statement, the confession is inadmissible if Officer Dalton's statement constitutes an implied promise of leniency. The majority opinion does not make it clear whether Dalton's statement is indeed an implied promise of leniency. It refers to it as an "offhand statement . . . which is at best ambiguous." If, of course, the statement is not an implied promise of leniency, then the result reached by the majority on the voluntariness issue is correct.

Because of the remaining analysis of the voluntariness issue contained in the majority opinion, the majority seems to assume that Dalton's statement is an implied promise of leniency. I agree that the statement is an implied promise that if defendant cooperated with officers and made a statement to them, he would be "helped." I do not see anything else to which Dalton could have had reference when he mentioned defendant's "opportunity to help" himself.

We have, therefore, an implied promise of leniency followed within approximately five minutes by defendant's willingness to make a statement which was in turn followed by defendant's confession. Under rules heretofore consistently followed by the Court, the confession must be considered a product of the promise and, therefore, inadmissible as being involuntary.

Believing that the confession was the product of Officer Dalton's statement as a matter of law, I also think this statement

initiated the subsequent dialogue with defendant so that the confession is inadmissible under *Edwards v. Arizona*, 451 U.S. 477 (1981).

STATE OF NORTH CAROLINA v. RICHARD EUGENE WATSON

No. 394A83

(Filed 6 March 1984)

1. **Criminal Law § 135.4— determining applicability of aggravating factor prior to trial**

Procedure whereby the trial court determined prior to trial of a first degree murder case that the aggravating circumstance relied on by the State was not supported by sufficient evidence and that the case should be tried as a non-capital first degree murder case is commended for its judicial economy and administrative efficiency.

2. **Constitutional Law § 31— refusal to appoint expert for indigent defendant**

The trial court in a first degree murder case did not abuse its discretion under G.S. 7A-454 in refusing to appoint an expert to determine, at State expense, the extent and impact of pretrial publicity about the case in the county of trial and adjoining counties where defendant had the full opportunity before trial to assemble and document all available data on pretrial publicity in the case and to question each potential juror about exposure to the publicity and any effect this may have had, and defendant has not shown what, if anything, the requested survey would have added to this information. Nor was the indigent defendant denied equal protection because of the court's refusal to appoint the expert.

3. **Criminal Law § 15.1— pretrial publicity—denial of change of venue or special venire**

The trial court in a first degree murder case did not err in the denial of defendant's motion for a change of venue or a special venire from another county because of pretrial newspaper and television publicity where the court found that newspaper and television coverage concerning details of the killing and defendant's arrest was factual and likely to be gleaned from evidence at the trial; news accounts concerning the victim were not overly dramatized; a period of seven months had elapsed since the news coverage about the killing; the crime took place in the largest urban area in this State; the transcript of the jury selection process revealed that, although most of the potential jurors had heard of the case, none knew the victim or his family, none stated that he or she had formed an opinion about the case or knew the facts, none had visited the scene of the crime or talked about the case with any person involved therein, and none was a neighbor of the victim or his family; each juror selected to hear defendant's case stated that he or she could set aside any

preconceived notions and determine defendant's guilt or innocence solely on the basis of the evidence at trial; and defendant made no attempt to challenge peremptorily another potential juror after exhausting his peremptory challenges. G.S. 15A-957; G.S. 15A-958.

4. Jury § 6— denial of individual examination of prospective jurors

The trial court in a non-capital first degree murder case did not err in the denial of defendant's motion to examine the prospective jurors individually. G.S. 15A-1214(j).

5. Jury § 7.7— challenge for cause—failure to preserve for appellate review—denial of additional peremptory challenges

Defendant failed to preserve for appellate review his objection to a challenge for cause and failed to show prejudice caused by the court's denial of his motion for additional peremptory challenges where defendant never attempted to challenge peremptorily another juror after using all of his peremptory challenges, and where defendant failed to renew his challenge for cause after exhausting his peremptory challenges as required by G.S. 15A-1214(h) and (i).

6. Criminal Law § 43— admission of photographs for illustrative purposes

A photograph of a homicide victim in the hospital emergency room was properly admitted to illustrate the victim's appearance during the course of the emergency room treatment, and a photograph of the victim behind a desk with his fishing pole at his side was properly admitted to illustrate the victim when he was alive.

7. Homicide § 30.3— first degree murder case—failure to submit involuntary manslaughter

The trial court in a first degree murder case did not err in failing to submit involuntary manslaughter as a permissible verdict where defendant admitted that he intended to fire the gun he was holding pointed in the direction of the victim and that he was fully aware that the gun was loaded.

ON appeal by defendant from judgment entered by *Snepp, J.*, at the 28 February 1983 Criminal Session of Superior Court, MECKLENBURG County. Heard in the Supreme Court 13 December 1983.

Defendant was charged in an indictment proper in form with murder in the first degree of Ernest Coleman, a Charlotte police officer working off duty at Peso's Food King on the night of 30 June 1982. The judge ruled prior to trial that the case would be tried as a non-capital case, there being insufficient evidence of aggravating circumstances which would justify imposition of the death penalty. Judge Snepp imposed the mandatory life sentence following a jury verdict of guilty of murder in the first degree.

Evidence presented by the state tended to show that the decedent was employed by Wallace Paysour, owner of Peso's Food King, to maintain peace and order in the store and to apprehend shoplifters. On the night in question, at about 7:00, defendant and his girlfriend, Brenda Brannon, were observed entering the store, arguing loudly as they came in and continuing the disturbance as they proceeded to the back of the store. Ernest Coleman approached them to break up the argument. There was a scuffle in the course of which Coleman pinned defendant's arm behind his back and pushed him out of the store, letting him go, after a brief struggle, about five or ten yards from the door of the store. As Watson was urged away from the store by Brenda Brannon, he was heard to say, "You're dead, . . ." to Coleman.

Defendant, going to a nearby park, approached a man named B. B. Reid and asked if he had a pistol. Reid held out a towel with a pistol in it. Defendant grabbed the weapon and ran back down toward the store. He told a bystander to go in the store and tell Coleman "that somebody out here wants to see him." He approached the store, then waited. When Officer Coleman emerged from the store with Paysour, defendant aimed the gun at Coleman with both hands and shot twice, wounding Coleman in the head. Defendant ran and was apprehended at about 11:30 that night outside a nearby apartment complex where he lived. Officer Coleman died shortly after midnight on 1 July 1982 of a gunshot wound to the head. At the time of the shooting he was in full uniform; the uniform was not "messed up" in any way; his revolver was in his holster; his radio was in place.

Defendant testified in his own behalf. His evidence tended to show that he and Brenda Brannon entered the store talking about a little problem they had, left the store when Brannon said something loud, then reentered the store. In line at the cash register, they were approached by Officer Coleman who asked if there was a problem and said to defendant, "Boy, I don't like you no way . . . You know, I feel like doing something to you." Coleman then grabbed defendant by the throat, gagging him, and threw him down on the floor. A struggle ensued which ended outside the store. Brannon left to return to the apartment complex; defendant went into a nearby restaurant and ordered a sandwich. While it was being prepared, he stepped outside and saw Officer Coleman

and Wallace Paysour emerging from Peso's. Coleman saw defendant and flinched as if reaching for a weapon. Defendant, afraid, panicked and shot his gun. After the first shot, when Coleman turned, defendant shot again, to scare Coleman, not to hit him. He ran, not knowing he had wounded Coleman. Defendant had found the pistol a week earlier and was intending to sell it. He had it on his person when he and Brannon first approached Peso's but left it in a brown bag across the street before they entered the store. He retrieved it after he had been ejected from Peso's. He did not aim the weapon with two hands. He shot with one hand. It was loaded when he found it and had been loaded ever since.

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

Isabel Scott Day, Public Defender, Twenty-Sixth Judicial District, for defendant.

MARTIN, Justice.

[1] We begin with a procedural note which we suggest is worthy of consideration by trial counsel in appropriate cases: Prior to the trial of this case, counsel for this defendant submitted the following motion to Judge Snepp:

> Now comes Defendant, by and through his counsel, Fritz Y. Mercer, Jr., and Isabel S. Day, and moves the Court to schedule a hearing prior to the trial of this case with regard to whether there is sufficient evidence to support the submission to the jury of the Aggravating Circumstance NCGS 15A-2000(e)(8).
>
> The Defendant shows unto the Court the following:
>
> 1. Defendant is charged with the First Degree Murder of Ernest Coleman;
>
> 2. In the event of guilty verdict of First Degree Murder, the State intends to request that the Aggravating Circumstance NCGS 15A-2000(e)(8) be submitted to the jury at the sentencing phase for a possible sentence of death;
>
> 3. The State contends that only one Aggravating Circumstance is supported by the evidence, NCGS 15A-2000(e)(8);

4. The Defendant contends that such evidence as will be presented by the State, whether at trial or at sentencing, is insufficient as a matter of law to call for the submission to the jury of the Aggravating Circumstance NCGS 15A-2000 (e)(8);

5. A pre-trial determination as to whether the evidence supports the applicability of this Aggravating Circumstance is important for the following reason:

If the Aggravating Circumstance is inapplicable, the time-consuming processes peculiar to a capital case—*e.g.*, filing and hearing numerous motions, selecting a "death qualified" jury—will have been avoided.

Therefore, Defendant moves the Court to grant this request for a hearing prior to trial to determine the applicability of NCGS 15A-2000(e)(8).

The pertinent aggravating circumstance is: "The capital felony was committed against a law enforcement officer . . . while engaged in the performance of his official duties or because of the exercise of his official duty." N.C. Gen. Stat. § 15A-2000(e)(8) (1983). The able trial judge, finding "under the circumstances of this case, it is in the best interests of justice, the public, and the judicial system, that this be determined prior to trial," ruled that Officer Coleman was not shot by defendant because of the exercise of his official duty and that the case therefore would be tried as a non-capital first degree murder case.

We do not here question or consider the correctness of this ruling. We do commend this procedure for its judicial economy and administrative efficiency.

Defendant raises seven issues on appeal, the first four having to do with the following set of circumstances surrounding this shooting incident: On the day Ernest Coleman was killed, a Mecklenburg County jury had earlier convicted and given a life sentence to the accused killer of another Charlotte police officer. The deaths of these two men had occurred within a seven-month period. Not unexpectedly, during the summer of 1982 local press and media coverage of the Coleman shooting included recitals of the earlier killing, interviews with jurors from the first trial, and general exhortations from the mayor, the police, and the public

concerning the need to deal more severely with the problem of "cop-killing."

Based on these factors, counsel for defendant Watson: (1) moved the court to appoint an expert to determine, at state expense, the extent and impact of pretrial publicity about this case in Mecklenburg and adjoining counties; (2) moved the court for a change of venue or in the alternative for a special venire from another county; (3) moved the court at trial to allow counsel to voir dire the prospective jurors individually and to sequester the jurors from the courtroom during the voir dire; and (4) moved at trial for additional peremptory challenges during jury selection.

The trial judge's denial of each of these motions is the subject of defendant's first four arguments on appeal to this Court. We consider each in turn and, for reasons which follow, find no error in the rulings on these motions.

[2] On 19 October 1982, counsel for the defendant filed a motion to appoint Dr. Paul Brandes to conduct the above-mentioned survey of Mecklenburg County and adjoining counties. Dr. Brandes is affiliated with Legal Experimental Consultants in Chapel Hill, a company offering its clients a research service wherein a statistical determination is made of the effects of pretrial publicity on possible juror bias. The trial judge heard evidence and arguments on the motion during that same week, whereupon he denied the motion.

Defendant argues that the services of this expert were essential to the case he would later be making to the trial court for a change of venue in this matter. He further argues that he has a statutory and constitutional right to this assistance. A solvent defendant could have hired Dr. Brandes to aid in the effectiveness of his defense—in this case measuring the effects of the massive pretrial publicity. Defendant concedes that by statute the appointment of experts for an indigent lies within the discretion of the trial judge. *In re Moore*, 289 N.C. 95, 221 S.E. 2d 307 (1976). In this case, he argues, the trial court "abused his discretion in chilling defendant's right to show the extent to which a fair trial was impossible in Mecklenburg County."

We disagree. The relevant statutory provisions are as follows:

N.C.G.S. 7A-454 provides that "[t]he court, *in its discretion*, may approve a fee for the service of an expert witness who testifies for an indigent person, and shall approve reimbursement for the necessary expenses of counsel. Fees and expenses accrued under this section shall be paid by the State." (Emphasis ours.)

N.C.G.S. 7A-450(b) provides that "[w]henever a person, under the standards and procedures set out in this Subchapter, is determined to be an indigent person entitled to counsel, it is the responsibility of the State to provide him with counsel and the *other necessary expenses of representation.*" (Emphasis ours.)

This Court has dealt at length with the questions of whether and when an indigent is entitled to the appointment of an expert witness at state expense to assist in his defense. *State v. Gray*, 292 N.C. 270, 233 S.E. 2d 905 (1977); *State v. Tatum*, 291 N.C. 73, 229 S.E. 2d 562 (1976); *State v. Montgomery*, 291 N.C. 91, 229 S.E. 2d 572 (1976). In sum, the Court first recognizes that "all defendants in criminal cases shall enjoy the right to effective assistance of counsel and that the State must provide indigent defendants with the basic tools for an adequate trial defense or appeal." *State v. Tatum, supra*, 291 N.C. at 80, 229 S.E. 2d at 566-67. *Accord Gideon v. Wainwright*, 372 U.S. 335, 9 L.Ed. 2d 799 (1963). We have held, however, that the state has no constitutional duty to provide an expert witness to assist in the defense of an indigent. *State v. Tatum, supra; State v. Gray, supra; accord Smith v. Baldi*, 344 U.S. 561, 97 L.Ed. 549 (1953). This is a question properly left within the sound discretion of the trial judge. *State v. Tatum, supra.* The applicable rule is that expert assistance need only be provided by the state when the defendant can show it is probable that he will not receive a fair trial without the requested assistance, *State v. Craig and State v. Anthony*, 308 N.C. 446, 302 S.E. 2d 740 (1983), or upon a showing by defendant that there is a reasonable likelihood that it will materially assist the defendant in the preparation of his defense. *State v. Gray, supra.* Mere hope or suspicion that favorable evidence is available is not sufficient. *State v. Tatum, supra.*

We find upon studying the circumstances of this case and details of the proposed Brandes survey that defendant's argument fails in precisely this regard. He had the full opportunity before trial to assemble and document all available data on pretrial

publicity in this case and to question each potential juror about exposure to the publicity and any effect this may have had. Defendant has not shown what, if anything, the requested survey would have added to this information. As the trial judge observed at the close of the hearing on this motion, the survey could not demonstrate to his satisfaction how much bias (as opposed to knowledge) remained six or seven months after the summer 1982 media coverage, nor how much of this publicity was even noted by individuals who might later serve as jurors in this trial. We find no abuse of discretion in his refusal to grant this motion.

Nor are we persuaded by defendant's equal protection argument regarding "the fundamental question of equality between the ability of a solvent and indigent defendant to present an effective defense." This Court has responded to this line of reasoning as follows:

> The equal protection clause of the Fourteenth Amendment prevents a state from making arbitrary classifications which result in invidious discrimination. It "does not require absolute equality or precisely equal advantages." *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 36 L.Ed. 2d 16, 93 S.Ct. 1278. In this case the State has imposed no arbitrary barriers which hinder or impede defense counsel's investigation or preparation of his case. There has merely been a refusal to provide defendant with an additional defense tool which is available to wealthier persons accused of crime. It was recognized in *Griffin v. Illinois*, 351 U.S. 12, 100 L.Ed. 891, 76 S.Ct. 585, which defendant cites in support of his argument, that this circumstance alone does not amount to a denial of equal protection by the State:
>
> > . . . Of course a State need not equalize economic conditions. A man of means may be able to afford the retention of an expensive, able counsel not within reach of a poor man's purse. Those are contingencies of life which are hardly within the power, let alone the duty, of a State to correct or cushion. (Frankfurter, J., concurring in the judgment.)

State v. Tatum, *supra*, 291 N.C. at 83, 229 S.E. 2d at 568. This assignment of error is overruled.

[3] On 29 September 1982, defense counsel moved the court for a change of venue for the trial pursuant to N.C.G.S. 15A-957[1] or in the alternative for a special venire from another county pursuant to N.C.G.S. 15A-958, on the grounds that defendant could not obtain a fair and impartial trial in Mecklenburg County. During the 10 January 1983 session of superior court, Judge Snepp conducted a full evidentiary hearing on the matter. In support of this motion, defendant submitted materials including virtually all newspaper accounts of the Coleman shooting, scripts of TV coverage, and videotapes of a number of the TV broadcasts. On 18 January 1983, Judge Snepp issued a memorandum opinion and order denying the motion, in which he made findings of fact and discussed the law applicable to this question.

We have read through the above-mentioned press clippings and television news broadcast scripts, the transcript of the hearing on the motion, the trial judge's order with its accompanying memorandum opinion, and the transcript of the subsequent jury selection process at trial. Based thereon, we do not find error in the trial court's refusal to grant this motion. Judge Snepp's findings of fact support his denial of the motion; the evidence in the record supports his findings of fact; the transcript of the jury selection process yields no showing of prejudice to defendant from the denial of the motion for a change of venue.

On this issue, the burden is on the defendant to prove prejudice so great that he cannot obtain a fair and impartial trial. *State v. Corbett*, 309 N.C. 382, 307 S.E. 2d 139 (1983); *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). The determination whether the defendant has met his burden of proof rests in the sound discretion of the trial judge. His ruling will not be overturned on appeal absent a showing of gross abuse of discretion. *State v. Corbett, supra; State v. Dobbins*, 306 N.C. 342, 293 S.E. 2d 162 (1982); *State v. Oliver*, 302 N.C. 28, 274 S.E. 2d 183 (1981).

1. N.C.G.S. 15A-957 provides that "[i]f, upon motion of the defendant, the court determines that there exists in the county in which the prosecution is pending so great a prejudice against the defendant that he cannot obtain a fair and impartial trial, the court must either: (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."

At the heart of the matter is the due process requirement that the defendant receive a trial by an impartial jury free from outside influences. *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). What defendant must prove in meeting his burden on this motion is 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." *State v. Jerrett*, 309 N.C. 239, 255, 307 S.E. 2d 339, 347 (1983). *See also State v. McDougald, supra.* Furthermore, when a defendant later alleges prejudice at trial on the basis of pretrial publicity, he must show that he exhausted his peremptory challenges, or that he had to accept jurors who were prejudiced by pretrial publicity. *State v. Dobbins, supra.*

We find that the arguments of this defendant have failed in both respects, showing neither abuse of discretion nor prejudice.

That there was extensive press and media publicity of the Coleman shooting is not of itself enough. How prejudicial to this defendant is this pretrial coverage? *State v. Richardson, supra*, 308 N.C. 470, 302 S.E. 2d 799. This Court has held consistently that factual news accounts regarding the commission of a crime and the pretrial proceedings do not of themselves warrant a change of venue. *State v. Dobbins, supra*, 306 N.C. 342, 293 S.E. 2d 162. In cases where coverage of the arrests only indicated that defendants had been charged with a crime, and news articles were "factual, non-inflammatory, and contained for the most part information that could have been offered in evidence at defendants' trial," the motion for a change of venue has been held properly denied. *State v. Oliver, supra*, 302 N.C. at 37, 274 S.E. 2d at 190. *Accord State v. Alford*, 289 N.C. 372, 222 S.E. 2d 222, *death sentence vacated*, 429 U.S. 809 (1976).

Having found as facts that all the coverage—newspapers and television—concerning details of the killing and defendant's arrest was factual and likely to be gleaned from evidence at trial, the trial court further found that similar news accounts of the victim, Ernest Coleman, were not overly dramatized. In addition, there was "no evidence of any media coverage from October 20 to the date of this hearing on January 13, 1983." Indeed, we note

that a period of some seven months had elapsed since the intense news coverage in the previous July.

In considering the totality of the circumstances, this Court has also taken note of the social and geographic context of the crime and accompanying pretrial publicity. In *State v. Jerrett, supra*, Chief Justice Branch took care to note:

> 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. 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 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.

309 N.C. at 256-57, 307 S.E. 2d at 348 (footnote omitted).

This crime took place in the largest urban area in this state. The area also has one of the highest murder rates in the state. Its connection in time with the killing of another Charlotte police officer becomes no less tragic, but not necessarily determinative, when we bear this in mind.

Defendant has not shown prejudice at trial. The transcript of the jury selection process reveals: Although most of the potential jurors in the venire had heard of the case, none knew the victim or his family, none stated that he or she had formed an opinion about the case or knew the facts; none had visited the scene of the crime or talked about the case with any person involved therein; no potential juror was a neighbor of the victim or his family. Moreover, each juror selected to hear defendant's case had unequivocally responded in the affirmative when asked by the trial judge if he or she could set aside preconceived notions and determine defendant's guilt or innocence solely on the basis of evidence introduced at trial.

Defendant exhausted his peremptory challenges, then later moved the trial court: "for the record I make a motion for additional peremptory challenges." The trial court's denial of this motion is not all that is required to show the necessary prejudice to prevail on this issue. No further attempt to peremptorily challenge any potential juror having been made, defendant has not proven that an objectionable person sat on the jury in this trial. *State v. Allred*, 275 N.C. 554, 169 S.E. 2d 833 (1969).

The motion to change venue was properly denied.

[4] Defendant argues that it was reversible error for the trial court to deny his motion to examine the prospective jurors individually. The applicable statute 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." N.C. Gen. Stat. § 15A-1214(j) (1983) (emphasis added).

By his prior order of 11 February 1983, the trial court had ruled that defendant's case would be tried as a non-capital, first degree murder case. Under N.C.G.S. 15A-1214(j), defendant does not have a right to have the jurors selected individually. The trial judge has broad discretion in the manner and method of jury voir dire in order to assure that a fair and impartial jury is impaneled, *State v. Phillips*, 300 N.C. 678, 268 S.E. 2d 452 (1980), and N.C.G.S. 15A-1214(d), (e), (f) sets forth the procedure ordinarily followed in non-capital trials.

This assignment of error is meritless.

[5] Defendant next seeks a finding of prejudicial error in the denials by the trial court of his challenge for cause and his motion for additional peremptory challenges.

With respect to the challenge for cause, defendant has not properly preserved his objection for appellate review. By the same token, he has made no showing of prejudice caused by the trial court's denial of his motion for additional peremptory challenges.

Numerous decisions of this Court have upheld the rule on this question, which is summarized as follows:

> "Where the court has refused to stand aside a juror challenged for cause, and the party has then peremptorily challenged him, in order to get the benefit of his exception he must exhaust his remaining peremptory challenges, and then challenge another juror peremptorily to show his dissatisfaction with the jury, and except to the refusal of the court to allow it."

State v. Allred, supra, 275 N.C. at 563, 169 S.E. 2d at 838 (quoting headnote in *Carter v. King*, 174 N.C. 549, 94 S.E. 4 (1917)).

As noted above, the defendant in this case never attempted to peremptorily challenge another juror after using all his peremptory challenges. His motion for additional peremptory challenges cannot be argued to cure this omission.

The pertinent parts of the applicable statute are:

> (h) In order for a defendant to seek reversal of the case on appeal on the ground that the judge refused to allow a challenge made for cause, he must have:
>
> (1) Exhausted the peremptory challenges available to him;
>
> (2) Renewed his challenge as provided in subsection (i) of this section; and
>
> (3) Had his renewal motion denied as to the juror in question.
>
> (i) A party who has exhausted his peremptory challenges may move orally or in writing to renew a challenge for cause previously denied if the party either:
>
> (1) Had peremptorily challenged the juror; or
>
> (2) States in the motion that he would have challenged that juror peremptorily had his challenges not been exhausted.

N.C. Gen. Stat. § 15A-1214(h) and (i) (1983). Defendant failed to comply with the statute because he did not renew his challenge for cause.

The defendant having made no showing that he was ever forced to accept a juror that he did not want, this assignment of error is overruled.

[6] By his next two assignments of error, defendant alleges that at trial certain photographs were improperly admitted into evidence: State's Exhibits 1 and 2, photographs of the victim, Officer Coleman, in the hospital emergency room; and State's Exhibit 3, a photograph of Coleman behind a desk with his fishing pole at his side.

Dr. Richard Sutton, a physician in the emergency room at Charlotte Memorial Hospital, testified at some length about the victim's wounds at the time he was brought into the hospital. He identified the first two photographs as illustrating Coleman's appearance during the course of the emergency room treatment. The third photograph was identified by three witnesses as illustrating the victim when he was alive. The jury was given cautionary instructions with respect to these photographs.

Defendant argues that the introduction of the third picture "is an attempt to create sympathy for the victim and disgust for the person who would kill this wonderful man," while the emergency room pictures "are excessive and have no purpose but to inflame the jury."

We find no error in the admission of these photographs. No prejudice whatever has been argued or shown with respect to the third photograph. With respect to the first two photographs, it is well settled that:

> Properly authenticated photographs of the body of a homicide victim may be introduced into evidence under instructions limiting their use to the purpose of illustrating the witness' testimony. Photographs are usually competent to be used by a witness to explain or illustrate anything that it is competent for him to describe in words. The fact that the photograph may be gory, gruesome, revolting or horrible, does not prevent its use by a witness to illustrate his testimony.

State v. Cutshall, 278 N.C. 334, 347, 180 S.E. 2d 745, 753 (1971). *See also State v. Atkinson*, 275 N.C. 288, 167 S.E. 2d 241 (1969), *death sentence vacated*, 403 U.S. 948 (1971).

We overrule these assignments of error.

[7] Finally, defendant argues, the trial court committed reversible error in denying his request for a jury instruction on the lesser included offense of involuntary manslaughter.

Involuntary manslaughter is the unintentional killing of a human being without either express or implied malice (1) by some unlawful act not amounting to a felony or naturally dangerous to human life, or (2) by an act or omission constituting culpable negligence. *State v. Wilkerson*, 295 N.C. 559, 247 S.E. 2d 905 (1978); *State v. Wrenn*, 279 N.C. 676, 185 S.E. 2d 129 (1971); *State v. Foust*, 258 N.C. 453, 128 S.E. 2d 889 (1963). In *Foust*, this Court noted:

> 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.

258 N.C. at 459, 128 S.E. 2d at 893 (emphasis added).

By defendant's own admission, he intended to fire the gun he was holding pointed in the direction of Officer Coleman. He was fully aware that it was loaded.

We hold that on the facts of this case there exists sufficient evidence of defendant's implied malice in his intentionally firing at Ernest Coleman—whether to frighten or to kill him—as to manifest the utter disregard of social duty which removes this case from the involuntary manslaughter category of homicide.

No error.

STATE OF NORTH CAROLINA v. EDWARD ALSTON

No. 246A83

(Filed 6 March 1984)

1. Kidnapping § 1.2— sufficiency of evidence

The evidence in a prosecution for first degree kidnapping was insufficient to withstand defendant's motion to dismiss at the close of the evidence where the evidence introduced at trial provided substantial evidence of force, intimidation and removal of the victim by the defendant, but the evidence was insufficient to show that the defendant removed her with the intent to commit rape. The evidence tended to show that defendant approached the victim at her school, defendant blocked her way and grabbed her arm, forcing her to walk with him towards the parking lot; defendant questioned her about where she was living and expressed a desire to see her again; there was no evidence that while he held her he had an intent to have sex with her; he made no sexual remarks but expressed a desire to talk about the relationship; the two then embarked on a walk through the neighborhood; the defendant and the victim continued on their walk, staying slightly apart, with the defendant neither holding the victim nor threatening her in any way with what might happen if she tried to leave; defendant made no sexual remarks at all until they reached a wooded area some distance from the school and stopped to talk; there the victim told the defendant that the relationship was over; for the first time defendant spoke of sex and said he deserved another lovemaking session; they changed directions at that point; and the victim said nothing but followed defendant to the house where the two had gone to have sex before. G.S. 14-39(a), (b). All the evidence tended to show that, after the victim told the defendant their relationship was over and he made his statement concerning sex, the defendant did not threaten the victim in any way and did not touch her again until he actually had sex with her at a friend's house. Instead, all the evidence tends to show that the victim followed the defendant to the friend's house without protesting or giving any apparent indication that she went unwillingly. Such evidence was insufficient to show that the defendant knew or had any reason to know at the time he removed the victim from the school that she would not have consensual sexual intercourse with him as she always had in the past.

2. Rape and Allied Offenses § 5— sufficiency of evidence of second degree rape

In a prosecution for second degree rape, the evidence was insufficient to allow the trial court to submit the issue to the jury where the record was devoid of any evidence that the victim was in any way intimidated into having sexual intercourse with the defendant by threat or any other act of the defendant. The victim specifically stated that her fear of the defendant was based on an experience with him prior to the date of the alleged rape and that on that date he did not hold her down or threaten her with what would happen if she refused to submit to him. Although the victim's general fear of the defendant may have been justified by his conduct on prior occasions, absent evidence that the defendant used force or threats to overcome the will of the victim to

resist the sexual intercourse alleged to have been rape, such general fear was not sufficient to show that the defendant used the force required to support a conviction of rape. The State's evidence was sufficient to show that the act of sexual intercourse in question was against the victim's will, but insufficient to show that the act was accomplished by actual force or by a threat to use force unless she submitted.

APPEAL by the defendant pursuant to G.S. 7A-30(2) from the decision of a divided panel of the Court of Appeals which upheld judgments entered by *Brannon, Judge* on January 12, 1982 in Superior Court, DURHAM County. Heard in the Supreme Court October 5, 1983.

The defendant was charged in bills of indictment with second degree rape and first degree kidnapping. The defendant pleaded not guilty and was convicted by a jury on January 8, 1982 of both charges. He was sentenced to a maximum prison term of ten years and a minimum term of eight years for second degree rape. He received a sentence of 25 years on the first degree kidnapping conviction, which sentence was suspended for five years. The Court of Appeals affirmed both convictions.

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

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

MITCHELL, Justice.

The defendant raises on appeal the question whether the evidence of his guilt of kidnapping and second degree rape was sufficient to support his convictions of those crimes. For reasons discussed herein, we conclude the evidence was insufficient to support his conviction of either crime.

The State's evidence tended to show that at the time the incident occurred the defendant and the prosecuting witness in this case, Cottie Brown, had been involved for approximately six months in a consensual sexual relationship. During the six months the two had conflicts at times and Brown would leave the apartment she shared with the defendant to stay with her mother. She testified that she would return to the defendant and the apartment they shared when he called to tell her to return. Brown

testified that she and the defendant had sexual relations throughout their relationship. Although she sometimes enjoyed their sexual relations, she often had sex with the defendant just to accommodate him. On those occasions, she would stand still and remain entirely passive while the defendant undressed her and had intercourse with her.

Brown testified that at times their consensual sexual relations involved some violence. The defendant had struck her several times throughout the relationship when she refused to give him money or refused to do what he wanted. Around May 15, 1981, the defendant struck her after asking for money that she refused to give him. Brown left the apartment she shared with the defendant and moved in with her mother. She did not have intercourse with the defendant after May 15 until the alleged rape on June 15. After Brown left the defendant, he called her several times and visited her at Durham Technical Institute where she was enrolled in classes. When he visited her they talked about their relationship. Brown testified that she did not tell him she wanted to break off their relationship because she was afraid he would be angry.

On June 15, 1981, Brown arrived at Durham Technical Institute by taxicab to find the defendant standing close to the school door. The defendant blocked her path as she walked toward the door and asked her where she had moved. Brown refused to tell him, and the defendant grabbed her arm, saying that she was going with him. Brown testified that it would have taken some effort to pull away. The two walked toward the parking lot and Brown told the defendant she would walk with him if he let her go. The defendant then released her. She testified that she did not run away from him because she was afraid of him. She stated that other students were nearby.

Brown stated that she and the defendant then began a casually paced walk in the neighborhood around the school. They walked, sometimes side by side, sometimes with Brown slightly behind the defendant. As they walked they talked about their relationship. Brown said the defendant did not hold her or help her along in any way as they walked. The defendant talked about Brown's "dogging" him and making him seem a fool and about Brown's mother's interference in the relationship. When the

defendant and Brown left the parking lot, the defendant threatened to "fix" her face so that her mother could see he was not playing. While they were walking out of the parking lot, Brown told the defendant she wanted to go to class. He replied that she was going to miss class that day.

The two continued to walk away from the school. Brown testified that the defendant continually talked about their relationship as they walked, but that she paid little attention to what he said because she was preoccupied with her own thoughts. They passed several people. They walked along several streets and went down a path close to a wooded area where they stopped to talk. The defendant asked again where Brown had moved. She asked him whether he would let her go if she told him her address. The defendant then asked whether the relationship was over and Brown told him it was. He then said that since everyone could see her but him he had a right to make love to her again. Brown said nothing.

The two turned around at that point and began walking towards a street they had walked down previously. Changing directions, they walked in the same fashion they had walked before—side by side with Brown sometimes slightly behind. The defendant did not hold or touch Brown as they walked. Brown testified that the defendant did not say where they were going but that, when he said he wanted to make love, she knew he was going to the house of a friend. She said they had gone to the house on prior occasions to have sex. The defendant and Brown passed the same group of men they had passed previously. Brown did not ask for assistance because some of the men were friends of the defendant, and she assumed they would not help. The defendant and Brown continued to walk to the house of one of the defendant's friends, Lawrence Taylor.

When they entered the house, Taylor was inside. Brown sat in the living room while the defendant and Taylor went to the back of the house and talked. When asked why she did not try to leave when the defendant and Taylor were in the back of the house, Brown replied, "It was nowhere to go. I don't know. I just didn't." The defendant returned to the living room area and turned on the television. He attempted to fix a broken fan. Brown asked Taylor for a cigarette, and he gave her one.

The defendant began talking to Brown about another man she had been seeing. By that time Taylor had gone out of the room and perhaps the house. The defendant asked if Brown was "ready." The evidence tended to show that she told him "no, that I wasn't going to bed with him." She testified that she did not want to have sex with the defendant and did not consent to do so at any time on June 15.

After Brown finished her cigarette, the defendant began kissing her neck. He pulled her up from the chair in which she had been sitting and started undressing her. He noticed that she was having her menstrual period, and she sat down pulling her pants back up. The defendant again took off her pants and blouse. He told her to lay down on a bed which was in the living room. She complied and the defendant pushed apart her legs and had sexual intercourse with her. Brown testified that she did not try to push him away. She cried during the intercourse. Afterwards they talked. The defendant told her he wanted to make sure she was not lying about where she lived and that he would not let her up unless she told him.

After they dressed they talked again about the man Brown had been seeing. They left the house and went to the defendant's mother's house. After talking with the defendant's mother, Brown took a bus home. She talked with her mother about taking out a complaint against the defendant but did not tell her mother she and the defendant had had sex. Brown made a complaint to the police the same day.

The defendant continued to call Brown after June 15, but she refused to see him. One evening he called from a telephone booth and told her he had to talk. When he got to her apartment he threatened to kick her door down and Brown let him inside. Once inside he said he had intended merely to talk to her but that he wanted to make love again after seeing her. Brown said she sat and looked at him, and that he began kissing her. She pulled away and he picked her up and carried her to the bedroom. He performed oral sex on her and she testified that she did not try to fight him off because she found she enjoyed it. The two stayed together until morning and had sexual intercourse several times that night. Brown did not disclose the incident to the police immediately because she said she was embarrassed.

The defendant put on no evidence and moved at the close of the State's evidence for dismissal of both charges based on insufficiency of evidence. The trial court denied the motions and the majority in the Court of Appeals affirmed the trial court.

Upon the defendant's motion to dismiss, the question for the court is whether substantial evidence was introduced of each element of the offense charged and that the defendant was the perpetrator. *State v. Earnhardt*, 307 N.C. 62, 296 S.E. 2d 649 (1982). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E. 2d 164, 169 (1980). The issue of substantiality is a question of law for the court. 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 to dismiss should be allowed. *State v. Cutler*, 271 N.C. 379, 383, 156 S.E. 2d 679, 682 (1967). This is true even though the suspicion is strong. *State v. Evans*, 279 N.C. 447, 183 S.E. 2d 540 (1971).

The court is to consider the evidence in the light most favorable to the State in ruling on a motion to dismiss. *State v. Earnhardt*, 307 N.C. 62, 296 S.E. 2d 649 (1982). The State is entitled to every reasonable intendment and inference to be drawn from the evidence; contradictions and discrepancies do not warrant dismissal—they are for the jury to resolve. *Id.*

[1] In light of these principles, we examine first the evidence relating to the charge of kidnapping. Kidnapping is the unlawful restraint, confinement or removal of a person without that person's consent, if the person is 16 or over, for one of the following purposes:

> (1) Holding such other person for ransom or as a hostage or using such other person as a shield; or
>
> (2) Facilitating the commission of any felony or facilitating flight of any person following the commission of a felony; or
>
> (3) Doing serious bodily harm to or terrorizing the person so confined, restrained or removed or any other person.
>
> (4) Holding such other person in involuntary servitude in violation of G.S. 14-43.2.

G.S. 14-39(a). In order to convict the defendant of first degree kidnapping, the State must allege and prove as an additional element that "the person kidnapped either was not released by the defendant in a safe place or had been seriously injured or sexually assaulted. . . ." G.S. 14-39(b); *State v. Jerrett*, 309 N.C. 239, 307 S.E. 2d 339 (1983).

The indictment for kidnapping in the present case alleged that the defendant removed Brown for the purpose of facilitating the commission of the felony of second degree rape. When such an indictment alleges an intent to commit a particular felony, the State must prove the particular intent alleged. *State v. White*, 307 N.C. 42, 296 S.E. 2d 267 (1982). In order to withstand the defendant's motion to dismiss, the State was, therefore, required to introduce substantial evidence tending to show that the defendant had the intent to rape Brown at the time he removed her.

The defendant argues that no substantial evidence was introduced tending to show either that he forcibly removed Brown or that he had the intent to rape her when he did so. Our review of the evidence introduced at trial leads us to the conclusion that, although there was substantial evidence of force, intimidation and removal of Brown by the defendant, the evidence was insufficient to show that the defendant removed her with the intent to commit rape.

The evidence tended to show that when he approached Brown at the school on June 15, the defendant blocked her way and grabbed her arm, forcing her to walk with him towards the parking lot. He questioned her about where she was living and expressed a desire to see her again. There was no evidence that while he held her he had an intent to have sex with her. He made no sexual remarks but expressed a desire to talk about their relationship. The two then embarked on a walk through the neighborhood. The defendant and Brown continued on their walk, staying slightly apart, with the defendant neither holding Brown nor threatening her in any way with what might happen if she tried to leave. They talked about their relationship as they walked.

The defendant made no sexual remarks at all until they reached a wooded area some distance from the school and stopped to talk. There Brown told the defendant that the relationship was

over. For the first time the defendant spoke of sex and said he deserved another lovemaking session. They changed directions at that point. Brown said nothing but followed him to the house where the two had gone to have sex before.

There was no substantial evidence of an intent by the defendant to have sex until the time he made his statement about deserving sex. Ordinarily, the mere fact that a defendant removed and then raped the victim is substantial evidence that the defendant removed the victim with the intent to commit rape. *See State v. White*, 307 N.C. 42, 49, 296 S.E. 2d 267, 271 (1982) (removal to facilitate sexual assault). Even when it is assumed *arguendo* that the defendant in this case raped Brown, however, all of the evidence tended to show that, at the time the defendant removed Brown, he had no reason to think that she would not engage in consensual sexual acts with him. To the contrary, all of the evidence tended to show that Brown's actions on June 15 prior to telling the defendant that their relationship was at an end were entirely consistent with the well established pattern of the couple's consensual sexual relationship. During that relationship she frequently remained entirely passive while the defendant at times engaged in some violence at the time of sexual intercourse. Brown's conduct on June 15, at least prior to her telling the defendant the relationship was over, was entirely consistent with her prior consensual sexual conduct. It in no way indicated to the defendant that he would have to rape Brown in order to have sexual intercourse with her. Therefore, there was no substantial evidence that the defendant had formed the intent to rape Brown at the time he forcibly removed her or that he removed her with the intent to facilitate any such crime.

All of the evidence tended to show that, after Brown told the defendant their relationship was over and he made his statement concerning sex, the defendant did not threaten Brown in any way and did not touch her again until he actually had sex with her at the Taylor house. Instead, all of the evidence tends to show that Brown followed the defendant to the Taylor house without protesting or giving any apparent indication that she went unwillingly. We think that such evidence was insufficient to show that the defendant knew or had any reason to know at the time he removed Brown from the school that she would not have consensual sexual intercourse with him as she always had in the past. Thus,

there was no substantial evidence that the defendant had formed an intent to rape Brown at the time he removed her from the school.

Since there was no substantial evidence of forcible confinement, restraint or removal for the purpose of committing rape, the State failed to present substantial evidence of every element of the offense charged in the bill of indictment. We reverse the majority holding of the Court of Appeals on this issue and hold that the trial court erred in denying the defendant's motion to dismiss the kidnapping charge for insufficiency of the evidence.

[2] In his second assignment of error the defendant contends there was no substantial evidence that the sexual intercourse between Brown and him was by force and against her will. He argues that the evidence was insufficient to allow the trial court to submit the issue of his guilt of second degree rape to the jury. After a review of the evidence, we find this argument to have merit.

Second degree rape involves vaginal intercourse with the victim both by force and against the victim's will. G.S. 14-27.3. Consent by the victim is a complete defense, but consent which is induced by fear of violence is void and is no legal consent. *State v. Hall*, 293 N.C. 559, 563, 238 S.E. 2d 473, 476 (1977).

A defendant can be guilty of raping even his mistress or a "common strumpet." *Cf. State v. Long*, 93 N.C. 542 (1885) (assault with intent to rape). This is so because consent to sexual intercourse freely given can be withdrawn at any time prior to penetration. *State v. Way*, 297 N.C. 293, 296, 254 S.E. 2d 760, 761 (1979). If the particular act of intercourse for which the defendant is charged was both by force and against the victim's will, the offense is rape without regard to the victim's consent given to the defendant for prior acts of intercourse. *Id.*; R. Anderson, 1 Wharton's Criminal Law and Procedure § 302 (1957).

Where as here the victim has engaged in a prior continuing consensual sexual relationship with the defendant, however, determining the victim's state of mind at the time of the alleged rape obviously is made more difficult. Although inquiry in such cases still must be made into the victim's state of mind at the time of the alleged rape, the State ordinarily will be able to show

the victim's lack of consent to the specific act charged only by evidence of statements or actions by the victim which were clearly communicated to the defendant and which expressly and unequivocally indicated the victim's withdrawal of any prior consent and lack of consent to the particular act of intercourse.

In the present case the State introduced such evidence. It is true, of course, that Brown gave no physical resistance to the defendant. Evidence of physical resistance is not necessary to prove lack of consent in a rape case in this jurisdiction. *State v. Hall*, 293 N.C. 559, 563, 238 S.E. 2d 473, 476 (1977). Brown testified unequivocally that she did not consent to sexual intercourse with the defendant on June 15. She was equally unequivocal in testifying that she submitted to sexual intercourse with the defendant only because she was afraid of him. During their walk, she told the defendant that their relationship was at an end. When the defendant asked her if she was "ready" immediately prior to having sexual intercourse with her, she told him "no, that I wasn't going to bed with him." Even in the absence of physical resistance by Brown, such testimony by her provided substantial evidence that the act of sexual intercourse was against her will. *See, e.g., State v. Arnold*, 284 N.C. 41, 199 S.E. 2d 423 (1973).

The State did not offer substantial evidence, however, of the element of force. As we have stated, actual physical force need not be shown in order to establish force sufficient to constitute an element of the crime of rape. Threats of serious bodily harm which reasonably induce fear thereof are sufficient. *See State v. Burns*, 287 N.C. 102, 214 S.E. 2d 56, *cert. denied*, 428 U.S. 933 (1975). In the present case there was no substantial evidence of either actual or constructive force.

The evidence in the present case tended to show that, shortly after the defendant met Brown at the school, they walked out of the parking lot with the defendant in front. He stopped and told Brown he was going to "fix" her face so that her mother could see he was not "playing." This threat by the defendant and his act of grabbing Brown by the arm at the school, although they may have induced fear, appeared to have been unrelated to the act of sexual intercourse between Brown and the defendant. More important, the record is devoid of evidence that Brown was in any way intimidated into having sexual intercourse with the de-

fendant by that threat or any other act of the defendant on June 15. Brown said she did not pay a lot of attention to what the defendant said because she was thinking about other things. She specifically stated that her fear of the defendant was based on an experience with him prior to June 15 and that on June 15 he did not hold her down or threaten her with what would happen if she refused to submit to him. The State failed to offer substantial evidence of force used or threatened by the defendant on June 15 which related to his desire to have sexual intercourse on that date and was sufficient to overcome the will of the victim.

We note that the absence of an explicit threat is not determinative in considering whether there was sufficient force in whatever form to overcome the will of the victim. It is enough if the totality of the circumstances gives rise to a reasonable inference that the unspoken purpose of the threat was to force the victim to submit to unwanted sexual intercourse. *State v. Barnette*, 304 N.C. 447, 284 S.E. 2d 298 (1981). The evidence introduced in the present case, however, gave rise to no such inference. Under the peculiar facts of this case, there was no substantial evidence that threats or force by the defendant on June 15 were sufficiently related to sexual conduct to cause Brown to believe that she had to submit to sexual intercourse with him or suffer harm. Although Brown's general fear of the defendant may have been justified by his conduct on prior occasions, absent evidence that the defendant used force or threats to overcome the will of the victim *to resist the sexual intercourse alleged to have been rape*, such general fear was not sufficient to show that the defendant used the force required to support a conviction of rape.

In summary, we think that the State's evidence was sufficient to show that the act of sexual intercourse in question was against Brown's will. It was not sufficient, however, to show that the act was accomplished by actual force or by a threat to use force unless she submitted to sexual intercourse. Since the State did not introduce substantial evidence of the element of force required to sustain a conviction of rape, the trial court erred in denying the defendant's motion to dismiss the case against the defendant for second degree rape.

For the foregoing reasons, we reverse the opinion of the Court of Appeals holding that there was no error in the defend-

ant's trial for kidnapping and second degree rape and remand this action to the Court of Appeals for its further remand to the Superior Court, Durham County, for the entry of directed verdicts in favor of the defendant.

Case No. 81CRS14691—Second degree rape—reversed and remanded.

Case No. 81CRS29047—First degree kidnapping—reversed and remanded.

STATE OF NORTH CAROLINA v. RONALD LEE STILLS

No. 462A83

(Filed 6 March 1984)

1. **Criminal Law § 89.3— thirdhand statements by corroborative witnesses—inadmissibility for corroborative purposes**

In a prosecution for first degree sexual offense and taking indecent liberties with a child, the trial court committed prejudicial error in permitting certain corroborative witnesses to testify as to thirdhand statements of other corroborative witnesses for the purpose of corroborating the other corroborative witnesses where portions of the statements did not corroborate the other witnesses and were in direct conflict with the substantive trial testimony of the State's two primary witnesses.

2. **Rape and Allied Offenses § 3— first degree sexual offense—sufficiency of indictment**

An indictment was sufficient to charge defendant with a first degree sexual offense with a child of the age of twelve years or less without specifying the sexual act which defendant is alleged to have committed with the child.

DEFENDANT appeals from judgments of *Mills, J.*, entered at the 2 May 1983 Mixed Session of Superior Court, FORSYTH County. Heard in the Supreme Court 14 February 1984.

Defendant was charged in two bills of indictment with taking indecent liberties with a child on or about 1 December 1982 and with first degree sexual offense on or about 30 November 1982. The victim, Tobias John Crandall, was six years old at the time of these events.

Since October 1981 the defendant had been living with the child's mother, Glenda Faye Cook, and her three children, Toby Crandall, Matthew Cooper, and Sheila Cooper. In October 1982 they all moved from Asheville to Greensboro and soon thereafter, in early November, to Kernersville, North Carolina, where they shared a rented trailer. The events leading to the charges against defendant occurred during the week of 29 November 1982. There is no dispute that prior to this time defendant had no sexual contact with the child. Nor is it disputed that when Toby Crandall was two or three years old and his mother was married to Ray Cooper, her brother-in-law, James Cooper, induced the boy to perform fellatio on him. In October 1982, while defendant was in Greensboro and Toby and his mother were still in Asheville, Dale, a male friend of Glenda Cook's stayed with them for a week. At that time, Toby played with him and fondled his genitals, on his own initiative and for "fun."

The state's evidence tends to show the following: On the night of Wednesday, 1 December 1982, defendant and Glenda Cook had been watching television in their bedroom with Toby. Glenda left the room. When she returned, defendant was on the bed and Toby was sitting in a small chair next to the bed with his hand inside defendant's underwear, fondling his genitals. Glenda became upset, running from the house in tears. When she later returned to the house, she would not speak with Toby, who testified that he "played" with defendant, sometimes on his own initiative and sometimes at defendant's request. Glenda and defendant agreed not to tell anyone and to try to work it out through a doctor.

The following Friday, Glenda Cook went to Asheville and told her sister, Tammy Jones, about the incident. The next day, Jones told their stepmother, Altha Crandall.

On Sunday, after Mrs. Crandall had talked to Glenda and had also learned about the prior incidents involving James Cooper and Dale, she refused to allow the children to return home with her stepdaughter. By Monday, she had convinced Glenda to seek help. On Friday, 10 December 1982, a social worker from the Buncombe County Protective Services and an investigator with the county sheriff's department interviewed Toby. That same day defendant was questioned at the sheriff's department.

Toby Crandall testified at trial that on three daytime occasions between Monday, 29 November 1982, and the following Wednesday night, he had performed fellatio on the defendant when defendant requested this and threatened him with a whipping if he refused.

Defendant has denied these charges. Concerning the Wednesday night in question, he testified that Toby reached for him as Glenda Cook entered the room and that he smacked the boy's hand. He further stated that when the child told him he had been made to do these things by James Cooper and Dale and he liked it, he reprimanded Toby, saying it was wrong. He denied that the child ever touched his genitals or performed fellatio on him.

After closing arguments and instructions from the court, the jury returned verdicts of guilty on both counts. From the trial judge's imposition of a mandatory life sentence for first degree sexual offense, defendant appeals to this Court. His motion to bypass the Court of Appeals in appealing a three-year sentence on his conviction of taking indecent liberties with a child was granted on 14 September 1983.

Rufus L. Edmisten, Attorney General, by Harry H. Harkins, Jr., Assistant Attorney General, for the state.

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

MARTIN, Justice.

[1] Defendant first claims that certain testimony designated as "corroborative" by the state far exceeded the proper bounds of corroboration and should never have been permitted by the trial court. We agree and remand this case for a new trial.

Toby Crandall and Glenda Cook were the only persons to testify as to matters they claimed to have observed firsthand. In addition, the state called six corroborative witnesses: family members Altha Joyce Crandall and Tammy Jones; Officer Marshall Gravley of the Buncombe County Sheriff's Department; Jane Olmsted of the Forsyth County Department of Social Services; Ralph Mason and Evelyn Harless, investigators for the Forsyth County Sheriff's Department.

Portions of the secondhand testimony of these six witnesses went to facts and information told to them by one or both of the substantive witnesses, Toby and Glenda.

Over defendant's objections, however, the trial court also permitted certain of these corroborative witnesses to testify as to prior out-of-court statements of other corroborative witnesses—"to corroborate the corroboration."

Here the court was faced with testimony thrice-removed from the original declarant. Furthermore, portions of these so-called "corroborative" statements were in direct conflict with the substantive trial testimony of Glenda Cook or Toby Crandall. Mrs. Altha Joyce Crandall, for example, testifying solely as a corroborative witness at trial, was interviewed by Forsyth County Deputy Sheriff Evelyn Harless on 6 January 1983. The interviewing officer was permitted to read to the jury the entire transcript of the interview. Defense counsel objected "that she has testified and it's hearsay and this is not sufficient value."

The trial judge responded:

> Objection overruled. Members of the jury, the transcript of this interview that this officer made with the grandmother will be received into evidence only for the purpose of corroborating what the grandmother said on the stand, if it does and for no other reason. If there are parts that do not corroborate what the grandmother said on the stand in previous testimony, you will disregard it.

A portion of the transcript read to the jury follows:

> A. Can you remember what the conversation was between you and Glenda?
>
> . . . .
>
> "JOYCE: And I asked her to tell me—I says, 'What is this I hear about Toby and Ronnie?'
>
> "And she proceeds to tell me that she had caught Toby and Ronnie in bed and that Toby was sucking Ronnie.
>
> "HARLESS: Okay. Now were these the words she used?
>
> "JOYCE: Yes, these were the words that she used.

. . . .

"And I says, 'Well, how long has this been going on?'

"And she says, 'Well, I don't know.' She says, 'I think it has been going on for a while.'

A review of the record reveals that this "corroborative" testimony is in direct and substantial conflict with the trial testimony of Glenda Cook, Toby Crandall, and Tammy Jones herself, each of whom had testified that Toby had been discovered "fondling" the defendant.

Elsewhere the record shows numerous examples of hearsay testimony such as the following:

Q. And do you remember what she told you on that occasion?

A. Yes. [Altha Crandall is testifying as to what she had been told by Tammy Jones.]

Q. And what did she tell you?

A. She told me that Glenda had come over on Friday evening to talk to her and told her that she had caught Ronnie and Toby having oral sex.

The trial judge, in his charge to the jury, later summarized this portion of the evidence as follows:

Altha Joyce Crandall indicated that she lives in Chandler, North Carolina, and she is the grandmother of Toby; that she was told about what happened sometime early in December. Said that Tammy had told her that Glenda had told her that she caught Ronnie and Toby with Toby performing some oral sex. She indicated when she saw Glenda, she asked Glenda what was going on and she said that Glenda had caught Ronnie and Toby and told her that Toby was sucking on Ronnie.

The evidence against defendant in this case thus consists of (1) confused and inconsistent trial testimony of the state's primary witnesses, Toby and Glenda; (2) testimony of the family and investigating officials as to prior statements of Toby and Glenda, corroborative in varying degrees and accompanied by limiting in-

structions from the trial court; (3) thirdhand hearsay statements offered by the state to "corroborate" other secondhand testimony which in fact directly conflict with the substantive trial testimony of Toby and Glenda; and (4) other impermissible hearsay statements admitted with no objection and reiterated by the trial court in his charge to the jury.

The trial court did not instruct the jury that prior statements of a corroborative witness had been introduced solely for the purpose of corroborating that witness's testimony and were not substantive evidence of the truth of any facts in those prior statements.

Defendant argues, and we agree, that it is the third and fourth categories of evidence as summarized above which were improperly heard by the jury and were sufficiently prejudicial to warrant a new trial.

The main task of the jury in most cases is to identify the substantive evidence which is credible. To this end, trial judges in this state generally have wide discretion in admitting evidence which they determine to be helpful to a jury appraisal of credibility. 1 Brandis on North Carolina Evidence § 52 (1982). However, as Professor Brandis has noted:

> The liberality of the rule has occasionally led counsel or a trial judge to assume that virtually any evidence is admissible if only it is labeled "corroboration." There are, nevertheless, some limitations, disregard of which may be reversible error, though such limitations are concerned more with *what* is corroborative than with *when* corroborative evidence is admissible.

Id. at 193.

By definition, a prior statement is admitted only as corroboration of the substantive witness and is not itself to be received as substantive evidence. *See State v. Easterling*, 300 N.C. 594, 268 S.E. 2d 800 (1980). Furthermore, "prior consistent statements" are admissible only when they are in fact consistent with the witness's trial testimony. 1 Brandis, *supra*, § 52; *State v. Moore*, 300 N.C. 694, 268 S.E. 2d 196 (1980); *State v. Warren*, 289 N.C. 551, 223 S.E. 2d 317 (1976); *State v. Bagley*, 229 N.C. 723, 51 S.E. 2d 298 (1949).

We hold that the trial court committed prejudicial error in admitting the challenged "corroborative" testimony. Much of it did not corroborate the other witnesses, and in part it contradicted the substantive testimony. With respect to the primary witness whose testimony is thereby contradicted, the statements are improper as impeachment. As "new" evidence they may not be introduced by the state under a claim of "corroboration." *State v. Moore, supra.* Moreover, the statements failed to corroborate the witness.

The potential of such statements to confuse the jury as to what *is* substantive evidence in the case far outweighs any probative value. To justify the admission into evidence of hearsay statements *three* or *four* times removed from the original declarant under the guise of corroborating the corroborative witnesses is unacceptable. This is not to say, however, that a corroborating witness may not be corroborated. This Court still favors the liberality of the rule as expressed in *State v. Henley,* 296 N.C. 547, 251 S.E. 2d 463 (1979). If there is a question as to whether evidence offered for corroborative purposes is corroborative and admissible, the trial court should conduct a voir dire hearing in the absence of the jury for this determination.

The state has argued that any error in admitting this unlawful evidence was harmless, there remaining "plenary competent evidence . . . from which the jury could have determined defendant's guilt of the crime charged." Be that as it may, viewing the extent of the incompetent evidence admitted and the likelihood of its effect on the jury, we hold that defendant has carried his burden of showing prejudicial error. N.C. Gen. Stat. § 15A-1443(a) (1983).

[2] Defendant has also challenged the validity of the indictment for first degree sexual offense in that it does not specify the sexual act which defendant is alleged to have committed with Toby Crandall.

The indictment reads as follows:

> THE JURORS FOR THE STATE UPON THEIR OATH PRESENT that on or about the 30th day of November, 1982, in Forsyth County Ronald Lee Stills unlawfully and wilfully did feloniously with force and arms commit and engage in a sexual

act with another person, to wit; Tobias John Crandall, a child of the age of twelve years of age or less and the defendant was four or more years older than the said Tobias John Crandall, in violation of North Carolina General Statute 14-27.4(a)(2).

Defendant argues that his conviction in this case is in violation of his constitutional right to indictment as guaranteed by article I, section 22 of the North Carolina Constitution.

In *State v. Effler*, 309 N.C. 742, 309 S.E. 2d 203 (1983), this Court dealt with this precise issue. In that case, as here, defendant was arguing that he "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." *Id.* at 747, 309 S.E. 2d at 206.

We do not find the argument persuasive and deem it adequate to repeat the following from *Effler*:

> 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.

309 N.C. at 747, 309 S.E. 2d at 206.

New trial.

STATE OF NORTH CAROLINA v. STEVEN VAN HIGSON

No. 482A83

(Filed 6 March 1984)

1. **Criminal Law § 138— aggravating factor of especially heinous, atrocious, or cruel—improperly considered**

In prosecutions for second degree murder and assault with a deadly weapon with intent to kill inflicting serious injury, the trial court erred in considering as an aggravating factor at the sentencing phase that the offenses were especially heinous, atrocious, or cruel. The record disclosed in the stabbing death that the victim was stabbed in the heart and died "that very same day." Nor does the assault on the other victim disclose excessive brutality, pain, or psychological suffering not normally present in that offense since the defendant stabbed the victim once in the abdomen, an act sufficient to warrant punishment for the crime with which he was charged. In the absence of evidence to the contrary, whatever physical pain the victim suffered was incident to the crime.

2. **Criminal Law § 138— duplicity in aggravating factors—improper**

The trial court's findings in aggravation that (1) the defendant was an extremely dangerous mentally abnormal person, and (2) the defendant's conduct during the crimes indicated a serious threat of violence were predicated upon the same fact that the defendant is mentally ill, and therefore violated the prohibition found in G.S. 15A-1340.4(a) that "the same item of evidence may not be used to prove more than one factor in aggravation."

3. **Criminal Law § 138— aggravating factor that defendant's conduct indicated a serious threat of violence—improperly considered**

In prosecutions for second degree murder and assault with a deadly weapon with intent to kill, the trial court improperly considered as an aggravating factor that "defendant's conduct during the crimes indicate[d] a serious threat of violence" since the crimes with which defendant was charged, by definition, are crimes of violence, and presumably the threat of violence inherent in these crimes was considered in determining the presumptive sentences for the offenses.

4. **Criminal Law § 138— aggravating factors that victims did not contribute to situation and victims had no ability to defend themselves—improperly considered**

In prosecutions for second degree murder and assault with a deadly weapon with intent to kill, the trial court erred in finding as factors in aggravation that (1) neither the deceased nor the victim contributed "to the situation wherein the deceased's life was taken or the victim was wounded"; and (2) the defendant attacked the victims without warning whereby the victims had no ability to defend themselves since inherent in most crimes is an unprovoked, uninvited and unwarranted attack on an unprepared, innocent victim and since neither victim could demonstrate a particular vulnerability.

5. Criminal Law § 138— aggravating factor that there is no suitable or reliable supervision available for defendant's condition—improperly considered

In prosecutions for second degree murder and assault with a deadly weapon with intent to kill, the trial court erred in considering as an aggravating factor that there was no suitable or reliable supervision available for defendant's mental condition since the fact that there appeared to be no alternative to a lengthy incarceration for this defendant was neither relevant to the injury the offense had caused nor did it relate to the particular culpability of the offender. Alternatives to incarceration are a matter for legislative inquiry. G.S. 15A-1340.3; G.S. 15A-1340.4(a).

6. Criminal Law § 138— failure to make separate findings in aggravation or mitigation as to each offense error

In prosecutions for second degree murder and assault with a deadly weapon with intent to kill, the trial judge erred in failing to make separate findings in aggravation and mitigation as to each offense.

Justice MITCHELL concurring in the result and dissenting in part.

Justice MARTIN joins in this opinion.

BEFORE *Llewellyn, J.*, at the 11 April 1983 Criminal Session of Superior Court, PITT County, following pleas of guilty to charges of second degree murder and assault with a deadly weapon with intent to kill inflicting serious injury, defendant was sentenced on a consolidated judgment to a term of life imprisonment. Defendant appealed as of right on the life sentence for second degree murder pursuant to Rule 4(d) of the N.C. Rules of Appellate Procedure. We allowed defendant's Motion to Bypass the Court of Appeals on the assault conviction on 5 October 1983. Heard in the Supreme Court 16 February 1983.

Defendant brings forward six assignments of error, all of which challenge the trial court's application of the statutory provisions of G.S. § 15A-1340.4, the Fair Sentencing Act. Because of errors in the application of certain aggravating factors to defendant's case, defendant is entitled to a new sentencing hearing.

Rufus L. Edmisten, Attorney General, by Ann Reed, Special Deputy Attorney General, for the State.

Donald C. Hicks, III, Public Defender, Attorney for defendant-appellant.

MEYER, Justice.

Defendant pled guilty to the second degree murder of his brother, James Earl Higson, and to the assault of his sister-in-law, Patricia Stocks Higson. At the sentencing hearing the trial judge was apprised of the following facts in connection with the crimes: On 28 February 1982, James and Patricia Higson and their son David were returning to Greenville from Belhaven when they decided to stop by the home of James Higson's parents. Upon inquiry, Patricia Higson discovered that only the defendant, who lived with his parents, was at home. Patricia Higson notified her husband of his parents' absence and then returned to the house to inform the defendant that the family would not stay to visit.

As Patricia Higson returned to the car, she was accompanied by the defendant who then opened the door on the driver's side of the car where James Higson was seated and began to "curse at him." Both Patricia Higson and her son David saw the defendant pull a knife from his boot. A struggle ensued. Patricia Higson testified that:

> When Steve [the defendant] came up with the knife, my husband was sitting in the car. He tried to get up, but he couldn't get up because of the steering wheel. It was a small car. My husband was struggling with him only with his hands. Steve stabbed right in the heart. That was inside the car.
>
> I got out of the car and picked up a bottle that was in the back seat on the floor. I went around to the other side of the car to try to get him off of my husband. I hit him over the head with the bottle three times before the bottle broke on his temple. While I was striking Steve, he was still struggling—he was killing my husband. I guess he finally felt the bottle when it broke and then he grabbed me.
>
> He wouldn't turn me loose and said he was going to kill me. He stabbed me in my stomach and my lower intestines were hanging out. He stabbed me once with that same butcher knife.

Anticipating that "there was going to be trouble," David Higson, who was sitting in the back seat of the car, ran into the

house to find a shotgun which he had loaned his grandmother "for protection." David Higson testified that when he got back outside

> I saw my father out of the car fighting with Steve. I fired one shot up in the air to see if that would get Steve to stop, but it didn't. I saw Steve push my father against the door and then he ran to the front of the car.
>
> He then grabbed my mother. I saw him stab her once. Then he got up and I shot him. My mother was at the back of the car when I saw Steve stab her. I couldn't tell you where he stabbed her. When he raised up, I tried to get in a good shot. I shot him, but there weren't but two shells in the gun. The first one was a warning shot and I didn't have but one left.
>
> He came at me after I shot him. I ran back up to the railroad track and he tried to get me. When he got to the railroad tracks, he fell down. I ran across the road to a restaurant and told the cashier that she should call the Police Department and an ambulance.

At the sentencing hearing the testimony of relatives, friends and local law enforcement officers, in addition to the testimony of a clinical psychologist and a psychiatrist, indicated quite clearly that the defendant had serious mental and emotional problems. He had been a patient at the Pitt County Mental Health Center in 1976 and was seen again in 1979 when an examination was made to determine the necessity for involuntary commitment. At this time there was a tentative diagnosis made of paranoid schizophrenia with findings of "delusions, auditory hallucinations, paranoid idealation and loose associations." Despite these findings, defendant was never committed. A discharge summary from Central Prison Hospital dated 26 May 1982 contained the following entry: "Inmate is obviously mentally disturbed, in other words, schizophrenic." Under the diagnoses listed in the report appeared "schizophrenia with history of violence."

Dr. Charles E. Smith, the testifying psychiatrist, stated:

> I very strongly recommend and emphasize that Mr. Higson needs to continue under psychiatric care and management indefinitely. As I told you earlier, we don't know the cure for the condition. So, I think the best way to visualize

this condition is as one that requires continued indefinite care. By this I mean that he needs to be seen regularly by someone who is skilled in the handling of this type of disorder, who can kind of keep tabs on what his condition is. Hopefully, this would be to regulate such medication as might be beneficial and also to take advantage of other opportunities for improving his condition as they may arise.

Based upon my examination of Mr. Higson and based upon my prior professional experience, I would not have any recommendation to the Court with regard to the conditions of the sentence. I would certainly urge that Mr. Higson be identified, or continued to be identified, as a person with a chronic mental disorder which needs continuing care. We emphasize the need for these care needs to be met.

Following the presentation of this evidence, the trial judge found as a statutory aggravating factor that the offense was especially heinous, atrocious, or cruel. Also found were the following additional nonstatutory findings of factors in aggravation:

a. The defendant is an extremely dangerous abnormal person.

b. The defendant's conduct during this crime indicates a serious threat of violence.

c. The deceased nor the victim of the assault did not in any way contribute to the situation wherein the deceased's life was taken or the victim was wounded.

d. The defendant attacked the deceased and the assault victim without warning and at a moment when the deceased had no ability to defend himself or herself.

e. There is no suitable or reliable supervision for the defendant's condition.

As factors in mitigation, the trial judge found that the defendant had no record of criminal convictions; that 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; and 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. The trial judge further found that the factors in aggravation outweighed the factors in mitigation.

Based on these findings, the trial judge, having consolidated the offenses for purposes of judgment, sentenced the defendant to life imprisonment.

[1] Defendant first contends that the trial judge erred in finding as an aggravating factor that these offenses were especially heinous, atrocious, or cruel. We agree.

In *State v. Blackwelder*, 309 N.C. 410, 414, 306 S.E. 2d 783, 786 (1983), we stated that in determining the appropriateness of this factor under the Fair Sentencing Act, "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.*" In the case sub judice, the facts surrounding the stabbing death of James Higson do not meet this test. The record discloses only that following a brief struggle, the victim was stabbed in the heart and died "that very same day." Nor do we agree that the assault on Mrs. Higson discloses excessive brutality, pain, or psychological suffering not normally present in that offense. The defendant stabbed Mrs. Higson once in the abdomen, an act sufficient to warrant punishment for assault with a deadly weapon with intent to kill inflicting serious injury. In the absence of evidence to the contrary, whatever physical pain she suffered was incident to the crime. The stabbing was not excessively brutal. There was no testimony that the victim was subjected to excessive psychological or physical suffering.

[2] Defendant next challenges the trial court's additional nonstatutory findings in aggravation that (1) the defendant is an extremely dangerous mentally abnormal person, and (2) the defendant's conduct during the crimes indicates a serious threat of violence. Defendant contends that these two findings "are predicated upon the same fact that the defendant is mentally ill" and therefore violate the prohibition found in G.S. § 15A-1340.4(a) that "the same item of evidence may not be used to prove more than one factor in aggravation." We agree that these two factors are duplicitous and both are proved by the same evidence. The seemingly unprovoked attack on his brother and sister-in-law were merely manifestations of the defendant's dangerous propensities

—propensities which were obviously the result of his being "an extremely dangerous mentally abnormal person."

[3] Defendant further contends that the evidence does not support a finding of either of these factors. With respect to the finding that the defendant is an extremely dangerous mentally abnormal person, we disagree. The evidence of record amply supports this finding. Defendant's long history of mental disorder, coupled with the testimony of the expert witnesses at trial and the violent attack on his family members, sufficiently demonstrates his dangerousness to others. The trial judge properly found this factor in aggravation. *See State v. Ahearn*, 307 N.C. 584, 300 S.E. 2d 689 (1983). We do not agree, however, that under the facts of this case it is relevant to consider as a separate aggravating factor that "defendant's conduct during the crimes indicates a serious threat of violence." Here, the defendant pled guilty to second degree murder and to assault with a deadly weapon with intent to kill inflicting serious injury. Both crimes, by definition, are crimes of violence. Presumably the threat of violence inherent in these crimes was considered in determining the presumptive sentences for the offenses. *See State v. Blackwelder*, 309 N.C. 410, 306 S.E. 2d 783; *State v. Chatman*, 308 N.C. 169, 301 S.E. 2d 71 (1983).

[4] Defendant's third assignment of error challenges the trial court's additional written findings of factors in aggravation that (1) neither the deceased nor the victim contributed "to the situation wherein the deceased's life was taken or the victim was wounded"; and (2) the defendant attacked the victims without warning whereby the victims had no ability to defend themselves. This assignment of error, too, has merit.

Inherent in most crimes is an unprovoked, uninvited and unwarranted attack on an unprepared, innocent victim. Such is the very essence of violent crime and it can be presumed that the Legislature was guided by this unfortunate fact when it established presumptive sentences for crimes which fall within the purview of the Fair Sentencing Act. *See State v. Blackwelder*, 309 N.C. 410, 306 S.E. 2d 783. We noted in *Blackwelder* that only where the particular vulnerability of the victim can be demonstrated is a trial judge permitted to consider this or similarly related facts in aggravation.

While we agree that James Higson, at the time of the attack, was in a disadvantaged position—that is, he was confined behind the steering wheel of his automobile and unable to fully defend himself—we do not consider this fact, standing alone, of sufficient import in determining this victim's particular vulnerability. Nor does the record support a conclusion that Patricia Higson, although attacked without warning, was made any more vulnerable than other victims similarly assaulted. While we consider it relevant that this victim was a woman, this fact alone will not support an aggravating factor bearing on a victim's particular vulnerability.

[5] Defendant contends that the trial court erred in finding as an additional factor in aggravation that there is no suitable or reliable supervision available for his condition. While defendant concedes that such a consideration might well be relevant in determining whether to suspend a prison sentence or impose an active one, he argues that the availability of suitable supervision should not be considered in determining whether to vary a sentence in excess of the presumptive under the Fair Sentencing Act. We agree.

It seems clear that the trial judge, in making this finding, was attempting to insure that the defendant, whom he found to be an extremely dangerous mentally ill person, be confined under supervision for a lengthy period of time. As noted earlier, a trial judge may properly consider a defendant's dangerousness to others as a factor in aggravation and impose a sentence in excess of the presumptive based thereon. One of the stated purposes of sentencing is "to protect the public by restraining offenders." G.S. § 15A-1340.3. *See State v. Ahearn*, 307 N.C. 584, 300 S.E. 2d 689. Here the defendant pled guilty to two serious offenses. The trial judge did find in mitigation that he suffered from a mental disorder which, although insufficient to constitute a defense, significantly reduced his culpability for the offense. The length of defendant's incarceration for these crimes must be determined on the basis of the trial judge's discretionary weighing of these and other properly found factors in aggravation and mitigation, together with any factor "reasonably related to the purposes at sentencing." G.S. § 15A-1340.4(a). The fact that there appeared to be no alternative to a lengthy incarceration for this defendant is neither relevant to the injury the offense has caused nor does it

relate to the particular culpability of the offender. G.S. § 15A-1340.3; *see State v. Ahearn*, 307 N.C. 584, 300 S.E. 2d 689. Alternatives to incarceration is a matter for legislative inquiry.

[6] Finally, we agree that the trial judge erred in failing to make separate findings in aggravation or mitigation as to each offense. In *State v. Ahearn*, 307 N.C. 584, 598, 300 S.E. 2d 689, 698, we stated:

> Separate findings as to the aggravating and mitigating factors for each offense will facilitate appellate review. Further, in the interest of judicial economy, separate treatment of offenses, even those consolidated for hearing, will offer our appellate courts the option of affirming judgment for one offense while remanding for resentencing only the offense in which error is found. This option is not available to us in the present case because error found on any aggravating factor applicable to only one offense will result in remand for resentencing on that offense, irrespective of whether the trial judge intended that the particular factor apply to one, the other, or both offenses. We therefore hold that in every case in which the sentencing judge is required to make findings in aggravation and mitigation to support a sentence which varies from the presumptive term, each offense, whether consolidated for hearing or not, must be treated separately, and separately supported by findings tailored to the individual offense and applicable only to that offense.

In the present case, however, the error is harmless inasmuch as the errors found in the aggravating factors apply equally to both offenses. Nevertheless, we once again caution trial judges that fairness and judicial economy dictate that, when sentencing a defendant for multiple offenses, separate findings are necessary for each offense.

Because the defendant is entitled to a new sentencing hearing for both offenses, it is unnecessary to address his final contention that the trial judge erred, through the exercise of his discretion, in imposing a sentence in excess of the presumptive term.

The cases are remanded to Superior Court, Pitt County, for resentencing.

82CRS3119—Remanded for resentencing.

82CRS3120—Remanded for resentencing.

Justice MITCHELL concurring in the result and dissenting in part.

I concur in the result reached by the majority. I also concur in all parts of the opinion of the majority except that part by which the majority holds that the trial court erred in finding in aggravation that the offenses committed by the defendant were especially heinous, atrocious or cruel. As to that part of the opinion of the majority, I dissent.

In my view the evidence before the trial court was sufficient to support the trial court's determination under the Fair Sentencing Act that as to each crime "the facts of the case disclose *excessive* brutality, or physical pain, psychological suffering, or dehumanizing aspects not normally present in that offense." *State v. Blackwelder*, 309 N.C. 410, 414, 306 S.E. 2d 783, 786 (1983). As the evidence was sufficient to support the trial court's determination in this regard, it is my view that this Court must accept that determination.

The record reveals that the defendant stabbed the victim, the defendant's brother, in plain view of the victim's wife and son. When the wife protested and tried to stop the defendant's murderous assault upon her husband, the defendant stabbed her in the abdomen causing her intestines to protrude in the presence of her son. The defendant then proceeded, after having been shot by the son, to pursue the son and attempt to stab him. The deadly tenacity exhibited by the defendant, together with his efforts to kill an entire family during this murderous course of conduct, were more than sufficient to show excessive brutality, physical pain, psychological suffering, or dehumanizing aspects not normally present *in cases of murder in the second degree.*

The evidence of the assault with intent to kill inflicting serious injury on the wife could be considered in determining whether the murder of the defendant's brother was especially heinous, atrocious or cruel when compared to other murders *in the second degree.* The fact that the defendant committed a deadly assault on the murder victim's wife and son during the course

of the murder in the second degree, was sufficient to disclose excessive brutality, physical pain, psychological suffering or dehumanizing aspects *not normally present in murder in the second degree.*

For similar reasons the assault with a deadly weapon with intent to kill inflicting serious injury upon the wife was especially heinous, atrocious or cruel. Surely it cannot seriously be argued that the killing of an assault victim's husband and the attempt to kill her son did not disclose excessive brutality, psychological suffering and dehumanizing aspects not normally present *in assaults* such as that for which the defendant was convicted.

For these reasons, I believe the trial court properly found as a factor in aggravation that each of the crimes for which the defendant was convicted were especially heinous, atrocious or cruel. I dissent from the holding of the majority to the contrary. I concur in the remainder of the opinion of the majority and in the result of remanding both cases for resentencing.

Justice MARTIN joins in this opinion.

STATE OF NORTH CAROLINA v. IRVING ROBERTS

No. 265A83

(Filed 6 March 1984)

1. Indictment and Warrant § 7; Rape and Allied Offenses § 3— first degree rape—sufficiency of indictment

The indictment charging defendant with the crime of first degree rape fully satisfied defendant's right to be indicted by a grand jury even though the indictment did not specify all the elements of the crime charged. G.S. 15-144.1, G.S. 15-144.2, G.S. 14-27.2.

2. Rape and Allied Offenses § 5— first degree rape—sufficiency of evidence

Testimonial evidence by the victim that defendant had a knife stuck in the ground beside him while he was engaged in intercourse with the victim was sufficient to support a finding of the element of first degree rape that the defendant employed or displayed a dangerous weapon during the course of the rape. G.S. 14-27.2.

3. Rape and Allied Offenses § 7-- assault inflicting serious injury properly not considered as lesser offense of first degree rape

The trial court properly failed to consider assault inflicting serious injury under G.S. 14-33(b)(1) as a lesser included offense of first degree rape under G.S. 14-27.2(a)(2)b since defendant's first degree rape charge was not submitted to the jury on the theory that he inflicted serious personal injury on the victim. Rather, the case was submitted to the jury on the theory that defendant engaged in vaginal intercourse with the victim against her will and he *employed or displayed a dangerous or deadly weapon.* G.S. 14-27.2(a)(2)a. Further, since the infliction of serious bodily injury upon the victim is not an essential element of the greater crime of first degree rape of which defendant was convicted, it was not improper for the jury to also find defendant guilty of assault inflicting serious bodily injury.

4. Criminal Law § 114.2— jury instructions—no expression of opinion in recapitulation of evidence

There was no expression of opinion in the trial court's summary of the evidence where the trial judge summarized the evidence as indicating both a State's witness and one of defendant's witnesses said they saw the defendant in the area of a tobacco barn and a packhouse since a careful review of the evidence adduced at trial showed that both witnesses were walking together on the day after the crime when they saw the defendant, respectively, at the tobacco barn and at the packhouse and since both are located in the same general area.

APPEAL by defendant from the judgments and sentences entered by the *Honorable David E. Reid, Judge Presiding,* at the 21 February 1983 Criminal Session of Superior Court, JONES County. Heard in the Supreme Court 9 November 1983.

Defendant was charged in bills of indictment, proper in form, with the following crimes, all of which were committed against the same victim, Pearlie Mae Roberts: first degree rape, first degree burglary, first degree kidnapping and assault inflicting serious bodily injury. All of the charges were consolidated for trial. A jury found the defendant guilty as charged. Judge Reid sentenced the defendant to life imprisonment for the first degree rape conviction, fifteen years for the first degree burglary conviction, twelve years for the first degree kidnapping conviction and two years for the assault inflicting serious bodily injury conviction, with all sentences to run concurrently.

Pursuant to G.S. § 7A-27(a) (1981), defendant appeals his conviction of first degree rape and the sentence imposed thereon as a matter of right. This Court allowed defendant's motion to bypass

the Court of Appeals on the remaining convictions in order to consolidate for review all of defendant's convictions in this case.

Rufus L. Edmisten, Attorney General, by Christopher P. Brewer, Assistant Attorney General, for the State.

Adam Stein, Appellate Defender, by Ann B. Petersen, Assistant Appellate Defender, and James R. Glover, Director, Appellate Defender Clinic, for the defendant.

FRYE, Justice.

Defendant seeks a new trial and brings forward for review by this Court four alleged errors committed by the trial court. Defendant contends that: (1) the indictment for rape was insufficient to charge an offense greater than second degree rape; (2) the evidence was insufficient to convict him of first degree rape; (3) the trial court erred by entering judgment for both first degree rape and assault causing serious bodily injury; and, (4) the trial judge impermissibly expressed an opinion concerning the testimony of two witnesses. For the reasons stated in this opinion, we find no error in the trial proceedings leading to defendant's convictions of the crimes charged.

I.

Most of the State's evidence at trial consisted of the testimony of Pearlie Mae Roberts, the victim. Mrs. Roberts testified as follows:

She lives in a trailer in an area of town known as Garnett Heights, which is located in Pollocksville, North Carolina. She is married to Edward Roberts, the defendant's cousin. On Saturday night, 4 December 1982, from approximately 7:30 to 9:30 p.m., Mrs. Roberts was across the street from her trailer visiting in the home of Ella Roberts, the defendant's mother. During the course of the visit, she drank a bottle of beer and some wine. The defendant was also present at his mother's house.

After leaving defendant's mother's house, Mrs. Roberts returned home. At approximately 11:00 p.m. she was lying on her couch watching television. All of the doors to her trailer were locked. However, the back door, which had a broken windowpane in it, could be opened from the outside, if someone reached their

hand through the space from which the pane was missing. The defendant approached Mrs. Roberts from behind, coming from the general direction of the back door, and put a knife to her throat. Defendant told her that if she hollered he would kill her.

Then the defendant, holding the victim by her neck and her arm, forced her out of the trailer and across the road to an unused tobacco barn. While in the barn, the defendant beat her and tore all of her clothes off.[1] Next, defendant tied the victim's hands together and gagged her. He then proceeded to have sexual intercourse with her. Thereafter, he tied her feet together. Defendant left her lying nude on the ground and as he departed he said, "[i]f you ain't dead when I come back the next morning, you will be dead." Shortly thereafter, defendant returned and threw a quilt over her.

After defendant left the barn, the victim was able to free her feet and run to a neighbor's house where she was given a coat. Then she ran to another neighbor's house who removed the gag from her mouth and untied her hands. After talking with her neighbor for a short period of time, she returned home and went to bed without calling the police. Her husband was not at home when she arrived.

The next morning she went to her mother-in-law's house and was subsequently driven to the sheriff's department where the crime was reported. After reporting the crime, Mrs. Roberts and Deputy Sheriff Roger Smith returned to the scene of the crime. Outside of the tobacco barn the deputy sheriff discovered a rag and a twelve-inch butcher knife with a wooden handle sticking in the ground. A quilt was found inside the barn. Mrs. Roberts identified the knife that was found outside of the barn as being the knife that defendant had when he entered her trailer.

Deputy Smith testified that one of the victim's eyes was swollen and "her lips were swollen real bad" when she came to the sheriff's department. He also testified that the dirt inside the

1. The victim's testimony about the sequence of events was not entirely consistent. At one point, she testified the defendant beat her up and then tore her clothes off. Then she testified the defendant beat her after she was tied and gagged with the torn clothes and before he had sexual intercourse with her. Later she testified the beating took place while they were on the ground and during the act of sexual intercourse.

barn was all scuffled up. Deputy Smith was unable to obtain any footprints from the ground of the barn. Additionally, no fingerprints could be taken from the knife because of the material of which the handle was composed.

The defendant's evidence, presented through the testimony of his mother and two sisters, tended to show that on 4 December 1982, defendant was staying with his sister in Elizabeth City, North Carolina, which is approximately three hours from Pollocksville. Defendant's sister testified that defendant was at her house on 4 December 1982 at 9:30 p.m. just prior to her going to bed and that she saw him again on 5 December 1982 at approximately 12:00 o'clock noon, thereby making it impossible for him to have been in Pollocksville on 5 December 1982 as testified to by some witnesses for the State.

Other facts necessary to a determination of the issues raised by defendant will be incorporated in the opinion.

II.

[1] Defendant's first assignment of error alleges that the indictment for rape was insufficient to charge an offense greater than second degree rape because the indictment does not specify the essential elements which distinguish first degree rape from second degree rape. Therefore, defendant contends that the trial court's entry of judgment for the offense of first degree rape deprived him of his constitutional right to indictment by a grand jury as guaranteed by Article I, § 22 of the North Carolina Constitution. Basically, the defendant's contention is that the indictment, which was in the short form approved by G.S. § 15-144.1, was insufficient to charge first degree rape because the indictment does not allege that "defendant displayed a dangerous weapon or that he caused serious injury or that he was aided and abetted by another, essential elements of first degree rape." G.S. § 14-27.2 (Cum. Supp. 1983) provides as follows:

> (a) A person is guilty of rape in the first degree if the person engages in vaginal intercourse:
>
> . . . .
>
> (2) With another person by force and against the will of the other person, and:

a. Employs or displays a dangerous or deadly weapon or an article which the other person reasonably believes to be a dangerous or deadly weapon; 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.

The indictment for rape in the instant case provided in pertinent part as follows:

> The jurors for the State upon their oath present that on or about the date of offense shown and in the county named above the defendant named above unlawfully, willfully and feloniously did ravish and carnally know Pearly [sic] Mae Roberts, a female person, by force and against her will.
>
> [Note: This indictment is sufficient to charge both First and Second Degree Rape of a female person when force was used. G.S. 15-144.1(a); G.S. 15-155. A prosecutor who only intends to prosecute for Second Degree Rape may want "Second Degree" typed before "Rape" in the offense block.
>
> This indictment is not sufficient to charge first degree rape of a child of the age of 12 years or less or second degree rape of a handicapped person. See G.S. 15-144.1 (b) and (c) to indict for these offenses.]

In *State v. Effler*, 309 N.C. 742, --- S.E. 2d --- (1983), this Court addressed the same arguments which are being made in the instant case, while discussing whether a short form indictment for a sexual offense, drafted pursuant to G.S. § 15-144.2, satisfied a defendant's constitutional right to indictment by a grand jury even though the indictment did not specify all of the elements of the crime charged. In *Effler* we stated:

> 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.

Id. at ---, --- S.E. 2d at ---. We find the above-quoted language from *Effler* to be equally applicable to the indictment in the instant case. Therefore, we hold that the indictment charging defendant with the crime of rape fully satisfied defendant's right to be indicted by a grand jury. Defendant's assignment of error is overruled.

III.

[2] Next, defendant contends that the evidence adduced at trial was insufficient to convict him of first degree rape. Defendant correctly states that his conviction for first degree rape was based upon the fact that he employed or displayed a dangerous weapon during the course of the rape. However, defendant contends that the evidence only shows that the knife which he possessed was displayed during the course of the kidnapping but not during the rape. Defendant's assignment of error is without merit.

During direct examination, the victim, Mrs. Roberts, testified as follows concerning defendant's actions while he engaged in intercourse with her:

> Q. When he was doing this, did he have any type of weapon when he was doing this in the tobacco barn?
>
> A. He had a knife stuck right beside of him.
>
> Q. In the ground?
>
> A. Yes. On the side right there. (Witness indicated.)

This testimonial evidence was definitely sufficient to support a finding of the element of first degree rape that the defendant

employed or displayed a dangerous weapon during the course of the rape. G.S. § 14-27.2 (Cum. Supp. 1983). This assignment of error is overruled.

IV.

[3] Defendant next contends that judgment should be arrested on his "conviction for assault inflicting serious injury" because "[a]ll of the elements of assault inflicting serious injury are included in the offense of first degree rape inflicting serious injury." Assuming, *arguendo*, that assault inflicting serious injury under G.S. 14-33(b)(1) is a lesser included offense of first degree rape under G.S. § 14-27.2(a)(2)b requiring the infliction of serious personal injury upon the victim, this will not help the defendant in the instant case. The defendant's first degree rape charge was not submitted to the jury on the theory that he inflicted serious personal injury on the victim. Rather, the case was submitted to the jury on the theory that defendant engaged in vaginal intercourse with the victim against her will and he *employed or displayed a dangerous or deadly weapon.* G.S. § 14-27.2(a)(2)a (Cum. Supp. 1983). (Emphasis added.) This is clear from the trial judge's charge to the jury, which included the following:

> And fourth, that the Defendant employed or displayed a dangerous or deadly weapon. A butcher knife, I instruct you members of the jury, is a dangerous or deadly weapon.
>
> So I charge, members of the jury, with respect to the charge of first degree rape, that if you find from the evidence and beyond a reasonable doubt that on or about the 4th day of December, 1982, Ervin [sic] Roberts engaged in vaginal intercourse with Pearlie Mae Roberts, and he did so by holding a knife to her throat and threatening to kill her, and that this was sufficient to overcome any resistance with Pearlie Mae Roberts, and that Pearlie Mae Roberts did not consent, and that it was against her will, and that Ervin [sic] Roberts employed or displayed a butcher knife, it would be your duty to return a verdict of guilty of first degree rape. However, if you do not so find, or if you have a reasonable doubt as to one or more of these things, it would be your duty to return a verdict of "not guilty" as to this charge.

In *State v. Weaver*, 306 N.C. 629, 295 S.E. 2d 375 (1982), this Court, in discussing what determines whether an offense is a

lesser included offense of a greater crime, stated that "[i]f the lesser crime has an essential element which is not completely covered by the greater crime, it is not a lesser included offense." *Id.* at 635, 295 S.E. 2d at 379. Since the infliction of serious bodily injury upon the victim is not an essential element of the greater crime of first degree rape of which defendant was convicted, it was not improper for the jury to also find defendant guilty of assault inflicting serious bodily injury since this offense is not a lesser included offense of the first degree rape. Defendant's assignment of error is meritless.

V.

During the trial, the defendant offered evidence which tended to show that he was in Elizabeth City, North Carolina, on the day in which these crimes were committed and the day afterwards. In an attempt to rebut this evidence, the State presented McArthur Cherry who testified that on Sunday, 5 December 1982, he saw the defendant standing near the tobacco barn where the victim was raped. In an attempt to rebut the State's evidence, the defendant presented Edward Roberts, the victim's husband, who testified that he saw the defendant at the same time as McArthur Cherry, but he saw him near a packhouse and not near the barn. In summarizing the testimony of Edward Roberts, the trial judge stated to the jury:

> And his testimony was that he recalls seeing—his testimony tends to show that he recalls seeing the Defendant at the same time on the morning of December the 5th, 1982, in the area where the witness, McArthur Cherry, said he saw the Defendant in the area of the tobacco barn and the packhouse as was testified to, as you will recall, by the witnesses.

[4] Defendant contends that the trial judge's recapitulation of the evidence forced the testimony of Edward Roberts into consistency with the testimony of McArthur Cherry, which was favorable to the State. Defendant also contends that the trial judge's mischaracterization of the evidence amounted to an improper expression of opinion by the trial judge in violation of G.S. § 15A-1222 and G.S. § 15A-1232.

We disagree with defendant's contentions. A careful review of the evidence adduced at trial shows that both men were walk-

ing together on Sunday morning, 5 December 1982, when they observed the defendant. The evidence also shows that the tobacco barn and the packhouse are located in the same general area. Therefore, the trial judge's recapitulation of the evidence was substantially correct, and at most, it amounted to a slight inadvertent statement which was not prejudicial to the defendant. *State v. Freeman*, 295 N.C. 210, 244 S.E. 2d 680 (1978); *State v. Willard*, 293 N.C. 394, 238 S.E. 2d 509 (1977). We also hold that no impermissible expression of opinion occurred during the trial judge's summarization of the evidence.

Lastly, we note that defendant did not object to the trial judge's summarization of the evidence at trial. Therefore, assuming *arguendo* that the trial judge's recapitulation of the evidence was erroneous, defendant has waived his objection to the trial judge's charge. *See* N.C. Rules of Appellate Procedure, Rule 10(b)(2); *Freeman*, 295 N.C. at 226, 244 S.E. 2d at 689-90. Additionally, we hold that the slight inadvertence by the trial judge is insufficient to invoke the "plain error" exception to N.C. Rules of Appellate Procedure, Rule 10(b)(2), because there is no reasonable probability that the evidence, which tended to show that defendant was seen the next day near the packhouse or the tobacco barn, "tilted the scales" in favor of defendant's conviction. *State v. Black*, 308 N.C. 736, 303 S.E. 2d 804 (1983). Defendant's assignment of error is overruled.

For the reasons hereinabove stated, we find that defendant received a fair trial free from prejudicial error.

No error.

PAUL R. WATERS AND WIFE, ALMA M. WATERS, AND WACHOVIA BANK AND TRUST COMPANY, N.A., TRUSTEE UNDER THE WILL OF JAMES A. TINGLE, DECEASED v. NORTH CAROLINA PHOSPHATE CORPORATION, DAVID B. ALLEMAN AND WIFE, RUTH G. ALLEMAN, AND ELIZABETH KEYS ALLEMAN WHEELER (DIVORCED)

No. 182PA83

(Filed 6 March 1984)

1. **Easements § 5.1— apparent and visible easements**

The doctrine of apparent and visible easements is a method used to create easements.

2. **Easements § 4; Registration § 3.1— recording of easement by grant—validity against purchasers for value**

Where an easement by grant is properly recorded, its validity against purchasers for value exists by reason of the recordation, not because it is visible from an inspection of the premises. G.S. 47-27.

3. **Easements § 5— express grant of easement—no implied easement**

The express granting of an easement negatives the finding of an implied easement of similar character.

4. **Registration § 3.1— recorded easements—effect on grantees**

Grantees take title to land subject to duly recorded easements imposed by their predecessors in title.

5. **Vendor and Purchaser § 4— conveyances of land with visible physical burdens—inapplicability to easement by judgment**

The rule of conveyances of land with visible physical burdens was inapplicable to a power company easement created by a judgment in a condemnation action which was properly recorded in the office of the clerk of superior court.

6. **Vendor and Purchaser § 4— power easement across land—right to reject deed for encumbrance**

Under a contract to convey land which required the land to be conveyed subject to no encumbrances not satisfactory to the buyer, the buyer had a right to reject the tendered deed because of the existence of a power company's recorded judgment granting it an easement across the property for a high voltage transmission line, since the easement constituted an encumbrance in that it materially affected or interfered with the full use or enjoyment of the land.

ON discretionary review of the decision of the Court of Appeals, 61 N.C. App. 79, 300 S.E. 2d 415 (1983), affirming judgment entered 6 October 1981 by *McKinnon, J.*, Superior Court, PAMLICO County. Heard in the Supreme Court 3 October 1983.

This appeal arises from a contract to convey real property executed by plaintiffs and North Carolina Phosphate Corporation (hereinafter Phosphate) on 30 October 1974. Plaintiffs filed this lawsuit on 30 April 1975 seeking specific performance of the contract. The property contained approximately 1,712 acres in Pamlico County. Phosphate alleges in its answer that the title to the property is not marketable and not in accord with the conditions of the contract.

Originally, the defendants Alleman alleged an interest in the property, but this was resolved against them by summary judgment on 9 April 1976. This action was affirmed by the Court of Appeals. *Waters v. Phosphate Corp.*, 32 N.C. App. 305, 232 S.E. 2d 275, *disc. rev. denied*, 292 N.C. 470 (1977). This appeal did not affect the rights of plaintiffs and Phosphate inter se.

At the first trial of the action between the present parties, a motion for directed verdict was granted for Phosphate. On appeal, the Court of Appeals reversed and remanded the case for a new trial. *Waters v. Phosphate Corp.*, 50 N.C. App. 252, 273 S.E. 2d 517, *disc. rev. denied*, 302 N.C. 402 (1981).

At the trial presently under review, the parties waived trial by jury, and after considering the evidence Judge McKinnon found facts and conclusions of law and entered judgment for the defendant Phosphate. Upon appeal to the Court of Appeals, the judgment was affirmed. This Court allowed discretionary review.

Gaylord, Singleton, McNally & Strickland, by Louis W. Gaylord, Jr. and Danny D. McNally, for plaintiff appellants.

Sumrell, Sugg & Carmichael, by Fred M. Carmichael and Rudolph A. Ashton III, for North Carolina Phosphate Corporation, defendant appellee.

MARTIN, Justice.

At the outset, we note that care must be taken to distinguish the doctrine of apparent and visible easements from the rule of conveyances of real property containing physical burdens upon the land, permanent in character and known to the vendee.

[1] The doctrine of apparent and visible easements is a method used to create easements. Easements can be created in at least

nine ways, including the use of the doctrine of apparent and visible easements. *Davis v. Robinson*, 189 N.C. 589, 127 S.E. 697 (1925); 1 Mordecai Law Lectures 464 (1916). The application of the doctrine is fully discussed in *Packard v. Smart*, 224 N.C. 480, 31 S.E. 2d 517 (1944), and *Ferrell v. Trust Co.*, 221 N.C. 432, 20 S.E. 2d 329 (1942). The doctrine is not applicable to the facts of this appeal.

The rule of conveyances of land with visible physical burdens is expressed in 77 Am. Jur. 2d *Vendor and Purchaser* § 222 (1975):

> General contracts to convey land, giving a title in fee, or free and clear of all encumbrances, or similar covenants, are generally held not to refer to visible physical burdens upon the land, permanent in character, known to the vendee. In the ordinary case the vendee is presumed to have contracted to accept the land subject to visible easements of an open and notorious nature, although it would seem that the circumstances may be such as to repel this presumption. This rule also applies to matters which a vendee should have known, or ascertained by a reasonable investigation.
>
> It seems that the rule that an agreement to convey land free and clear of encumbrances does not refer to visible physical burdens upon the land, permanent in character, will not be applied, in the absence of evidence to show that the vendee knew of their existence.

The purpose of this rule is to place the vendee on notice of the physical burden or easement on the property. If the physical burden or right-of-way was created or authorized by a grant of easement which is properly recorded, the reason for the rule no longer exists because the vendee then has legal notice, either actual or constructive, of the existence of the burden or easement.

The rule of conveyances of land with visible physical burdens has been applied by this Court in *Goodman v. Heilig*, 157 N.C. 6, 72 S.E. 866 (1911) (The Court took judicial notice of the "great public highway" of the North Carolina Railroad, running from Goldsboro to Charlotte); *Tise v. Whitaker-Harvey Co.*, 144 N.C. 508, 57 S.E. 210 (1907) (public highway in the city of Winston); *Ex Parte Alexander*, 122 N.C. 727, 30 S.E. 336 (1898) (Western N.C.

Railroad on right-of-way granted by predecessor in title). None of these cases involved a suit for specific performance but concerned breaches of warranty against encumbrances. All of the North Carolina cases disclosed by our research involve easements of a public nature, such as highways or railroads. Here, we are concerned with a private easement.

We note that in *Light Co. v. Bowman*, 228 N.C. 319, 45 S.E. 2d 531 (1947), the facts would have supported an argument for the application of this rule. Plaintiff sought to enjoin defendants from interfering with its alleged easement. The easement was similar in character to the one in the case at bar: It was a high voltage transmission line, strung on steel towers. The plaintiff had similar rights of ingress to the right-of-way for maintenance and protection of the installation. Defendants contended that plaintiff did not have an enforceable easement because it was not recorded pursuant to N.C.G.S. 47-27 and that they were bona fide purchasers for value. In rebuttal of this argument, plaintiff offered evidence that its easement was acquired by judgment in a condemnation action which was filed in the office of the clerk of superior court in the county where the subject land lies. The judgment was not recorded in the office of the register of deeds. The Court held that plaintiff was not required to record its judgment in the registry as such easements were expressly excepted from the requirements of the statute. The recording and indexing of the judgment in the office of the clerk of superior court provided legal notice. In *Light Co.*, neither counsel nor the Court argued or referred to the rule of conveyances of land subject to visible physical burdens. Although the rule could arguably have supported plaintiff's position, counsel argued and the Court decided the case on recording principles.

[2-4] Where an easement by grant is properly recorded, as in the case at bar, its validity against purchasers for value exists by reason of the recordation, not because it is visible from an inspection of the premises. N.C. Gen. Stat. § 47-27 (Cum. Supp. 1983). The express granting of an easement negatives the finding of an implied easement of similar character. 25 Am. Jur. 2d *Easements* § 24 (1966). Grantees take title to land subject to duly recorded easements imposed by their predecessors in title. *Borders v. Yarbrough*, 237 N.C. 540, 75 S.E. 2d 541 (1953). The law contemplates that a purchaser of land will examine each recorded deed and oth-

er instrument in his chain of title and charges him with notice of every fact affecting his title which an accurate examination of the title would disclose. *Hensley v. Ramsey*, 283 N.C. 714, 199 S.E. 2d 1 (1973).

The easement in the present case was created by grant. As the result of a condemnation action brought by Carolina Power and Light Company seeking a right-of-way over the subject property, a judgment was entered 24 July 1967 granting to Carolina Power and Light Company an easement across the property. This judgment is recorded in the office of the Clerk of Superior Court of Pamlico County and in Book 147, at page 341, of the office of the Register of Deeds. An easement by grant may be created by judgment. *Yount v. Lowe*, 288 N.C. 90, 215 S.E. 2d 563 (1975); *Miller v. Teer*, 220 N.C. 605, 18 S.E. 2d 173 (1942).

[5] The rule of conveyances of land with visible physical burdens is not applicable to the present case, and the trial court and the Court of Appeals erred insofar as they relied upon it. Therefore, it is not necessary for us to decide whether the rule applies to contracts to convey land as distinguished from suits for breach of warranty against encumbrances. We express no opinion on this question.

[6] This case turns upon the question of whether under the terms of the contract Phosphate had the right to reject the tendered deed because of the existence of the easement across the property. We hold that it did.

Phosphate admitted the existence of the contract to purchase the property in question. That contract contains the following:

> QUALITY OF TITLE. At the closing, SELLERS shall deliver to the BUYER a properly executed and recordable general warranty deed, prepared by the SELLERS with a description satisfactory to BUYER prepared according to the perimeter survey and plot hereinabove mentioned and subject to the approval of BUYER's counsel, bearing sufficient documentary stamps, and conveying to BUYER an indefeasible fee simple and marketable title to the above described property. It is specifically understood and agreed that this property shall be conveyed subject to no encumbrances not satisfactory to BUYER, and that the same shall convey indefeasible fee simple

and marketable title in and to any and all mineral rights within the perimeter of said property. It is understood that the BUYER shall accept the conveyance of said property subject to 1975 ad valorem taxes.

The recorded judgment grants to Carolina Power and Light Company an easement of right-of-way almost straight north and south for about 8,550 feet across the subject property, being located adjacent to the western boundary line of the property. The right-of-way is one hundred feet wide and contains 19.63 acres; it has been cleared by Carolina Power and Light Company and large H-towers have been erected on it carrying five transmission lines. It has been maintained in substantially the same condition since it was constructed. The easement grants Carolina Power and Light Company the right to go to and from the right-of-way at all times over the subject property at reasonably convenient places, including private roads and ways, on foot or by conveyance, with materials, machinery, and supplies as may be desirable to construct, inspect, and maintain the transmission lines. The grantee has the right to clear and keep clear the right-of-way strip and to cut in its discretion any tree likely to endanger the lines. The owners of the fee have the right to use the land within the right-of-way for all purposes not inconsistent with the rights of the power company.

The Carolina Power and Light Company easement is a private easement as distinguished from a public easement. It is not attached to any dominant estate of the power company. It is an easement in gross for the benefit of Carolina Power and Light Company, its successors and assigns, and not the general public. *Shingleton v. State*, 260 N.C. 451, 133 S.E. 2d 183 (1963). A private right-of-way over land subject to a contract to sell constitutes such a burden upon the land that the vendee is under no obligation to accept title subject to the easement. 77 Am. Jur. 2d *Vendor and Purchaser* § 224 (1975). It is to be remembered that this is a high voltage transmission line, not a distribution line, and serves no beneficial purpose to the land it crosses.

An easement which materially affects or interferes with the full use or enjoyment of the land constitutes an encumbrance. 77 Am. Jur. 2d *Vendor and Purchaser* § 221 (1975). Phosphate, anticipating that an examination of the title to the property might

disclose such encumbrances, protected itself in the contract of purchase. The contract expressly states: "It is specifically understood and agreed that this property shall be conveyed subject to no encumbrances not satisfactory to BUYER . . . ." While the grammar used by the draftsman leaves much to be desired, the intent of the parties is plain and unambiguous: Phosphate was not required to buy the property subject to an encumbrance which was not satisfactory to Phosphate. When the deed was tendered to Phosphate, it objected to the encumbrance of the Carolina Power and Light Company easement and rejected the deed for that reason. Where a contract contains a stipulation that the property is to be conveyed free and clear of easements or other encumbrances, the fact that at the time the contract was entered into there were encumbrances of record against the property is immaterial. *Id.* § 120.

Judge McKinnon found that Phosphate intended using the property for phosphate mining. To do so, it was necessary to assemble the tract with other lands in order to have sufficient property for mining. The obstruction of the easement along the western border of the property would be a detriment to assemblage along that border. He also found that the easement was a detriment to the use of the land for phosphate mining and constituted an encumbrance that was not satisfactory to Phosphate and that it interfered with its right of exclusive possession. We hold that the easement in favor of Carolina Power and Light Company would have materially affected and interfered with the full use and enjoyment of the property by Phosphate. *See generally id.* § 224. Phosphate had the right under its contract to refuse to purchase the property for this reason.

Plaintiffs contend that the trial court erred in allowing into evidence the judgment granting the easement to Carolina Power and Light Company. This argument must fail because the plaintiffs, not the defendants, introduced the judgment into evidence. The case was tried by the court without a jury. After considering the evidence and arguments of counsel, the court entered judgment finding facts and making conclusions of law. Plaintiffs argue that the findings relative to the Carolina Power and Light Company easement are not supported by the evidence because the judgment granting the easement was improperly admitted as evidence. As just stated, this argument falls. The challenged findings

are supported by the evidence. The findings in turn support the conclusions of law, except those with respect to the applicability of the rule of conveyances of land subject to visible physical burdens, and the conclusions support the judgment in the case. *Transit, Inc. v. Casualty Co.*, 285 N.C. 541, 206 S.E. 2d 155 (1974).

The decision of the Court of Appeals is

Modified and affirmed.

EWELL G. PEARCE v. THE NORTH CAROLINA STATE HIGHWAY PATROL VOLUNTARY PLEDGE COMMITTEE, CAPT. O. R. McKINNEY, AND CAPT. E. D. YOUNG

No. 501A83

(Filed 6 March 1984)

Associations § 2— action to recover association benefits—statute of limitations

Plaintiff's claim to recover monetary benefits from the North Carolina State Highway Patrol Voluntary Pledge Fund Committee pursuant to a contractual agreement was barred by the three year statute of limitations applicable to contracts, G.S. 1-52(1), where, under the express terms of the contract, plaintiff was entitled to receive monetary benefits on his retirement date of 30 June 1975, and where any payments due plaintiff were to have been made within 30 days after his retirement. Therefore, plaintiff was due to have been paid benefits from the fund on or before 30 July 1975, defendants were in breach of the contract on the following day, and plaintiff's filing of his claim on 18 December 1981 was not timely.

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

APPEAL as a matter of right pursuant to G.S. § 7A-30(2) (1981) from a decision of the Court of Appeals, one judge dissenting, reported at 64 N.C. App. 120, 306 S.E. 2d 796 (1983). The decision of the Court of Appeals affirmed the entry of judgment in favor of the plaintiff by the *Honorable Henry L. Stevens, III, Judge Presiding*, at the 2 July 1982 Session of Superior Court, SAMPSON County. Judgment was entered on 13 August 1982, out of term and out of county, by consent of the parties. Heard in the Supreme Court 14 December 1983.

Warrick, Johnson & Parsons, P.A., by Dale P. Johnson, for plaintiff-appellee.

Rufus L. Edmisten, Attorney General, by Isaac T. Avery, III, Special Deputy Attorney General, for defendant-appellant.

FRYE, Justice.

This is an action in which the plaintiff seeks to recover monetary benefits from the North Carolina State Highway Patrol Voluntary Pledge Fund Committee pursuant to a contractual agreement executed 23 February 1973. The dispositive issue on appeal is whether the plaintiff's claim is barred by the three year statute of limitations provided by G.S. § 1-52. For the reasons stated in this opinion, we hold that plaintiff's lawsuit was initiated after the three year statute of limitations had run, and therefore, his claim is barred. Accordingly, we reverse the decision of the Court of Appeals.

I.

Plaintiff, a uniformed member of the North Carolina State Highway Patrol, became a member of the North Carolina State Highway Patrol Voluntary Pledge Fund [hereinafter referred to as the Voluntary Pledge Fund] on 23 February 1973. The relevant portions of the Voluntary Pledge Fund Agreement executed by the plaintiff provided that monetary benefits would be paid to qualified members according to the rules and regulations listed below:

1. Membership in the Highway Patrol Voluntary Pledge Fund is limited to uniformed enforcement officers of the North Carolina State Highway Patrol.

2. Payments made only to Patrol members who have executed instruments identical to this one.

3. The amount of the payment to the recipient will be the sum of ten dollars ($10.00) for each pledge member. At any time a backlog exists, each member will be assessed an amount not to exceed twenty dollars ($20.00). If no backlog exists, ten dollars ($10.00) will be assessed from each member until a surplus fund will be accumulated in the amount of fifty dollars ($50.00) per man.

. . . .

6. To be paid to any member that retires on disability provided; he has qualified and is receiving disability payments under the Federal Social Security Law.

7. The payments herein pledged are to be made within thirty (30) days of the death or retirement of the member unless other bona fide claims previously filed take precedent by date. When more than one claim is pending at any given time, they shall be paid in the order of the date of retirement. In cases where more than one retirement is effective on the same date, then the one that was filed first will take precedent. Claims for death will take precedent over claims for service or disability.

On 2 July 1973, while performing his duties as a Highway Patrolman at the scene of an accident, plaintiff was struck by a speeding vehicle which, *inter alia*, severely injured both of his legs. After numerous operations and repeated attempts to cure plaintiff's left leg which had become infected, plaintiff's leg was amputated on 20 February 1975. Due to the amputation of his leg, plaintiff retired from the Highway Patrol on disability on 30 June 1975.

Pursuant to an agreement which was worked out between the plaintiff and the Highway Patrol, plaintiff accepted employment as a telecommunicator on 1 July 1975. Sometime between 15 April and 15 June 1975, after inquiry from plaintiff, plaintiff was told by Lieutenant J. S. Powell that he did not qualify to receive any benefits from the Voluntary Pledge Fund.

Plaintiff was declared totally disabled and entitled to receive disability benefits from the Social Security Administration, after his accident. He received Social Security benefits from January 1974 until December 1976.

Plaintiff requested a hearing before the Voluntary Pledge Fund Committee on 25 July 1978 to discuss the denial of benefits to him. On 15 December 1978, a hearing was held before the Voluntary Pledge Fund Committee. By letter dated 18 December 1978, plaintiff was informed by the Voluntary Pledge Fund Committee that he was not entitled to any benefits.

Subsequently, plaintiff filed the instant lawsuit against the Voluntary Pledge Fund Committee and specifically named individuals on 18 December 1981. The trial court denied both parties' motions for summary judgment. On 2 June 1982, both parties stipulated that this case could be decided upon affidavits and that the order of the trial court could be entered out of term and out of county. Thereafter, the trial court ruled that plaintiff's claim was not barred by the statute of limitations and that plaintiff was entitled to receive $10.00 from each of 795 persons who were members of the Voluntary Pledge Fund on 1 July 1975. The Court of Appeals affirmed the decision of the trial court.

II.

In the instant case, plaintiff contends that the defendants breached their contractual obligation to him by refusing to pay to him benefits to which he was entitled pursuant to the terms of the Voluntary Pledge Fund Agreement. Defendants contend that, even if they did breach the contract, which they do not concede, the plaintiff's claim is nevertheless barred by the three year statute of limitations.

Since plaintiff's lawsuit is based on the contractual agreement entered into between himself and the Voluntary Pledge Fund, it is governed by the statute of limitations applicable to contracts, which is G.S. § 1-52(1). G.S. § 1-52(1) provides that a three year statute of limitations is applicable to an action upon a liability arising out of a contract; that is, a plaintiff must commence any action based on a contract within three years from the time the cause of action accrues, absent the existence of circumstances which would toll the running of the statute of limitations. *See generally Acceptance Corp. v. Spencer*, 268 N.C. 1, 149 S.E. 2d 570 (1966).

In a contract action, the statute of limitations begins to run when the contract has been breached and the cause of action has accrued. *Reidsville v. Burton*, 269 N.C. 206, 152 S.E. 2d 147 (1967). Therefore, in order to determine if plaintiff's lawsuit is barred by the three year statute of limitations, this Court must first determine when the breach occurred which caused the cause of action to accrue.

Plaintiff contends that the contract was not breached until the Voluntary Pledge Fund Committee issued its formal letter of

denial of benefits on 18 December 1978. He contends that until that time, no formal action had been taken by the Voluntary Pledge Fund Committee which had ultimate responsibility under the contract. Defendants contend that the breach occurred, if at all, on 31 July 1975, when the plaintiff was not paid any benefits pursuant to the contract. For the reasons stated hereinafter, we agree with the defendants that the breach of the contractual agreement occurred on 31 July 1975, and at that time, the plaintiff's cause of action accrued.

In *Matthieu v. Gas Co.*, 269 N.C. 212, 152 S.E. 2d 336 (1967), this Court stated the following concerning the accrual of a cause of action and the statute of limitations:

> A cause of action accrues and the statute of limitations begins to run whenever a party becomes liable to an action, if at such time the demanding party is under no disability. . . . However, the more difficult question is to determine when the cause of action accrues. In the case of *Mast v. Sapp*, 140 N.C. 533, 53 S.E. 350, this Court said: "Where there is a breach of an agreement or the invasion of an agreement or the invasion of a right, the law infers some damage. . . . The losses thereafter resulting from the injury, at least where they flow from it proximately and in continuous sequence, are considered in aggravation of damages. . . . The accrual of the cause of action must therefore be reckoned from the time when the first injury was sustained. . . . When the right of the party is once violated, even in ever so small a degree, the injury, in the technical acceptation of that term, at once springs into existence and the cause of action is complete."

Id. at 215, 152 S.E. 2d at 339. This Court also has held that "[n]onperformance of a valid contract is a breach thereof . . . unless the person charged shows some valid reason which may excuse the non-performance." *Sechrest v. Furniture Co.*, 264 N.C. 216, 217, 141 S.E. 2d 292, 294 (1965), citing *Blount-Midyette & Co. v. Aeroglide Corp.*, 254 N.C. 484, 119 S.E. 2d 225 (1961).

Applying the above-stated principles to the facts of the instant case, it becomes abundantly clear that plaintiff's claim is barred by the three year statute of limitations. Under the express terms of the contract, plaintiff was entitled to receive monetary benefits pursuant to paragraph six of the Voluntary Pledge Fund

Agreement because, on his retirement date of 30 June 1975, he had qualified for and was receiving disability payments under the Federal Social Security Law. Pursuant to paragraph seven of the Voluntary Pledge Fund Agreement, any payments due plaintiff were to have been made within 30 days after his retirement, unless other bona fide claims took precedence over his claim.[1] Therefore, plaintiff was due to have been paid benefits from the Voluntary Pledge Fund on or before 30 July 1975. Since payment was not made on that date, the defendants were in breach of the contract on the following day, 31 July 1975. Plaintiff's cause of action accrued on 31 July 1975, because on that date, the plaintiff, not being under any legal disability, was at liberty to sue the Voluntary Pledge Fund Committee to enforce his rights under the contractual agreement. *See Acceptance Corp. v. Spencer*, 268 N.C. 1, 149 S.E. 2d 570 (1966).

We note that pursuant to the terms of the contractual agreement, the Voluntary Pledge Fund Committee was not required to hold a hearing to review plaintiff's claim, although a hearing was held. As was stated in the dissenting opinion of the Court of Appeals, "no administrative hearing to determine benefit eligibility was required because neither the contract nor the defendants come under the provisions of the Administrative Procedure Act, G.S. 150A-1 *et seq.*" *Pearce v. Highway Patrol Vol. Pledge Committee*, 64 N.C. App. 120, 124, 306 S.E. 2d 796, 799 (1983) (Braswell, J., dissenting). Therefore, plaintiff cannot obtain solace from the fact that he was gratuitously granted a hearing.

It follows from the aforementioned statements that the period covered by the statute of limitations applicable to plaintiff's claim expired on 31 July 1978, three years after the date on which plaintiff's cause of action accrued. Therefore, the filing of this action by the plaintiff on 18 December 1981—more than three years after the statute of limitations had run—was not timely.

Plaintiff's other contentions, all of which seek to toll the running of the statute of limitations, are of no avail in this case. This Court strictly adheres to and is bound by the following principles enunciated in *Shearin v. Lloyd*, 246 N.C. 363, 98 S.E. 2d 508 (1957):

1. Since neither party has mentioned any other existing claims, we have assumed that no such claims existed.

> Statutes of limitations are inflexible and unyielding. They operate inexorably without reference to the merits of plaintiff's cause of action. They are statutes of repose, intended to require that litigation be initiated within the prescribed time or not at all.
>
> It is not for us to justify the limitation period prescribed for actions such as this. See *Albert v. Sherman*, 167 Tenn. 133, 67 S.W. 2d 140. Suffice to say, this is a matter within the province of the General Assembly.

Id. at 370, 98 S.E. 2d at 514.

Briefly stated, plaintiff contends that the reason he waited so long to file this lawsuit was because he did not know whether he was going to be paid his monetary benefits "until the Voluntary Pledge Committee finally ruled on it [his case] on December 18, 1978." This statement does nothing to help plaintiff's case. As this Court has stated on numerous occasions, a plaintiff's lack of knowledge concerning his claim does not postpone or suspend the running of the statute of limitations. *Lewis v. Shaver*, 236 N.C. 510, 73 S.E. 2d 320 (1952); *Gordon v. Fredle*, 206 N.C. 734, 175 S.E. 126 (1934). Likewise, plaintiff's claim that the defendants are equitably estopped from pleading the statute of limitations is not supported by the evidence and is without merit. At all times relevant to this lawsuit, the defendants and others closely associated with the Voluntary Pledge Fund steadfastly maintained that plaintiff did not qualify to receive any benefits. The record is completely void of any evidence to support a finding that any actions or representations of the defendants induced the plaintiff to delay filing the instant lawsuit. Additionally, "equity will not afford relief to those who sleep upon their rights, or whose condition is traceable to that want of diligence which may fairly be expected from a reasonable and prudent man." *Coppersmith v. Insurance Co.*, 222 N.C. 14, 17, 21 S.E. 2d 838, 839 (1942). Based on the foregoing, we hold that the statute of limitations was not tolled in this case and as stated above, plaintiff's claim is barred. Having reached the above conclusion, we find it unnecessary to address the other issues raised by the defendant.

For all of the foregoing reasons, we hold that the Court of Appeals erred in its conclusion that plaintiff's claim was not barred by the three year statute of limitations. Therefore, we

reverse that decision and remand this case to the Court of Appeals for further remand to the Superior Court, Sampson County, for entry of judgment consistent with this opinion.

Reversed and remanded.

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

MARION DOUGLAS McCULLOUGH, JR. v. AMOCO OIL COMPANY

No. 537A83

(Filed 6 March 1984)

Automobiles and Other Vehicles § 62.2— striking of pedestrian—insufficient evidence of negligence and last clear chance—contributory negligence

In an action to recover for injuries suffered by plaintiff pedestrian when he was struck by defendant's oil tanker, defendant was entitled to summary judgment on the issue of negligence where (1) defendant presented evidence from its driver, two eyewitnesses and the investigating officer that defendant's driver was traveling at a reasonable speed in his proper lane of travel as he approached a fork in the highway, that while maintaining a lookout, the driver observed plaintiff in the grass median between the two branches of a fork in the highway, that plaintiff was running toward the southern branch from behind a large directional sign and telephone pole in the median, that plaintiff ran out onto the southern branch of the highway into the immediate path of the oncoming oil tanker, that the driver braked the vehicle and the vehicle stopped almost immediately after impact, and that plaintiff was observed lying underneath the tanker "in the roadway"; (2) the physical facts belie a conclusion that the oil tanker deviated from its proper lane of travel and struck plaintiff as he was on the median waiting to cross the highway; and (3) plaintiff's evidence, contrary to that of two eyewitnesses, at best suggested that he stopped in the grass median for some period of time prior to entering the highway. Furthermore, plaintiff's contributory negligence appears without contradiction and there was no forecast of evidence of a last clear chance on the part of defendant's driver to avoid the collision.

DEFENDANT appeals from a decision of the Court of Appeals, 64 N.C. App. 312, 307 S.E. 2d 208 (1983), one judge dissenting, reversing summary judgment in favor of defendant, entered by *Kivett, J.*, at the 3 June 1982 Civil Session of Superior Court, GUILFORD County. Heard in the Supreme Court 14 February 1984.

The sole issue on appeal is whether the Court of Appeals erred in reversing the trial court's entry of summary judgment in favor of the defendant. We hold that it did and therefore reverse the decision of the Court of Appeals.

Petree, Stockton, Robinson, Vaughn, Glaze & Maready, by Norwood Robinson, Leon E. Porter, Jr. and Ann Guttenberger Sugg, Attorneys for defendant-appellant.

Forman and Hall, P.A., by Paul E. Marth, Attorney for plaintiff-appellee.

MEYER, Justice.

By complaint filed 27 March 1981, the plaintiff, then a student at Kernersville Wesleyan Academy, alleged that on 7 March 1979, Noel G. Mathlery was employed by the defendant Amoco Oil Company as a driver of a vehicle in its tanker fleet, and at all times relevant was acting in the course and scope of this employment. The complaint further alleges that:

> 4. At approximately 11:00 a.m. on March 7, 1979, Noel G. Mathlery was proceeding in an eastward [amended by motion to *westward*] direction along Old U.S. 421 in the area of Kernersville Wesleyan Academy. The weather was clear, and the road surface over which he was traveling was dry and free of defects. While driving in said location, Noel G. Mathlery did negligently, carelessly, and recklessly run down and strike the plaintiff, who was standing on the shoulder of the road, resulting in severe and permanent injuries and disfigurement.
>
> 5. The sole and proximate cause of the collision and the resulting injuries sustained by plaintiff was the negligence of Noel G. Mathlery which is imputed to defendant Amoco Oil Company. The agent was negligent in the following respects:
>
> (a) He operated the Amoco truck carelessly and heedlessly in wanton disregard of the rights and safety of the plaintiff, in violation of N.C.G.S. Sec. 20-140(a);
>
> (b) He operated said truck upon a highway without due caution and circumspection at a speed and in a manner so as

to endanger the person of the plaintiff, in violation of N.C.G.S. Sec. 20-140(b);

(c) He operated said truck upon a highway at a speed greater than is reasonable and prudent under the conditions then existing, in violation of N.C.G.S. Sec. 20-141(a);

(d) He operated said truck upon a highway without keeping a proper lookout, without paying proper attention to his driving, and without keeping his vehicle under proper control;

(e) He operated said truck upon a highway in a school zone at a speed in excess of the posted speed limit of 35 miles per hour.

In its answer the defendant denied all allegations of negligence and raised as a further defense plaintiff's contributory negligence. Plaintiff replied raising an issue of last clear chance. In addition to the pleadings, the trial judge had before him on defendant's motion for summary judgment the following evidence gleaned from depositions and affidavits of the parties and witnesses: On 7 March 1979 plaintiff McCullough's car was parked in a shopping center on the north side of Highway 421. Normally he parked on the south side of Highway 421 in front of the school, but he and several other students had been restricted from driving their cars on school property because they had failed to sign out during lunch hour. Highway 421 forks into two branches in front of Kernersville Wesleyan Academy. The northern branch, initially accommodating one-way traffic north, leads into downtown Kernersville. The southern branch of the highway remains a two-way highway for traffic going to and from Interstate 40. A triangular grass median separates the two branches of the fork.

At 10:50 a.m. on the day of the accident McCullough left school, crossed the southern branch of 421, the median, and the northern branch, and retrieved a business math book which he had left in his car. His business math class was scheduled to begin at 11:00 a.m. He recalled possibly jogging back to the northern fork of the road where he stopped to wait for two cars to pass. He then crossed the grass median between the two branches. McCullough stated:

> I stopped two feet from the northern edge of the pavement of the left [southern] branch at Old 421 and looked in a westerly direction. There were two vehicles coming headed in a easterly direction. One was a Trans Am, which I was interested in watching, so I watched it as it traveled past me. I then saw a car go past me in the westerly direction toward Winston-Salem. That is the last thing I remember. I am not sure whether I jogged or not from the edge of the right [northerly] branch to the edge of the left [southerly] branch. The weather on the occasion of the accident was sunny.

Noel G. Mathlery, the driver of defendant's oil tanker, testified by deposition that on the morning of 7 March 1979 he was driving in a westerly direction on Highway 421. As he approached the section of the highway that forks into the northern and southern branches, he was traveling at approximately 40 to 45 miles per hour. He stated that

> the first time I saw Mr. McCullough he was running toward the highway from behind a large directional sign and telephone pole or power line pole in the median. Sitting in the truck cab, my view of the median was blocked by the sign and pole. At no time as I was proceeding under the railroad bridge coming in a westerly direction on 421, did I see [the plaintiff] coming across the first fork in the road that goes to Kernersville. When I saw Mr. McCullough I was starting to hit my brakes.

Mathlery noted that McCullough "was running, looking back [to his right], and I knew that I was going to hit him."

There were two eyewitnesses to the accident. Henry K. Von Herman was a passenger in an automobile which was heading west on Highway 421. His testimony, in pertinent part, was as follows:

> 4. As we entered the one-way northern branch, I saw a male youth running very briskly across the highway from the right shoulder of that branch. He ran continuously at that pace from the northern branch, across the triangular median, and out on the westbound lane of the southern branch, into the path of an oncoming oil tanker. I had looked toward the southern branch and had seen the westbound oil tanker.

> When the youth did not stop then, I knew he was going to be hit by the truck, so I prayed that he would get across the highway. The truck came to a very quick stop after impact. It did not appear, at any point, to be traveling in excess of a safe speed for that area.

Michael Truta was preparing to travel east at the westbound lane of the southern branch of Highway 421 at the time of the accident. He stated:

> Before turning left to continue east, I saw for the first time someone running across the highway at a gait somewhere between a jogging pace and an all out sprint. I also saw an oil tanker approaching from the east just as it approached the split in Highway 421. As I turned left, the pedestrian ran from a point in the northern branch, across the median strip, and onto the westbound lane of the southern branch into the immediate path of the tanker. While running, he had his head turned toward my position on the highway; he never turned his head towards the approaching tanker until it was right on top of him. The tanker stopped quickly after impact indicating that it was traveling at a reasonable rate of speed. I do not see how the driver could have avoided the accident.

Mr. Truta observed that the plaintiff was wearing a bright yellow shirt and white pants "which made him very visible." He did not hear Mathlery blow his horn, nor did he observe Mathlery swerve his vehicle or slow down before striking the plaintiff.

Rick Hughes, the investigating officer, arrived at the scene of the accident shortly after 11:00 a.m. The plaintiff was lying underneath defendant's tanker "in the roadway." There were no markings or signs either on the highway adjacent to the median or beside it indicating a school zone or pedestrian crossing. The speed limit in that area was 45 miles per hour.

As a result of the injuries sustained in the accident, McCullough was hospitalized for nearly two months and incurred substantial medical expenses.

The Court of Appeals, in reversing the trial court's entry of summary judgment on the issue of defendant's negligence, conceded that

> [h]ad McCullough stated in his deposition that after getting his math book he started back towards school and does not thereafter remember what happened, summary judgment clearly would have been appropriate since negligence is not presumed from the mere fact that an accident or injury occurred—the accident or injury alone does not raise an inference of negligence.

64 N.C. App. at 315-16, 307 S.E. 2d at 211.

That court considered as significant, however, the fact that plaintiff "specifically remember[ed] stopping two feet from the edge of the pavement and watching cars pass in both directions. Thereafter, plaintiff was struck." The Court of Appeals continued:

> And it does not matter that the driver of the tanker and two disinterested witnesses contradict McCullough and say that he never stopped at the edge of the pavement. Judges cannot accredit the testimony of the disinterested witnesses and discredit the testimony of obviously interested witnesses, however sparse that testimony may be. The weight and credit of the testimony is for the jury to decide. Further, the evidence indicates that the driver of the tanker was travelling on a straight highway with little traffic in front of him on a clear and sunny day. Although the northern branch and the grassy median between the two branches were visible to the truck driver, he never saw McCullough until it was too late for him to stop. McCullough had on brightly colored clothing and was visible to drivers and passengers in nearby vehicles.

64 N.C. App. at 316, 307 S.E. 2d at 211.

In determining whether summary judgment is appropriate under the facts of any given case it is incumbent on the moving party to prove that an essential element of the opposing party's claim is nonexistent, or, through discovery, that the opposing party cannot produce evidence to support an essential element of his or her claim. *Lowe v. Bradford*, 305 N.C. 366, 289 S.E. 2d 363 (1982); *Bone International, Inc. v. Brooks*, 304 N.C. 371, 283 S.E. 2d 518 (1981). As provided in Rule 56(c) of the North Carolina Rules of Civil Procedure, summary judgment will be granted "if the pleadings, depositions, answers to interrogatories, and admis-

sions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." "[A] fact is material if it would constitute or would irrevocably establish any material element of a claim or defense." *Bone International, Inc. v. Brooks*, 304 N.C. at 375, 283 S.E. 2d at 520.

In support of its motion for summary judgment, the defendant submitted the deposition of its employee/driver, Noel G. Mathlery, and the affidavits of two eyewitnesses and the investigating officer who reached the scene shortly after the accident. This evidence refutes a claim of actionable negligence on the part of the defendant. It appears from this evidence that Mathlery was traveling at a reasonable speed, well within the speed limit, and in his proper lane of travel as he approached the fork on Highway 421; that he customarily slowed his vehicle as he approached this area of Highway 421; that while maintaining a lookout, he observed the plaintiff in the grass median between the branches of the fork; that plaintiff was running toward the southern branch from behind a large directional sign and telephone or power line pole in the median; and that Mathlery then "gripped the steering wheel with both hands, pushed the clutch in and stomped the brakes." The vehicle stopped almost immediately after impact. The evidence of record further discloses that the plaintiff ran out onto the westbound lane of the southern branch of Highway 421 into the immediate path of the oncoming oil tanker. Also of record is a photograph of the oil tanker as it appeared in a stationary position after the impact, still fully within its lane of travel. Plaintiff was observed lying underneath the tanker "in the roadway."

Under these circumstances the burden shifted to the plaintiff to affirmatively set forth *"specific facts"* showing that there existed a triable issue of fact, as required by Rule 56(e) of the North Carolina Rules of Civil Procedure. *Lowe v. Bradford*, 305 N.C. at 371, 289 S.E. 2d at 367. Here the plaintiff failed to meet his burden. In addition to the testimony of witnesses, the physical facts belie a conclusion that the oil tanker deviated from its proper lane of travel and struck plaintiff as he was on the median waiting to cross the highway. *Powers v. Sternberg*, 213 N.C. 41, 195 S.E. 88 (1938). Nor do we consider significant whatever factual dispute exists as to whether the plaintiff first stopped two

feet from the northern edge of the southern branch of Highway 421 and then darted in front of the oil tanker, or whether he ran continuously from the northern branch across the triangular median prior to darting in front of the oil tanker. The determining event was plaintiff's decision to cross at the moment he did. Plaintiff has no recollection of this decision. Plaintiff's evidence, contrary to that of the two eyewitnesses, at best suggests that he stopped in the grass median for some period of time prior to entering the highway. Mathlery's view, by his own testimony, was initially "blocked by the sign and pole." Three witnesses described in consistent detail plaintiff's precipitous movement as he emerged from the median into the path of the oncoming tanker, evidence which plaintiff was unable to explain and therefore does not contradict. Thus, the evidence is uncontroverted that plaintiff eventually came into Mathlery's view, left the median, entered the westbound lane of the southern branch, and ran "into the immediate path of the tanker." Under these circumstances, Mathlery could not have reasonably been expected to anticipate plaintiff's movement, thereby avoiding the accident.

The trial judge correctly concluded that there was no genuine issue as to any material fact. Defendant is entitled to summary judgment on the issue of negligence. Furthermore, assuming *arguendo* that sufficient evidence of Mathlery's negligence could be found, plaintiff's contributory negligence appears without contradiction. *See Pinkston v. Connor*, 63 N.C. App. 628, 306 S.E. 2d 132 (1983), *aff'd*, 310 N.C. 148, 310 S.E. 2d 347 (1984). Again, assuming the driver's negligence *arguendo* and the plaintiff's contributory negligence as shown by the affidavits and deposition, there has been no forecast of evidence of a last clear chance on the part of the defendant's driver to avoid the collision. *See Watson v. White*, 309 N.C. 498, 308 S.E. 2d 268 (1983).

The decision of the Court of Appeals is reversed and the case is remanded to the Court of Appeals for further remand to the Superior Court, Guilford County, for reinstatement of the summary judgment entered by the trial court in favor of the defendant.

Reversed and remanded.

STATE OF NORTH CAROLINA v. JOHN WOOD

No. 289A83

(Filed 6 March 1984)

Criminal Law § 89.2— exclusion of testimony concerning alibi witnesses—no prejudicial error

In a prosecution for first-degree rape, kidnapping and armed robbery, the trial court's exclusion of testimony relating to the circumstances under which defendant's alibi witnesses refused to retract their statement which supported defendant's alibi was not prejudicial error where extensive evidence of similar import was before the jury.

APPEAL by defendant from *Helms, Judge*, at the 28 March 1983 Criminal Session of RICHMOND County Superior Court.

Defendant was charged in indictments, proper in form, with first-degree rape, kidnapping and armed robbery (second offense). Defendant was originally tried for these offenses before Judge William H. Helms and a jury during the 30 March 1981 Criminal Session of Richmond County Superior Court. The jury found defendant guilty of each of the crimes charged. On appeal to this Court, defendant was granted a new trial on the basis of the erroneous admission of hearsay testimony of a prosecuting witness. *State v. Wood*, 306 N.C. 510, 294 S.E. 2d 310 (1982).

On retrial, defendant was again convicted of first-degree rape, kidnapping and armed robbery (second offense). He was sentenced to life imprisonment for each offense and appeals directly to this Court as a matter of right pursuant to G.S. 7A-27(a).

The evidence presented during the retrial of this case did not materially differ from the evidence presented at defendant's first trial on these charges. The material underlying facts of this case are therefore fully discussed in the opinion reported at 306 N.C. 510, 294 S.E. 2d 310 and we will not repeat them here. Those facts necessary to an understanding of the issue presented on appeal will be set forth in our discussion of the assignment of error brought forward by defendant.

Rufus L. Edmisten, Attorney General, by John R. B. Matthis, Special Deputy Attorney General, and Alan S. Hirsch, Assistant Attorney General, for the State.

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

BRANCH, Chief Justice.

The sole question presented for review in this case concerns the trial court's exclusion of testimony relating to the circumstances under which defendant's alibi witnesses refused to retract their statements supportive of defendant's alibi.

The victim, Mrs. Vera Stevens, identified defendant as the perpetrator of the offenses committed against her on 2 January 1981 between 5:30 a.m. and 6:45 a.m. Defendant denied committing the offenses and testified that he was with his aunt, Kay Williams, and her boyfriend, Leon Jiles, at the time Mrs. Stevens was assaulted.

Ms. Williams and Sergeant Jiles each testified that defendant was with them at the time the crimes were allegedly committed. Their testimony reveals that a few days after defendant's arrest, Lieutenant Terry Moore of the Hamlet Police Department came to Ms. Williams' house to question her and Jiles about defendant's activities on the morning of 2 January. After speaking with the officer, both Ms. Williams and Sergeant Jiles went to the police department and gave written statements indicating that defendant rode with them to Aberdeen early that morning. Ms. Williams and Sergeant Jiles estimated that they left her house in Hamlet around 6:00 a.m. Jiles testified that it is approximately 20 miles from Hamlet to Aberdeen and that they dropped defendant off at Martin's Grill in Aberdeen at about 6:30 a.m. In response to questioning by Lieutenant Moore at the police station, Williams and Jiles each affirmed the truthfulness of their statements.

On two subsequent occasions, Lieutenant Moore traveled to Fort Bragg and spoke to Sergeant Jiles and to Jiles' commanding officer. On both occasions, Sergeant Jiles reiterated that his statement was truthful and that he would not change it.

The trial court permitted both Ms. Williams and Sergeant Jiles to testify as to these earlier corroborative statements to

Lieutenant Moore. In a further attempt to show the circumstances under which they reaffirmed the accuracy and truthfulness of their original statements, defendant sought to elicit testimony from Williams and Jiles as to the comments made by Lieutenant Moore during his conversations with them. The State's objections to this testimony were sustained on the basis that such evidence constituted inadmissible hearsay.

The *voir dire* transcript reveals that both Ms. Williams and Sergeant Jiles would have testified that they continued to affirm their alibi for defendant in the face of personal threats from Lieutenant Moore. Ms. Williams testified on *voir dire* that Lieutenant Moore accused her of lying and threatened to arrest her and put her in jail if she did not change her statement. Sergeant Jiles testified that Lieutenant Moore kept saying his statement could not be true. When Moore later came to Fort Bragg, he said to Sergeant Jiles, in the presence of a superior officer, that his statement was untrue and he would be given a last chance to change it. Moore further threatened Jiles that if he did not tell the truth, "it would mess up [his] military career."

Defendant argues that the trial judge erred in ruling that this evidence of threats by Lieutenant Moore was inadmissible hearsay. To support his contention, defendant cites the Court to Brandis on North Carolina Evidence § 141 (2d rev. ed. 1982) and cases cited therein for the proposition that "[i]f a statement is offered for any purpose other than that of proving the truth of the matter stated, it is not objectionable as hearsay." It is defendant's position that the statements of Lieutenant Moore were not offered to prove the truth of any matter stated by him, but were instead offered to show that the alibi witnesses consistently refused to change their statements despite threats of prison and ruination of Jiles' military career. Because of the close relationship between defendant and his alibi witnesses, defendant maintains that it was "competent and essential to the strength of the defense to offer [this] evidence corroborating the alibi witnesses."

Assuming, *arguendo*, that the trial judge erred by excluding this testimony illustrating the circumstances under which the alibi witnesses refused to retract or modify their statements, we perceive no prejudice to defendant. We reach this conclusion because our review of the transcript reveals that the jury was in

fact made aware of Moore's repeated attempts to convince these defense witnesses to change their stories and of threats to imprison Ms. Williams and to jeopardize Sergeant Jiles' military career.

Prior to objection by the district attorney, Ms. Williams testified as follows on direct examination: "I told him that I was not lying, and he threatened that if I didn't change my statement, that he was going to put me in jail, and I told him—."

Similarly, Jiles' testimony clearly reveals that he felt he was being intimidated, but that he refused to abandon his story nonetheless. The following excerpts from his testimony plainly show the Lieutenant's persistence:

> Q. O.K. As a result of anything he [Lieutenant Moore] said to you, what did you next say to him?
>
> A. I told him I wasn't going to change it.
>
> Q. Told him what?
>
> A. I told him, I told the Lieutenant I wasn't going to change the statement.
>
> . . .
>
> Q. As a result of anything else that he said after you told him you weren't going to change the statement, what did you next say to him?
>
> A. I told the Lieutenant the statement was true, and that was it.
>
> Q. All right. Did you talk with Lt. Moore any after that date?
>
> A. Yes, sir, I did.
>
> Q. When was that?
>
> A. Later on, I would say approximately a month later, the Lieutenant and another officer came down to Fort Bragg and went to the Order Room where my commanding officer works, and my First Sergeant, and talked to them, and—
>
> . . .
>
> Q. What did you say in response to anything that Lt. Moore said to your First Sergeant?

A. I told Lt. Moore and the First Sergeant that I wasn't going to change my statement, that statement was true, and I wasn't going to change it.

Q. Did Lt. Moore say anything after that?

A. Yes, he did.

. . .

Q. What did you say as a result of anything that Lt. Moore said at that time?

A. I told Lt. Moore making that statement would not affect my Military career.

Q. Did he say anything else?

A. Yes, he did.

. . .

Q. As a result of anything else that he said, what did you say?

A. I told Lt. Moore that everything on the statement is true, and I was going to let it stay exactly like that.

Q. Did you talk with Lt. Moore any after that day?

A. Yes, sir.

Q. When was that and where?

A. Lt. Moore and another officer came back to Fort Bragg and approached my Commander again and the First Sergeant. At the time I was working and I got a telephone call telling me somebody was in the Order room where my Commander works, and he wanted to see me.

Q. Did you go to the Order room?

A. Yes, I did.

Q. Who was there when you got there?

A. Again Lt. Moore.

Q. Did Lt. Moore say anything to you?

A. Yes, he did.

Q. What did he say?

OBJECTION. SUSTAINED. EXCEPTION NO. 40.

Q. What did you say to him in response to whatever he said to you?

A. I told Lt. Moore he might as well stop bothering me in trying to get me to change my statement. Again I told him my statement is true, and again he brought up how it would affect—

OBJECTION. SUSTAINED. EXCEPTION NO. 41.

Q. What did you say to him as a result of anything he said to you, Sgt. Jiles?

A. Well, I told Lt. Moore the statement will still stay the same, and I wasn't going to change it and I was told—

OBJECTION. SUSTAINED. EXCEPTION NO. 42.

Q. You can tell what you said, you can't tell what someone said to you. Just tell what you said during the course of that conversation?

A. I told Lt. Moore and my First Sergeant that at that time that I had over 20 years in the Military and I didn't fear any repercussion because of writing a statement, and I was telling the truth.

We hold that any error committed by the trial court in excluding testimony concerning Lieutenant Moore's statements to the alibi witnesses was harmless in light of the above cited evidence which was before the jury.

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

No error.

STATE OF NORTH CAROLINA v. ROBERT RAY GREEN

No. 577A83

(Filed 6 March 1984)

Larceny § 7.6— misdemeanor larceny—sufficiency of evidence

The State's evidence was sufficient to support conviction of defendant for misdemeanor larceny of meat from an A&P store and misdemeanor larceny of personal property from an Eckerd's drugstore where it tended to show: Defendant was observed in the A&P store and in the Eckerd's drugstore in the area where the recovered property was displayed, behaving in such a manner that the persons in charge of each store were moved to call the police; defendant was observed leaving each store with bulges in his clothes and without going through the checkout counter in either store; within minutes after leaving the Eckerd's store, he was found to have in his pockets and concealed inside his belt products sold by Eckerd's and many items identified by code number as being from the very store from which he had exited without going through the checkout counter; meat found between defendant's legs and in the seat he occupied in an automobile bore the label of the A&P store; and some of the meat was identified as being from the A&P store from which defendant had exited without going through the checkout counter only a short time before.

APPEAL by the State from a decision of the Court of Appeals, opinion by *Webb, J.*, with *Hedrick, J.*, concurring and *Hill, J.*, dissenting, 64 N.C. App. 616, 307 S.E. 2d 797 (1983), reversing the trial court's denial of defendant's motion to dismiss the charges against him.

Defendant was charged by warrant with the misdemeanor larceny of meat of the value of $46.72 belonging to the Great Atlantic and Pacific Tea Company, Inc., on or about the 19th day of April 1982. In a separate warrant, he was charged with misdemeanor larceny of personal property of the value of $188.87 belonging to Eckerd Drugs of North Carolina, Inc., on or about the 19th day of April 1982. Defendant entered pleas of not guilty to each charge in the District Court of Wake County. Upon his conviction of both offenses, he appealed to the Wake County Superior Court. The charges were consolidated for trial in the Superior Court and the jury returned separate verdicts of guilty of misdemeanor larceny. Defendant appealed to the Court of Appeals from judgments imposing consecutive sentences of not less than two years nor more than two years. The Court of Appeals reversed, holding that Judge Hobgood erred by failing to grant

defendant's motions to dismiss the charge in each case. The State appealed to this Court as a matter of right pursuant to G.S. 7A-30(2).

Rufus L. Edmisten, Attorney General, by Fred R. Gamin, Assistant Attorney General, for the State.

Adam Stein, Appellate Defender, by Lorinzo L. Joyner, Assistant Appellate Defender, for defendant appellee.

BRANCH, Chief Justice.

The sole question presented by this appeal is whether the Court of Appeals erred in holding that the trial judge erroneously denied defendant's motion to dismiss both counts of misdemeanor larceny.

We think it necessary to restate the well-established rules governing the sufficiency of the evidence to carry a case to the jury.

When a defendant in a criminal case moves to dismiss or for judgment as of nonsuit, the trial judge must determine whether there is substantial evidence of each element of the offense charged and whether defendant was the perpetrator of the offense. If there is such evidence, a motion to dismiss must be denied. *State v. Roseman*, 279 N.C. 573, 184 S.E. 2d 289 (1971). If, however, the evidence is sufficient only to raise a suspicion or conjecture as to the commission of the offense or as to the identity of the defendant as the perpetrator of the offense, a motion to dismiss or for judgment as of nonsuit must be allowed. *State v. Cutler*, 271 N.C. 379, 156 S.E. 2d 679 (1967).

In *State v. Johnson*, 199 N.C. 429, 431, 154 S.E. 730, 731 (1930), Chief Justice Stacy stated the general rule as follows:

> [I]f there be any evidence tending to prove the fact in issue, or which reasonably conduces to its conclusion as a fairly logical and legitimate deduction, and not merely such as raises a suspicion or conjecture in regard to it, the case should be submitted to the jury.

The function of the trial judge is to determine as a matter of law whether the evidence permits a reasonable inference of defendant's guilt of the crime charged. *State v. Thomas*, 296 N.C.

236, 250 S.E. 2d 204 (1978). The test is the same whether the evidence is direct, circumstantial or a combination of both. *State v. Stephens*, 244 N.C. 380, 93 S.E. 2d 431 (1956). In ruling upon a motion to dismiss, the trial judge must consider all the evidence admitted, whether competent or incompetent, in the light most favorable to the State and he must give the State every reasonable inference to be drawn from that evidence. Contradictions and discrepancies in the evidence do not require dismissal and such matters are for resolution by the jury. The defendant's evidence, unless favorable to the State, is not to be considered in ruling on the motion. *State v. Earnhardt*, 307 N.C. 62, 296 S.E. 2d 649 (1982).

Larceny is the wrongful taking and carrying away of the personal property of another without his consent and with the intent to permanently deprive the owner thereof. *State v. Booker*, 250 N.C. 272, 108 S.E. 2d 426 (1959).

General Statute 14-72(a) provides that where the value of the property taken is not more than $400.00, it is a misdemeanor punishable under G.S. 14-3(a). Subsection (b) of the statute, which provides for other circumstances where the larceny is a felony without regard to the value of the property taken, is not applicable to the facts of this case.

We summarize pertinent portions of the State's evidence as follows:

James M. McConnell testified that he worked for the Great Atlantic and Pacific Tea Company, Inc. (hereinafter referred to as A&P), as night manager at its store on Western Boulevard in Raleigh, North Carolina. On the night of 18 April 1982, at approximately 11:30 p.m., he observed defendant at the meat counter "fumbling" with the meat. As McConnell started to the front of the store to call the police, he observed defendant leave the premises. Defendant's shirttail was out and the back of it was "bulged." The witness did not see defendant go through the checkout counter. Neither he nor any other employee of A&P gave defendant permission to take anything from the store.

Mrs. Blanche Steinbeck testified that she was employed by Eckerd Drugs of North Carolina (hereinafter referred to as Eckerd's) at its Holly Park Store in Raleigh, North Carolina, as

night cashier. She came to work at midnight on 18 April 1982. Shortly thereafter, she observed defendant standing in front of the store magazine rack reaching toward a shelf where overstocked merchandise such as radios were on display. When defendant saw her looking at him he went to the cosmetics counter. At that time she called the police. About fifteen minutes later defendant, accompanied by a female companion, left the store without going through the checkout counter. It appeared as if he had something in his pockets. Neither Mrs. Steinbeck nor any other person gave defendant permission to take anything from the store.

Patrolman J. G. Moore of the Raleigh Police Department testified that he was on duty during the early morning hours of April 19, 1982, and at about 12:34 a.m., as he was sitting about three hundred feet from Eckerd's Holly Park Store, he received a call about a possible larceny at that store. He observed four people including defendant enter a car in the parking lot of the shopping center and he then called for assistance. He and three other patrolmen stopped the car occupied by defendant about seventy-five feet from the entrance to the shopping center parking lot. Defendant was sitting on the passenger side of the front seat and the witness observed some meat between his legs. Defendant was ordered from the automobile and during a body search for weapons, the officers discovered several pieces of jewelry (State's Exhibit 12) in defendant's rear pocket, two bottles of cologne in his right front pocket, and a cosmetic item in his front pants pocket. Two hair care items and cologne were concealed in defendant's belt by his shirt. Officer Moore put the items in grocery bags and wrote defendant's name on them. In court, Moore identified items shown to him as those which he put in the bags on the morning of 19 April 1982.

Later that morning at about 1:00 a.m., Officer Moore brought defendant into the drugstore, together with the five grocery bags containing merchandise retrieved from defendant's person. Mrs. Steinbeck identified a cosmetic item (State's Exhibit 2), a hair care item (State's Exhibit 5), another hair care item (State's Exhibit 6), and cologne (State's Exhibit 8), as items which came from Eckerd's Holly Park Store. She made this positive identification because each item had the Holly Park Store number 1175 upon it. She also identified a radio as one similar to those sold by the

store, and Wind Song Cologne as an item carried by the store. The witness also identified other items as similar to those carried by Eckerd's. She placed a value of less than $200 on the items identified by her.

After delivering these items to Eckerd's, Officer Moore then took four packages of meat from the right front of the automobile in which defendant was riding, three of which contained A&P labels on the package. He called Mr. McConnell at the Western Boulevard A&P Store. McConnell came to the police station and identified three of the packages of meat taken from the car occupied by defendant as being from the Western Boulevard A&P Store.

Mr. McConnell testified that he identified the meat shown him by Officer Moore from the sticker on it. He stated that the sticker showed the date of 20 April and that it had the letter (F) on it, indicating that a girl who worked in the store on Western Boulevard wrapped the meat.

In summary, the State's uncontradicted evidence shows that defendant was observed in the A&P Store and the Eckerd's Store in the area where the recovered property was displayed, behaving in such a manner that the persons in charge of each store were moved to call police. Defendant was observed leaving each store with bulges in his clothes and he did not go through the checkout counter in either store. Within minutes after leaving the Eckerd's Store, he was found to have in his pockets and concealed inside his belt products sold by Eckerd's and many items identified by code number as being from the very store from which he had exited without going through the checkout counter. Meat was found between his legs and in the seat he occupied which bore the label of the A&P Store. Some of the meat was identified as being from the A&P Store on Western Boulevard from which defendant had exited without going through the checkout counter within an hour before the still partially frozen meat was found in his possession.

We are of the opinion that there was plenary evidence from which the jury could reasonably infer that on or about 19 April 1982, defendant took and carried away property from the A&P Store and from the Eckerd's Store without the consent of the owner or anyone in charge of the establishments and with the in-

tent to permanently deprive the respective owners of the property.

We hold that the trial judge properly denied defendant's motion to dismiss each count of misdemeanor larceny.

The decision of the Court of Appeals is

Reversed.

BELLEFONTE UNDERWRITERS INSURANCE COMPANY v. ALFA AVIATION, INC., WILLIAM AXSON SMITH, JR., MARY JO BECK, DONNA STOCKS, WILLIAM T. TAYLOR AND J. D. DAWSON COMPANY, INC.

No. 237PA83

(Filed 6 March 1984)

Insurance § 147— aircraft insurance policy—rented aircraft—no liability coverage for pilot or passengers

Neither an "airport" liability policy nor a "aircraft" liability insurance policy provided liability coverage to the pilot or to the passengers where the terms of the airport policy insured against hazards relating to the "ownership, maintenance or use" of the airport premises, the aircraft policy specifically excluded persons operating the aircraft under terms of a rental agreement, as the pilot was, and the aircraft policy protected the passengers only against their liability for the injury of others.

ON petitions for further review and a petition for certiorari to review a decision of the Court of Appeals, 61 N.C. App. 544, 300 S.E. 2d 877 (1983), reversing a judgment of *Judge Reid*, presiding in PITT Superior Court.

Maupin, Taylor & Ellis, P.A., by Thomas W. H. Alexander and M. Keith Kapp for plaintiff appellee.

Taft, Taft & Haigler by Kenneth E. Haigler and Thomas F. Taft for Alfa Aviation, Inc., defendant appellant.

James, Hite, Cavendish & Blount by M. E. Cavendish and Charles R. Hardee for William Axson Smith, Jr., defendant appellant.

Dixon, Duffus & Doub by J. David Duffus, Jr. and Michael C. Stamey for Donna Stocks, defendant appellant; Williamson, Herrin, Stokes & Heffelfinger by Ann J. Heffelfinger Barnhill for Mary Jo Beck, defendant appellant.

PER CURIAM.

This is a declaratory judgment action brought to determine whether an "airport" liability policy and the liability coverages of an "aircraft" insurance policy, issued by plaintiff to defendant Alfa Aviation, Inc., provide coverage for personal injuries suffered by defendants Beck and Stocks in an airplane crash which occurred on 20 June 1978 near Belhaven. At the time of the crash, the airplane was being piloted by defendant Smith who had rented it from Alfa Aviation. It was owned by Kadima Corporation but had been leased by Kadima to defendant Alfa Aviation to be used by Alfa Aviation in its airplane rental business as a rental airplane.

On 15 February 1982 Judge Reid, presiding in Pitt County Superior Court, concluded that the policies did provide coverage and entered summary judgment for defendants. The Court of Appeals, in an opinion by Judge Braswell, concurred in by Judges Hedrick and Whichard, reversed and remanded the case for entry of summary judgment for plaintiff. We allowed petitions for further review filed by defendants Alfa Aviation, Beck, and Stocks. We allowed a petition for certiorari filed by defendant Smith.

These facts are not in dispute: On 20 June 1978 the airplane rented by Smith from Alfa Aviation and piloted by him crashed. The airplane was destroyed. Smith and three passengers, Beck, Stocks, and Taylor, suffered injuries. The three passengers brought claims for their personal injuries against Smith, Alfa Aviation, and J. D. Dawson Company, Smith's employer, alleging Smith's negligence in piloting the airplane and Alfa Aviation's negligence in entrusting the airplane to Smith. Upon Alfa Aviation's demand, plaintiff provided it with a defense in these personal injury actions under a reservation of rights, denying that its policies provided coverage for Alfa Aviation or any of the other defendants.

These actions by the injured parties against Smith, Alfa Aviation and J. D. Dawson Company terminated as follows: Tay-

lor dismissed his claim with prejudice. A directed verdict in favor of Alfa Aviation was granted by the trial court. The jury found that the pilot Smith was not at the time of the crash acting as the agent of J. D. Dawson Company. The jury found that Beck and Stocks were injured by the negligence of Smith and awarded damages to these parties for their personal injuries. A judgment was entered that Beck and Stocks have and recover such damages against Smith. No appeal by Beck and Stocks from this judgment has been perfected. As to them, the judgment is final.[1]

Since it has been finally determined that Alfa Aviation is not liable to any of the parties injured in the crash, the question of whether the policies in question provide liability coverage to Alfa Aviation is now moot and need not be addressed.

We think it clear that the policies provided no liability coverage to the pilot Smith. The airport liability policy essentially insures against hazards relating to Alfa Aviation's "ownership, maintenance or use" of its premises at the airport where it had its operations. Specifically, the policy provides that the hazard insured against is

> the ownership, maintenance or use of the premises for the purpose of an airport and all operations either on the premises or elsewhere which are necessary, usual and incidental thereto.

Expressly excluded from coverage is "any aircraft owned by, hired by, loaned to, or operated for the account of the Insured." The policy further excludes from coverage "machinery, equipment or other property rented to . . . others or to the operations in connection therewith, while away from the premises described in the declarations."

It is equally clear that the aircraft insurance policy issued by plaintiff provided no liability coverage to the pilot Smith. That policy contained the following provisions:

> III. DEFINITION OF 'INSURED.' The unqualified word 'Insured' wherever used in this policy with respect to Coverage A, B,

1. The facts in this paragraph did not appear in the record on appeal in the Court of Appeals. They were added to the record in this Court by our order on 3 November 1983 allowing plaintiff's motion to so amend the record filed on 12 October 1983.

> C, and D [the liability coverage] includes not only the Named Insured but also any person while using or riding in the aircraft and any person or organization legally responsible for its use, provided the actual use is with the permission of the Named Insured.
>
> *The provisions of this paragraph do not apply:*
>
> . . .
>
> (c) To any person operating the aircraft under the terms of any rental agreement or training program which provides any remuneration to the Named Insured for Use of said aircraft.

Since Smith was operating the aircraft under the terms of a rental agreement for which he paid a fee to the named insured Alfa Aviation, Smith was not an insured under the clear terms of the policy's definition of an insured.

Finally, we are satisfied that defendants Beck and Stocks may not recover from plaintiff as "insureds" under the terms of the aircraft policy set out above. It is true that they were "riding in the aircraft" at the time it crashed. But the "insureds" referred to are not protected against their own injury. They are protected only against their liability for the injury of others. As defendant Smith's brief in this case states, the aircraft policy "provided single limit bodily injury and property damage coverage to the policyholder and passengers *against liability*. . . ." (Emphasis supplied.) No claim of liability has been made against defendants Beck and Stocks.[2]

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

Affirmed.

2. The parties have not argued and we do not address whether Beck and Stocks may recover from plaintiff under the "medical payments" coverage of the aircraft policy.

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

ALLEN v. ALLEN

No. 627P83.

Case below: 65 N.C. App. 86.

Petition by defendant for discretionary review under G.S. 7A-31 denied 6 March 1984.

BARBER v. BARBER

No. 467P83.

Case below: 61 N.C. App. 567.

Petition by Margaret Grace Barber for discretionary review under G.S. 7A-31 denied 6 March 1984.

BARRINGTON v. EMPLOYMENT SECURITY COMMISSION

No. 635P83.

Case below: 65 N.C. App. 602.

Petition by defendants for discretionary review under G.S. 7A-31 denied 6 March 1984.

BOZA v. SCHIEBEL

No. 626P83.

Case below: 65 N.C. App. 151.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 6 March 1984.

BRIDGERS v. BRIDGERS

No. 317P83.

Case below: 62 N.C. App. 583.

Petition by plaintiffs for discretionary review under G.S. 7A-31 denied 6 March 1984.

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

BROWN v. MILLER

No. 474P83.

Case below: 63 N.C. App. 694.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 6 March 1984. Motion by defendants to dismiss appeal for lack of substantial constitutional question allowed 6 March 1984.

CARTER v. FRANK SHELTON, INC.

No. 358P83.

Case below: 62 N.C. App. 378.

Petition by defendants for discretionary review under G.S. 7A-31 denied 6 March 1984.

DELCONTE v. NORTH CAROLINA

No. 9PA84.

Case below: 65 N.C. App. 262.

Petition by plaintiff for discretionary review under G.S. 7A-31 allowed 6 March 1984. Motion by Attorney General to dismiss appeal for lack of substantial constitutional question denied 6 March 1984.

DURHAM v. QUINCY MUTUAL FIRE INS. CO.

No. 519PA83.

Case below: 63 N.C. App. 700.

Petition by plaintiff for discretionary review under G.S. 7A-31 allowed 6 March 1984.

FAULKNER v. NEW BERN-CRAVEN BD. OF EDUC.

No. 24PA84.

Case below: 65 N.C. App. 483.

Petition by defendant for discretionary review under G.S. 7A-31 allowed 6 March 1984.

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

GOODMAN TOYOTA v. CITY OF RALEIGH

No. 499P83.

Case below: 63 N.C. App. 660.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 6 March 1984.

GRIFFITTS v. THOMASVILLE FURNITURE CO.

No. 15P84.

Case below: 65 N.C. App. 369.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 6 March 1984.

IN RE WILL OF MAYNARD

No. 548P83.

Case below: 64 N.C. App. 211.

Petition by propounders for discretionary review under G.S. 7A-31 denied 6 March 1984.

McKAY v. PARHAM

No. 427P83.

Case below: 63 N.C. App. 349.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 6 March 1984.

MARTIN v. PETROLEUM TANK SERVICE

No. 72P84.

Case below: 65 N.C. App. 565.

Petition by defendants for writ of certiorari to North Carolina Court of Appeals denied 6 March 1984.

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

PENLEY v. PENLEY

No. 16A84.

Case below: 65 N.C. App. 711.

Petition by defendant for discretionary review under G.S. 7A-31 allowed 6 March 1984.

RAINES v. MOORE

No. 33P84.

Case below: 65 N.C. App. 622.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 6 March 1984.

STATE v. BARNES

No. 17P84.

Case below: 65 N.C. App. 426.

Petition by Attorney General for discretionary review under G.S. 7A-31 denied 6 March 1984.

STATE v. BOGIN

No. 41P84.

Case below: 66 N.C. App. 184.

Petition by defendant for discretionary review under G.S. 7A-31 denied 6 March 1984.

STATE v. DAVIS

No. 532P83.

Case below: 64 N.C. App. 186.

Petition by defendant for discretionary review under G.S. 7A-31 denied 6 March 1984.

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

STATE v. HERALD

No. 30A84.

Case below: 65 N.C. App. 692.

Motion by Attorney General to dismiss appeal for lack of violation of constitutional rights allowed 6 March 1984.

STATE v. INGRAM

No. 38P84.

Case below: 65 N.C. App. 585.

Petition by defendant for discretionary review under G.S. 7A-31 denied 6 March 1984.

STATE v. JONES

No. 5P84.

Case below: 65 N.C. App. 624.

Petition by defendant for discretionary review under G.S. 7A-31 denied 6 March 1984.

STATE v. LOCKLEAR

No. 18P84.

Case below: 65 N.C. App. 624.

Petition by defendant for discretionary review under G.S. 7A-31 denied 6 March 1984. Motion by Attorney General to dismiss appeal for lack of substantial constitutional question allowed 6 March 1984.

STATE v. SALTERS

No. 619P83.

Case below: 65 N.C. App. 31.

Petition by defendant for discretionary review under G.S. 7A-31 denied 6 March 1984.

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

STATE v. SMITH

No. 32PA84.

Case below: 65 N.C. App. 684.

Petition by Attorney General for discretionary review under G.S. 7A-31 allowed 6 March 1984.

STATE v. SNYDER

No. 76PA84.

Case below: 66 N.C. App. 191.

Petition by Attorney General for discretionary review under G.S. 7A-31 allowed 23 February 1984.

STATE v. TAYLOR

No. 500PA83.

Case below: 64 N.C. App. 165.

Petition by Attorney General for discretionary review under G.S. 7A-31 allowed 6 March 1984.

STATE v. WILLIAMS

No. 11P84.

Case below: 65 N.C. App. 373.

Petition by defendant for discretionary review under G.S. 7A-31 denied 6 March 1984.

STILLINGS v. CITY OF WINSTON-SALEM

No. 488PA83.

Case below: 63 N.C. App. 618.

Petition by defendant for discretionary review under G.S. 7A-31 allowed 6 March 1984. Motion by plaintiffs to dismiss appeal for lack of substantial constitutional question denied 6 March 1984.

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

WEST v. WEST

No. 6P84.

Case below: 65 N.C. App. 417.

Petition by defendant for discretionary review under G.S. 7A-31 allowed 6 March 1984 for the limited purpose of remanding the cause to the Court of Appeals for consideration of the defendant's appeal on the merits.

STATE OF NORTH CAROLINA v. WILLIAM DENNIS MOOSE

No. 600A82

(Filed 3 April 1984)

1. **Criminal Law § 100— participation of private prosecutor—no denial of fair trial**

In a prosecution for first degree murder, there was no merit to defendant's contention that he was denied a fair trial because of the participation of a private prosecutor employed by the family of the deceased in that (1) assistance of the public prosecutor by private counsel is not a per se constitutional violation, (2) the record disclosed that the district attorney was at all times in control of the prosecution, and (3) the "fundamental fairness" of the use of private prosecutors in general are adequately addressed by existing safeguards.

2. **Criminal Law § 169.6— exclusion of evidence detailing a purported "deal" offered to a witness by the State—proper**

There was no error in the exclusion of evidence on re-direct examination of a defense witness which detailed a purported "deal" offered to the witness to enter into plea negotiations since the evidence concerned a collateral matter in that defendant sought to excuse the killing not on grounds that he was intoxicated but rather that the killing was accidental, and since the relevance of the excluded testimony became more tenuous when the jury returned a verdict of guilty on the felony murder charge of which premeditation and deliberation are not necessary elements.

3. **Criminal Law § 102.6— prosecutor's argument to jury concerning racial motivation of murder—proper**

In a prosecution for first degree murder, the prosecutor was properly allowed to allege a racial motive for the murder in his argument to the jury since there was evidence that the victim was black; that he was murdered in a white community; and that the defendant referred to the victim as a "damn nigger," and since the fact had become highly relevant during the trial in light of defendant's denial that he knew that the victim was black; that, as earlier argued by defense counsel, race had no part in the murder; and therefore, that the defendant, in the absence of any motive, had no intention of killing or injuring the victim.

4. **Criminal Law § 102.6— prosecutor's argument to jury—no impropriety**

In a prosecution for first degree murder, a prosecutor's argument that there was no evidence to support defense counsel's insinuation of an "underhanded deal" involving a sentence reduction for one of the witnesses in return for his testimony against the defendant was not improper since the thrust of the prosecutor's argument was to refute what he viewed as defense counsel's suggestion that the State had procured the testimony of the witness by surreptitiously arranging a "deal."

5. Criminal Law § 135.8— first degree murder—sentencing phase—aggravating factor that murder especially heinous, atrocious, or cruel—insufficient evidence to support

At the sentencing phase of a prosecution for first degree murder, the trial court incorrectly submitted as an aggravating factor that the murder was especially heinous, atrocious, or cruel pursuant to G.S. 15A-2000(e)(9) where the evidence indicated that the defendant pursued the victim's car without explanation down a road and that, although there was a considerable amount of "wondering" about the intentions of their pursuer, and some very legitimate concern and apprehension engendered by defendant's inexplicable behavior, there was no evidence that either the victim or his companion believed that the ultimate result of the pursuit of their car would be death—at least not until the victim's car pulled off the road, the defendant pulled up alongside the victim's car and a shotgun appeared through the window. In fact, the victim's final utterance, "Oh God, what are they going to do?" suggested that even then, the controlling factor was as much incredulity as it was fear.

6. Criminal Law § 135.8— aggravating factor that defendant knowingly created a great risk of death to more than one person supported by evidence

In a prosecution for first degree murder, the evidence supported the submission of the aggravating circumstance that "[t]he defendant knowingly created a great risk of death to more than one person by means of a weapon or device which would normally be hazardous to the lives of more than one person." G.S. 15A-2000(e)(10). The aggravating factor requires a showing that defendant (1) knowingly created a great risk of death to more than one person, (2) by means of a weapon or device which would normally be hazardous to the lives of more than one person. With regard to the risk element the evidence was sufficient to support a jury finding that the defendant knew there were two people in the front seat of the victim's car; that defendant stopped his car in the parking lot within several feet of the victim's car and fired a shotgun into the occupied vehicle within two or three feet of the victim and his passenger. When a shotgun is fired at close range into the passenger compartment of an automobile, the risk created is not simply a risk of injury but a risk of death, and the risk existed to both occupants of the passenger compartment. As to the weapon element, a Winchester Model 370 single barrel, single shot, breech loading .16 gauge which had been modified to accept a larger caliber .12 gauge shell, fell within the category of weapons envisioned in G.S. 15A-2000(e)(10).

7. Criminal Law § 135.9— mitigating factor that defendant under influence of mental or emotional disturbance—insufficient evidence to support

The trial judge in a prosecution for first degree murder properly failed to consider as a mitigating factor that the defendant was under the influence of mental or emotional disturbance at the time of the offense pursuant to G.S. 15A-2000(f)(2) where the basis for the factor was the testimony of a forensic psychiatrist who testified that defendant had a history of repeated alcohol abuse and had a "mixed personality disorder" which was manifested by his inability to deal adequately with frustrations which led to outbursts of temper. The inability to control one's drinking habits or one's temper is neither a men-

tal disturbance nor an emotional disturbance as contemplated by this mitigating factor.

8. **Criminal Law § 135.4— sentencing hearing—closing arguments to jury—reference to victim's rights and suffering of victim proper**

In the sentencing hearing for a prosecution for first degree murder, there was no impropriety in the prosecutor's reference to the victim's rights and the suffering of the victim in his jury argument.

9. **Criminal Law § 135.4— sentencing hearing—jury argument—references to Bible**

In a prosecution for first degree murder, the State inappropriately cited passages from the Bible and argued in effect that the powers of public officials, including the police, prosecutors and judges are ordained by God as his representatives on earth and that to resist these powers is to resist God in his argument to the jury at the sentencing hearing.

Justice MARTIN dissenting in part.

Justices COPELAND and MITCHELL join in this dissenting opinion.

BEFORE *Morgan, J.*, at the 20 September 1982 Criminal Session of Superior Court, BURKE County, defendant was convicted of first degree murder and sentenced to death. He appeals as of right pursuant to G.S. § 7A-27(a). Heard in the Supreme Court 13 February 1984.

This case arises out of the 26 March 1982 nighttime shooting death of Ransom Connelly. The evidence for the State tended to show that the defendant, driving a pickup truck and accompanied by two women began following closely behind the victim's car for some period of time, ultimately causing the victim, Mr. Connelly, and his passenger, Phillip Kincaid, to turn off the road into the parking lot of a drugstore. The defendant pursued the Connelly vehicle into the parking lot, pulled up beside it, aimed his shotgun at the car, and shot Mr. Connelly in the head.

The jury convicted the defendant of first degree murder based on the theory of premeditation and deliberation, and on the theory of felony murder, the underlying felony being a violation of G.S. § 14-34.1 (discharging certain barreled weapons or a firearm into occupied property). At the sentencing hearing held pursuant to G.S. § 15A-2000, the court submitted and the jury found two aggravating factors: that the murder was especially heinous, atrocious, or cruel; and that the defendant knowingly created a great risk of death to more than one person by means

of a weapon which would normally be hazardous to the lives of more than one person. The jury found three mitigating factors; determined that the aggravating factors outweighed the mitigating factors; and recommended a sentence of death.

Defendant's assignments of error relate to both the guilt and penalty phases of his trial. For the reasons set forth below, we find no error in the guilt phase. For error in submitting as an aggravating factor that the murder was especially heinous, atrocious, or cruel, defendant is entitled to a new sentencing hearing.

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

Ann B. Petersen, Assistant Appellate Defender, Malcolm Ray Hunter, Jr., Assistant Appellate Defender, and James R. Glover, Appellate Defender Clinic, UNC School of Law, for defendant-appellant.

MEYER, Justice.

Additional facts necessary to an understanding of the issues raised on this appeal are as follows: Phillip Kincaid, a surviving eyewitness to the murder, testified that he and Ransom Connelly were driving down Zion Road at about 10:30 p.m. on the night of 26 March 1982. As they crossed the intersection of Zion Road and Settlemyer Road, they noticed a pickup truck. The truck followed them for a distance of 1.3 miles to the intersection of Zion Road and Highway 64-70. The truck followed Connelly's Pontiac Bonneville very closely, repeatedly honking its horn, and bumping the back of the car as it came to a stop at the 64-70 intersection. Although there was no traffic and the pickup truck had numerous opportunities to pass, it did not. The pickup truck continued to follow Connelly's car as it turned left on 64-70, at which point Connelly and Kincaid became alarmed and decided to pull off the road into the parking lot of the Drexel Discount Drug Store. Kincaid watched as the pickup truck drove up along the driver's side of the car, and the barrel of a shotgun emerged from the window on the passenger side of the truck. Kincaid testified that the shotgun remained pointed at them for approximately five seconds before the blast which shattered the driver's window of the Pontiac and killed Ransom Connelly.

The defendant testified on his own behalf to the effect that he and two women, Lynn Whisnant and Carolyn Bradshaw Chapman, left the American Legion Hut on Settlemyer Road in defendant's pickup truck. He and Whisnant were living together at the home of Whisnant's father in Morganton. Defendant had been drinking beer and liquor all day. He pulled up behind a vehicle on Zion Road and attempted to pass it twice. He blew his horn when he reached the stop sign at the 64-70 intersection. He followed the car as it turned left on 64-70 because he was going to visit a friend in Valdese. He attempted to pass the car again, but it veered to the middle of the road. He was carrying two shotguns in the cab of his truck. He asked Whisnant to pass him one of the guns because, "Well, we were sitting there at the stop sign and there were several cars coming by, and he was taking longer than he should to be turning, and stuff, and I, you know, got a little irritated sitting there behind him, and after we turned, you know, the idea struck me to fire over him and scare him."

The defendant placed the shotgun "across the upper part of the door frame, where the window rolls down, inside there. It was laid across that and my leg, with my hand on it." Defendant testified that he remembered being off the road and "the doorpost of the truck being approximately even with the front window of the car." He then testified, "I thought somebody hollered at me, but anyway, I had the impression that I was about to hit something and I swerved to the left, as instinct, to get the truck turned as fast as I could, and as I started to turn, I brought my right hand up to grab for the wheel and the shotgun went off." He maintained that he did not bring the truck to a complete stop, did not aim the shotgun at anyone, and did not know that he had shot anyone until after he was arrested. Nevertheless, immediately after the blast, defendant fled the scene, colliding with another automobile as he entered highway 64-70. He drove his truck into the M & C Auto Parts Store lot, located a short distance down the road, and began to repair a broken fuel line "busted during the impact." Shortly afterwards the defendant and Whisnant were apprehended. Carolyn Bradshaw disappeared before the police arrived. She would not testify at trial.

Lynn Whisnant testified that as they drove down Zion Road defendant did follow a car which she knew to be occupied by two black men. Although she and the defendant had decided to go to

Morganton after leaving the American Legion Hut, when they reached the intersection of 64-70, rather than turning right to Morganton as she had asked him to do, the defendant turned left. He continued to follow the Pontiac until it pulled into the Drexel Discount Drug parking lot. The truck pulled up nearly parallel to the car. She remembered the blast of the shotgun and hearing glass shatter.

Ronnie Glenn Bowen testified for the State. Bowen occupied the same jail cell with the defendant in the Burke County jail and the two discussed the murder of Ransom Connelly. Moose described to Bowen the events leading up to the murder, repeatedly referred to the victim as an "old man" or a "nigger," expressed no regret for his actions, and said he wished that he had shot one of the arresting officers.

The State also offered the testimony of witnesses placing the defendant at the scene of the murder, investigating officers, and a forensic pathologist.

During the sentencing phase of the trial, defendant offered the testimony of his mother, his son, a forensic psychiatrist, and a deputy sheriff. Based on this testimony, the trial judge submitted the following statutory factors in mitigation:

1. The defendant has no significant history of prior criminal activity. G.S. § 15A-2000(f)(1).

2. The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired. G.S. § 15A-2000(f)(6).

The trial judge submitted the following additional factors in mitigation:

1. The defendant was 29 years of age at the time of the crime.

2. The defendant continued to have a close relationship with his mother.

3. The defendant was the father of three young children and has had a loving relationship with them.

4. The defendant has had an especially close and loving relationship with his oldest son.

5. The defendant had exhibited good behavior while incarcerated in the Burke County jail.

6. The defendant has skills and abilities in areas of mechanics.

7. The defendant has had a history of alcohol abuse.

8. Other circumstances of mitigating value.

The jury found the following factors in mitigation:

Since his arrest, the defendant has always exhibited good behavior while in the Burke County Jail and has caused no problems there.

The defendant has a history of alcohol abuse.

Any other circumstance or circumstances arising from the evidence which the jury deems to have mitigating value.

GUILT PHASE

[1] I. Defendant first contends that he was denied a fair trial because of the participation of a private prosecutor employed by the family of the deceased. He argues that the private prosecutor was "unusually active in the preparation of the case and had more first hand knowledge regarding the State's case than the district attorney," and that at trial, "the private prosecutor's role was at least as prominent as that of the District Attorney and his assistant." Defendant also urges this Court to abolish the practice of allowing private prosecution in criminal cases, particularly in capital cases.

The law in this State with respect to private prosecutors is clear: absent some evidence that the private prosecutor has in fact ignored the interests of justice in seeking a conviction, his assistance of the public prosecutor is not a per se constitutional violation. *State v. Branch*, 288 N.C. 514, 220 S.E. 2d 495 (1975), *cert. denied*, 433 U.S. 907 (1977); *State v. Best*, 280 N.C. 413, 186 S.E. 2d 1 (1972); *State v. Westbrook*, 279 N.C. 18, 181 S.E. 2d 572 (1971), *death penalty vacated*, 408 U.S. 939 (1972); *State v. Carden*, 209 N.C. 404, 183 S.E. 898, *cert. denied*, 298 U.S. 682 (1936).

This Court has, over the years, considered the role of private prosecutors in criminal cases and has, we believe, struck a fair balance between the articulated concern that a private prosecutor's loyalty to his client (usually the family or friends of the victim) may in some way serve to prejudice the rights of a defendant, *see* 50 N.C. L. Rev. 1171 (1972), and the recognition that a criminal prosecution is an adversary proceeding and, as such, the role of the solicitor and the role of privately employed counsel are not necessarily inconsistent. *See State v. Westbrook*, 279 N.C. 18, 181 S.E. 2d 572. Thus where it is shown that the solicitor consented to the participation of a privately employed prosecutor and retained control and management of the prosecution, no reason exists why such an accepted and well-settled practice, in and of itself, should cause reversal of the case. As we stated in *State v. Best*, 280 N.C. 413, 417, 186 S.E. 2d 1, 4 (1972):

> " '. . . While under the present practice officers are appointed or elected for the express purpose of managing criminal business, the old practice survives in most jurisdictions to the extent that counsel employed by the complaining witness or by other persons desirous of a conviction are permitted to assist the prosecuting attorney in the conduct of the prosecution, and, as a general rule, no valid objection can be raised by the accused to allow the prosecuting attorney to have the assistance of private members of the bar . . . . (p. 94) It is within the discretion of the trial court to allow special counsel to aid the prosecuting attorney in the prosecution of a case, and such discretion will be interfered with only on a showing of abuse thereof . . . . In all such cases it is within the discretion of the court to appoint competent counsel to assist, or to permit counsel employed by private parties, or even volunteers, to appear for that purpose.' "

Furthermore, the defendant's concerns over the "fundamental fairness" of the use of private prosecutors in general are adequately addressed by existing safeguards. Private prosecutors, like all attorneys, are officers of the court, bound by the ethical responsibilities set forth in the Code of Professional Responsibility; guided by statutory rules and case law; and always controlled by the trial judge whose overriding concern is to insure orderly and evenhanded conduct in his courtroom.

Nor do we find persuasive the argument that assistance of a private prosecutor results in a "mismatching" of legal talent and experience to a defendant's disadvantage. We know of no law that requires counsel to be equal to or better or greater in number than counsel for the opposition. A criminal defendant is only entitled to effective representation by competent counsel.

The record before us discloses that the district attorney was at all times in control of the prosecution; that he adequately supervised the participation of the private prosecutor; and that the two attorneys worked as a team sharing the workload evenly. In short, the private prosecutor acted well within allowable limits. *See State v. Chapman*, 294 N.C. 407, 241 S.E. 2d 667 (1978). The trial judge did not abuse his discretion in permitting the participation of private prosecution in this case. *See State v. Boykin*, 298 N.C. 687, 259 S.E. 2d 883 (1979), *cert. denied*, 446 U.S. 911 (1980).

[2] II. Defendant next contends that the trial court erred in refusing to allow evidence enhancing the credibility of Lynn Whisnant after the State had impeached her.

Lynn Whisnant appeared as a witness for the defendant. The purpose of her testimony was to corroborate defendant's assertion that he was highly intoxicated and did not intend to kill the victim, but rather that he intended to shoot over the car. On cross-examination, the State attempted to impeach the credibility of the witness by emphasizing Whisnant's close friendship with the defendant and her own involvement in the crime. On re-direct examination, defense counsel asked Whisnant whether she had been offered "a deal" to change her story as to what, if anything, the defendant said just prior to the murder. She responded in the affirmative. The defense attorney then attempted to elicit from Whisnant the details of "the deal." The State objected and, following a voir dire hearing, the trial judge sustained the State's objection.

During the voir dire hearing it was disclosed that a representative of the State had approached Whisnant's attorney and stated that he would recommend that plea negotiations be commenced in her case if Whisnant had any information tending to show that the defendant had, prior to the murder, made threatening or disparaging remarks concerning the victim, and if she was

willing to so testify. Whisnant testified on voir dire that her attorney had asked her whether she wanted to change her story, but did not reveal to her what the changes might concern or what the plea might involve.

The defendant now argues to this Court that this information was critical to his defense because "(h)er conversations with her lawyer about a plea bargain for her altered or enhanced testimony was powerful evidence that she had a strong interest in saying what the State wanted her to say to save her own neck and that her credibility was enhanced because she testified against her own interests."

We agree with the trial judge that the proffered evidence was not "the major thrust in this case." Certainly the exclusion of evidence on re-direct examination which detailed a purported "deal" offered to Whisnant to enter into plea negotiations did not deny the defendant the right to present his defense of intoxication. In fact, following defendant's testimony it became clear that he sought to excuse the killing not on grounds that he was intoxicated but rather that the killing was accidental. Thus, the excluded evidence concerned a collateral matter, the credibility of a witness, and the trial judge acted well within his discretion in curtailing questioning which had the real potential of resulting in a "mini-trial" on a collateral matter the substance of which was already before the jury. As we recently stated in *State v. McDougall*, 308 N.C. 1, 22, 301 S.E. 2d 308, 321, *cert. denied*, --- U.S. ---, 78 L.Ed. 2d 173 (1983):

> It is the duty of the trial judge to supervise and control the trial to prevent injustice to either party. *Greer v. Whittington*, 251 N.C. 630, 111 S.E. 2d 912 (1960). The court has the power and duty to control the examination and cross-examination of the witnesses. *State v. Arnold*, 284 N.C. 41, 199 S.E. 2d 423 (1973); *Greer, supra*. The trial judge may ban unduly repetitious and argumentative questions as well as inquiry into matters of tenuous relevance. *State v. Satterfield*, 300 N.C. 621, 268 S.E. 2d 510 (1980); *State v. Vestal*, 278 N.C. 561, 180 S.E. 2d 755 (1971), *cert. denied*, 414 U.S. 874 (1973). The extent of cross-examination with respect to collateral matters is largely within the discretion of the trial judge.

State v. McLean, 294 N.C. 623, 242 S.E. 2d 814 (1978); *Ingle v. Transfer Corp.*, 271 N.C. 276, 156 S.E. 2d 265 (1967).

Furthermore, the relevance of the excluded testimony becomes even more tenuous in light of the jury's verdict of guilty on the felony murder charge. Whisnant's testimony that the defendant did not utter threats prior to the murder is merely some evidence tending to negate the elements of premeditation and deliberation, elements not necessary to support defendant's conviction for felony murder. Defendant's second assignment of error is overruled.

[3] III. Defendant contends that the State's closing arguments during the guilt phase of the trial denied him a fair trial. Specifically he contends that the prosecutors improperly emphasized a racial motive for the killing without adequate foundation and injected personal opinions and testimonials in an effort to create sympathy for the victim.

We first note that of the ten exceptions listed under this assignment of error, only one was the subject of an objection at trial. We must determine, therefore, whether these statements, with the exception of the one objected to, "amounted to such gross impropriety as to require the trial judge to act *ex mero motu*." *State v. Oliver*, 309 N.C. 326, 356, 307 S.E. 2d 304, 324 (1983).

In a criminal trial "[a] prosecutor may argue the evidence and any inferences to be drawn therefrom." *Id.* at 357, 307 S.E. 2d at 324. With respect to the alleged racial motive for the murder, there was evidence that the victim was black; that he was murdered in a white community; and that the defendant referred to the victim as a "damn nigger." With this in mind, defendant now argues that the prosecutor's repeated reference to the victim as an "old black gentleman" and a "black man" were improper. Not only were these references not objected to at trial, but no exception to them has been taken. The evidence that the victim was a black man and that he was driving through a white community, taken together with defendant's ignoble racial slur in referring to the victim as a "damn nigger," is sufficient to raise an inference that the murder was, in part, racially motivated. Indeed, this fact became highly relevant during the trial in light of defendant's denial that he knew that the victim was black; that, as earlier

argued by defense counsel, race had no part in the murder; and therefore, that the defendant, in the absence of any motive, had no intention of killing or injuring Mr. Connelly.

The prosecutor also argued to the jury that the murder was as clearly a premeditated and deliberated murder as any murder he had previously tried; that it must have been a "horrible experience" for Mr. Connelly as he "looked down the barrel of a shotgun"; that Mr. Connelly was entitled to the help he received from a bystander "after that man deliberately murdered him"; that the defendant "succeeded in frightening, scaring Mr. Connelly, but it was all over with him"; and finally that "[t]he blood of Ransom Connelly cries out from the ground to find this man guilty of first degree murder." While we agree that these comments had little relevance to the determination of defendant's guilt or innocence, we do not find them, individually or taken together, to be so grossly improper, prejudicial, or highly inflammatory as to require the trial judge to interfere *ex mero motu*. *See State v. Kirkley*, 308 N.C. 196, 302 S.E. 2d 144 (1983); *State v. Johnson*, 298 N.C. 355, 259 S.E. 2d 752 (1979); *State v. Britt*, 288 N.C. 699, 220 S.E. 2d 283 (1975).

[4] Finally, defendant objected to the State's argument that there was no evidence to support defense counsel's insinuation of an "underhanded deal" involving a sentence reduction for Ronnie Bowen in return for his testimony against the defendant. Bowen, an inmate at Central Prison, testified for the State concerning defendant's remarks about the victim. The thrust of the prosecutor's argument was to refute what he viewed as defense counsel's suggestion that the State had procured the testimony of Bowen by surreptitiously arranging "a deal." Prosecutor Greene concluded "my law license means more to me than a first degree murder case." Defense counsel's objection to this statement was, we believe, properly overruled. Defendant "opened the door" to this line of argument. *See State v. Whisenant*, 308 N.C. 791, 303 S.E. 2d 784 (1983); *State v. Fearing*, 304 N.C. 471, 284 S.E. 2d 487 (1981).

PENALTY PHASE

[5] IV. Defendant first contends that the evidence in this case was insufficient to support a finding of the aggravating factor

that the murder was especially heinous, atrocious, or cruel. G.S. § 15A-2000(e)(9). We agree.

It is clear from the record that in support of this factor the State argued that because the victim was "stalked" for a period of time prior to the murder, he suffered psychological torture in excess of that normally present in a first degree murder case. We agree with the State that where the facts in evidence support a finding that a victim is stalked and during the stalking the victim is aware of it and in fear that death is likely to result, the issue of whether the murder is especially heinous, atrocious, or cruel may be properly submitted for jury consideration.

Thus, the issue before us is whether, as a matter of law, there is sufficient evidence to submit the issue to the jury. As succinctly stated by Justice Martin in his dissenting opinion in the recent case of *State v. Stanley*, 310 N.C. 332, 347, 312 S.E. 2d 393, 401 (1984):

> In making this decision, we must view the evidence in the light most favorable to the state, discrepancies and contradictions are disregarded, the state's evidence is taken as true, and the state is entitled to every inference of fact that may be reasonably deduced therefrom. The defendant's evidence, unless favorable to the state, is not to be considered in deciding the question. If there is substantial evidence of each element of the issue under consideration, the issue must be submitted to the jury for its determination. If the evidence only raises a suspicion or conjecture as to the existence of the fact to be found, the issue should not be submitted. (Citations omitted.)

In the present case, the trial judge conducted a voir dire hearing at which time the State was permitted to present the testimony of Phillip Kincaid for the purpose of attempting to prove that, through a continuing and escalating course of events culminating in the murder, the victim became increasingly fearful for his life, and thereby underwent psychological torture. Kincaid testified that shortly after the defendant appeared behind them, he discovered that he and Mr. Connelly were not being pursued by a police car and informed Connelly of that fact. They "were asking each other, wondering who was that behind us." The vehicle behind them continued to bump them and at the intersection

they thought the truck was going to pull around them. Connelly then said, "Well, maybe we can make it on to Fender's." They continued to wonder "who was that behind us blowing the horn." As they turned into the Drexel Discount Drug Connelly said, "I'll just pull off here, maybe whoever it is will go on by." Kincaid's testimony concluded with:

Q. Was there anything stated about the ability to make it to Fender's?

A. Well, we thought we would have been safe if we got to Fender's.

Q. Was there anything said by Ransom Connelly when the shotgun came out the window and during the time that it was pointed at him and you?

A. He said Oh God, what are they going to do?

Q. What conversation during the entire time, beginning from Zion Road and coming on down No. 64-70 what, if anything, did Ransom Connelly say about wanting the vehicle behind to go on and pass to leave you alone?

A. Yea, he said I wish they'd go ahead and pass and leave us alone.

Kincaid's testimony before the jury essentially paralleled that given during the voir dire hearing. He did state before the jury, however, that they "drove up the road frightened" and that he [Kincaid] "was beginning to get more frightened after [the defendant] wouldn't pass" and "after we pulled off the road, and after the shotgun came out of the window I just froze."

It seems then that although there was a considerable amount of "wondering" about the intentions of their pursuer, and some very legitimate concern and apprehension engendered by defendant's inexplicable behavior, there is no evidence that either Kincaid or Connelly believed that the ultimate result of the pursuit would be death—at least not until the shotgun appeared. In fact, Connelly's final utterance, "Oh God, what are they going to do?" suggests that, even then, the controlling factor was as much incredulity as it was fear.

We do not consider this evidence sufficient to support the State's theory that Ransom Connelly suffered excessive psychological torture as he was being "stalked for the kill."

Because we have held that the submission of the G.S. § 15A-2000(e)(9) factor was error in this case, we deem it unnecessary to address defendant's challenge to the jury instructions on this factor.

[6] V. Defendant contends that the evidence was insufficient to support the aggravating circumstance that "[t]he defendant knowingly created a great risk of death to more than one person by means of a weapon or device which would normally be hazardous to the lives of more than one person." G.S. § 15A-2000(e)(10). This Court has not previously spoken to this particular aggravating circumstance nor to its equivalent in the Fair Sentencing Act—G.S. § 15A-1340.4(a)(1)(g), bearing identical language.[1]

At least five states have similar aggravating factors requiring a risk of death to more than one person by a weapon or device that would normally be hazardous to the lives of more than one person.[2]

The G.S. § 15A-2000(e)(10) aggravating factor requires a showing that defendant (1) knowingly created a great risk of death to more than one person, (2) by means of a weapon or device which would normally be hazardous to the lives of more

1. For other terms relating to weapons in various statutes, see for example:

G.S. § 14-34.1 Barreled weapon, firearm

G.S. § 14-49 Explosive or incendiary device or material

G.S. § 14-288.8 Weapon of mass death and destruction

G.S. § 15A-2000(e)(5) Destructive device or bomb

2. These states are Georgia, Kentucky, Missouri, Nevada, South Carolina and South Dakota. Ga. Code Ann. § 17-10-30(b)(3); Ky. Rev. Stat. § 532.025(2)(a)(3); Mo. Ann. Stat. § 565.012(2)(3); Nev. Rev. Stat. § 200.033 (3); S.C. Code § 16-3-20-(C)(a)(3); S.D. Compiled Laws Ann. § 23A-27A-1-(2). Only in Georgia do we find cases interpreting this factor. The similar provision in the Georgia Code (Ga. Code Ann. § 17-10-30(b)(3), formerly 27-2534.1(b)(3), containing the language "a weapon or device which would normally be hazardous to the lives of more than one person" has been interpreted by the Georgia Supreme Court to apply to a .32 caliber automatic pistol used in an attack on two 7-11 Store cash couriers. *Jones v. State*, 243 Ga. 820, 256 S.E. 2d 907 (1979). *See Chenault v. State*, 234 Ga. 216, 215 S.E. 2d 223 (1975), where it was found to exist when defendant used two pistols.

than one person. This factor thus addresses essentially two considerations: a great risk of death knowingly created and the weapon by which it is created. We therefore address ourselves to both the risk and the weapon.

With regard to the risk element, the evidence is certainly sufficient to support a jury finding that the defendant knew there were two people in the front seat of Connelly's car. While much of the evidence is conflicting, it is clear that defendant's passenger, Mrs. Whisnant, testified that she knew there were two men in the victim's car and that they were black, and said in a statement given three days after the incident that the driver was wearing a hat and the passenger was not. The defendant virtually drove right on the bumper of the victim's car for the substantial distance of 1.3 miles and in fact bumped it at least twice. The defendant stopped his car in the parking lot within several feet of the victim's car and in fact fired the shotgun into the occupied vehicle within two or three feet of the victim and his passenger. The jury found this evidence sufficient to convict the defendant of felony murder in violation of G.S. § 14-34.1 (discharging certain barreled weapons or a firearm into occupied property). It cannot be said that the defendant did not knowingly create the risk.

When a shotgun is fired at close range into the passenger compartment of an automobile, the risk created is not simply a risk of injury but a risk of death. The risk of death to Connelly and Kincaid was "great" and not merely negligible. The risk did not exist as to only one of the occupants but to both. The fact that only one of the occupants was killed does not refute the fact that both were placed at risk of death.

As to the weapon, the crucial consideration in determining what type of weapon or device is envisioned by G.S. § 15A-2000 (e)(10) is its potential to kill more than one person if the weapon is used in the normal fashion, that is, in the manner for which it was designed. The focus must be upon the destructive capabilities of the weapon or device. Whether used for sporting purposes against game birds, water fowl and animals, or as a weapon against man, the shotgun is selected for the very reason that it is capable of firing more than one, and in fact, many projectiles in a pattern over a wide impact area rather than a specifically aimed single projectile such as from a rifle or pistol. It is used by law

enforcement officers and the military alike for its widespread destructive power in close places or at close range. It is axiomatic that a shotgun is a weapon which would normally be hazardous to more than one person if it is fired into a group of two or more persons in close proximity to one another.

The defendant argues that the modifications made to the shotgun in question increased the muzzle velocity but decreased the size of the pattern (*i.e.*, the amount the pellets spread out), thus making the weapon more discriminating and less dangerous to more than one person, hence, not a weapon normally dangerous to more than one person. We reject this argument. The weapon used in this case, a Winchester Model 370, was a single barrel, single shot, breach loading .16 gauge shotgun which had been modified (the barrel reamed out or bored open) to accept the larger caliber .12 gauge shell. The effect of the modification was to allow the greater amount of gunpowder and pellets of a .12 gauge shell to be fired through the smaller caliber barrel of the .16 gauge. We note that the .12 gauge shell used here was a 3-inch magnum shell and thus contained more powder and shot than a standard 2-3/4 inch shell. We further note that the expert witness testified that the spent shell which was found was a Federal .12 gauge 3-inch magnum No. 4 and would have contained 1-7/8 ounces of shot or approximately 253 pellets (135 per ounce). We further note that only approximately 40 pellets were recovered from the victim's body.

We hold that a shotgun falls within the category of weapon envisioned in G.S. § 15A-2000(e)(10) and that there was sufficient evidence from which the jury could conclude that the defendant knowingly created a great risk of death to Ransom Connelly and Phillip Kincaid by means of a weapon or device which would normally be hazardous to the lives of more than one person. The jury's finding of this factor is supported by the evidence.

[7] VI. Defendant contends that the trial judge erred when he refused to submit, as a mitigating factor, that the defendant was under the influence of mental or emotional disturbance at the time of the offense. G.S. § 15A-2000(f)(2). The basis for the submission of this factor was the testimony of Dr. Bruce Berg, a forensic psychiatrist, who conducted a pretrial evaluation of the defendant. Dr. Berg testified that defendant had a history of repeated

alcohol abuse and had a "mixed personality disorder" which was manifested by his inability to deal adequately with frustrations which led to outbursts of temper. On the other hand, the State's characterization of defendant was, in short, "a man of average intelligence with a penchant for alcohol and a hot temper."

We agree that this evidence falls short of that necessary to support the submission of G.S. § 15A-2000(f)(2), that the defendant was under the influence of mental or emotional disturbance when he murdered Ransom Connelly. The inability to control one's drinking habits or one's temper is neither a mental disturbance nor an emotional disturbance as contemplated by this mitigating factor. In *State v. Brown*, 306 N.C. 151, 293 S.E. 2d 569, *cert. denied*, 459 U.S. 1080, 74 L.Ed. 2d 642 (1982), we reiterated this Court's position with respect to the definition of mitigating circumstances under G.S. § 15A-2000. That definition and the policy it represents bears repeating:

> "A definition of mitigating circumstance approved by this Court is a fact or group of facts which do not constitute any justification or excuse for killing or reduce it to a lesser degree of the crime of first-degree murder, *which may be considered as extenuating, or reducing the moral culpability of killing or making it less deserving of the extreme punishment than other first-degree murders.*"

Id. at 178, 293 S.E. 2d at 586 (Emphasis added).

Thus in *Brown*, as we had previously held in *State v. Irwin*, 304 N.C. 93, 106, 282 S.E. 2d 439, 447-48 (1981), we stated that " 'voluntary intoxication by alcohol or narcotic drugs at the time of the commission of a murder is not within the meaning of a mental or emotional disturbance under G.S. § 15A-2000(f)(2). Voluntary intoxication, to a degree that it affects defendant's ability to understand and to control his actions ... is properly considered under the provision for impaired capacity, G.S. 15A-2000(f)(6).' " *Id.* at 179, 293 S.E. 2d at 587. In the present case the trial judge submitted and the jury failed to find as a mitigating factor that "[t]he capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired." G.S. § 15A-2000(f)(6).

The burden was on the defendant to prove in mitigation that he was under the influence of mental or emotional disturbance. Here he failed to come forward with any evidence other than that his temper controlled his reason, particularly when he consumed alcohol. Furthermore, the trial judge submitted and the jury found as an additional factor in mitigation that the defendant had a history of alcohol abuse. The submission of G.S. § 15A-2000(f)(2) thus would have been duplicative with respect to defendant's alcohol abuse. The assignment of error is overruled.

VII. Defendant argues next that he was denied a fair sentencing hearing because of the State's closing arguments to the jury. He asserts first that the State injected personal opinion into the argument and misrepresented the standard for the especially heinous, atrocious, or cruel aggravating factor. Because this factor will not be submitted at resentencing, we deem it unnecessary to address this contention.

Defendant additionally asserts that the State impermissibly appealed to racial fears and biases when he argued that the murder was racially motivated. We held in the guilt phase portion of this opinion that arguments relating to the racially motivated character of this murder were supported by the evidence and relevant to refute defendant's contention that he did not intend to harm Mr. Connelly. Likewise, this evidence, and the argument based thereon, was relevant at sentencing to illustrate the depravity of defendant's character. *See State v. Brown*, 306 N.C. 151, 293 S.E. 2d 569; *State v. Taylor*, 304 N.C. 249, 283 S.E. 2d 761 (1981), *cert. denied*, --- U.S. ---, 77 L.Ed. 2d 1398 (1983).

[8] The defendant also argues under this assignment of error that the State injected prejudice into its jury argument by referring to the victim's rights and the suffering of the victim. In *State v. Oliver*, 309 N.C. at 360, 307 S.E. 2d at 326, we stated that during sentencing, where "[t]he emphasis is on the circumstances of the crime and the character of the criminal," arguments concerning the rights of the victim are relevant. *See State v. Pinch*, 306 N.C. 1, 292 S.E. 2d 203, *cert. denied*, 459 U.S. 1056, 74 L.Ed. 2d 622 (1982), *reh'g denied*, --- U.S. ---, 74 L.Ed. 2d 1031 (1983). Defendant argues, however, that he was unduly prejudiced by what he alleges was a reference to a letter which had appeared in the local newspaper. There is no evidence that the jurors had

knowledge of the letter. Furthermore, objection was taken to the remark and the trial judge instructed the jury to disregard it. Any prejudice was therefore cured by the trial judge's action. *State v. Lake*, 305 N.C. 143, 286 S.E. 2d 541 (1982). We also note that defense counsel effectively appealed to the sympathy of the jury by arguing that the jury's life or death choice would determine "whether a little boy and girl understand their daddy is alive" and "whether or not that boy's daddy is to die."

[9] Finally defendant argues that the State inappropriately cited passages from the Bible and argued in effect that the powers of public officials, including the police, prosecutors and judges are ordained by God as his representatives on earth and that to resist these powers is to resist God. The passage quoted was taken from Romans, Chapter XIII. A similar jury argument was made in *State v. Miller*, 288 N.C. 582, 220 S.E. 2d 326 (1975), but it was not assigned as error or brought forward on appeal before this Court. On petition for federal habeas corpus the Fourth Circuit Court of Appeals in *Miller v. North Carolina*, 583 F. 2d 701 (4th Cir. 1978), noted this argument with disapproval. We likewise disapprove of this argument. The prosecutor is cautioned to avoid it at resentencing.

Defendant's assignments of error numbers 10 through 19 are prefaced as follows: "The following issues are all issues this Court has previously and recently decided against the defendant. He merely raises them here to give this Court an opportunity to reexamine its previous holding, and, if this court declines to do so, for purposes of preserving the issues for later review by a federal court. *See Engle v. Isaac*, 456 U.S. 107 (1982)." These issues are:

X. "The trial court erred in its instruction to the jury that malice and unlawfulness are implied by law from the intentional shooting with a deadly weapon contrary to law, constitutes an unconstitutional conclusive presumption on an element of the offense, impermissibly and unconstitutionally relieve the State of the burden of proving all elements of the offense and places the burden on the defendant to disprove an element of the offense and is unconstitutionally irrational, thereby depriving the defendant of his right to trial by jury, his right to have the State prove every element beyond a reasonable doubt and his right to due process of law."

See State v. Pinch, 306 N.C. 1, 292 S.E. 2d 203, *cert. denied*, 459 U.S. 1056, 74 L.Ed. 2d 622 (1982), *reh'g denied*, --- U.S. ---, 74 L.Ed. 2d 1031 (1983).

XI. "The imposition of a death sentence by a jury drawn from a venire from which potential jurors were questioned about their scruples against capital punishment deprive this defendant of his right to life without due process of law and his right to trial by jury."

See State v. Oliver, 309 N.C. 326, 307 S.E. 2d 304 (1983).

XII. "G.S. § 15A-2000(e)(9), that the murder was especially heinous, atrocious or cruel, is unconstitutionally vague on its face, and vague and overbroad as construed and applied in North Carolina."

See Id.

XIII. "The court erred in failing to instruct the jury that the State had the burden of proving beyond a reasonable doubt that the aggravating circumstances substantially outweighed the mitigating circumstances sufficient to call for the death penalty, or the court erred in instructing the jury that it must return a verdict of death if it finds that the aggravating outweighed the mitigating circumstances, thereby lowering the State's burden of proof violating G.S. § 15A-2000(b)(3) and denying the defendant his right to be free from cruel and unusual punishment and due process of law as guaranteed by the eighth and fourteenth amendments to the United States Constitution and Article I, §§ 19, 27 and 35 of the North Carolina Constitution."

See State v. McDougall, 308 N.C. 1, 301 S.E. 2d 308, *cert. denied*, --- U.S. ---, 78 L.Ed. 2d 173 (1983).

XIV. "The court erred in failing to instruct the jury during the penalty phase that if it was deadlocked a life sentence would be imposed."

See State v. Smith, 305 N.C. 691, 292 S.E. 2d 264, *cert. denied*, 459 U.S. 1056, 74 L.Ed. 2d 622 (1982).

XV. "The court erred in failing to instruct the jury that the State had the burden of proving the nonexistence of each mitigating circumstance beyond a reasonable doubt and in placing

the burden on the defendant to prove each mitigating circumstance by a preponderance of the evidence."

See State v. Oliver, 309 N.C. 326, 307 S.E. 2d 304.

XVI. "The North Carolina Death Penalty Statute, G.S. § 15A-2000, and consequently the verdict of death in this case, unconstitutional, imposed in a discriminatory manner and involves subjective discretion, all in violation of the eighth and fourteenth amendments to the United States Constitution and Article I, §§ 19 and 27 of the North Carolina Constitution."

See State v. Williams, 305 N.C. 656, 292 S.E. 2d 243, *cert. denied*, --- U.S. ---, 74 L.Ed. 2d 622 (1982), *reh'g denied*, --- U.S. ---, 74 L.Ed. 2d 1031 (1983).

XVII. "The North Carolina capital murder scheme is unconstitutional under *Furman v. Georgia*, in that it permits subjective discretion and discrimination in imposing the death penalty, thereby depriving the defendant of his right to equal protection, due process of law and freedom from cruel and unusual punishment as guaranteed by the eighth and fourteenth amendments to the United States Constitution and Article I, §§ 19 and 27 of the North Carolina Constitution."

See State v. Oliver, 309 N.C. 326, 307 S.E. 2d 304.

XVIII. "The court erred in failing to instruct the jury on the manner in which they were to determine the existence or nonexistence of the specific mitigating circumstances submitted to it, thereby depriving the defendant of his right to a guided decision by the jury, his right to be free from arbitrariness, his right to be free from cruel and unusual punishment and his right to due process of law as guaranteed by the eighth and fourteenth amendments to the United States Constitution and Article I, §§ 19, 27 and 35 of the North Carolina Constitution."

See Id.

XIX. "G.S. § 15A-2000(e)(9), that the murder was especially heinous, atrocious or cruel, unconstitutionally vague under the due process clause of the fourteenth amendment."

See Id.

We appreciate defendant's candor. We have carefully reviewed the arguments set forth in defendant's brief and find no fact or circumstance that would remove this case from the context in which the issues were discussed in previous cases. Furthermore, we have reviewed in detail our previous holdings on these issues, together with our reasoning in support thereof and decline to accept defendant's invitation to alter our position on any of the issues he now raises. Therefore, under the authority of the above cited cases, we find no error in defendant's assignments of error X through XIX.

Our review of the transcript indicates that defendant received the benefit of able and aggressive representation at trial before an able and thorough trial judge. His representation on appeal was equally competent.

In the guilt phase we find no error. The case is remanded to the Superior Court, Burke County, for resentencing.

Guilt Phase—no error.

Remanded for resentencing.

Justice MARTIN dissenting in part.

I concur in the guilt-innocence portion of the majority opinion but respectfully dissent from the remanding of the case for a new sentencing hearing. The majority finds the evidence insufficient to submit the issue to the jury of whether the capital crime was especially heinous, atrocious, or cruel. In this finding I cannot concur. I do concur in that portion of the majority opinion concerning whether the shotgun in this case was a weapon within the meaning of N.C.G.S. 15A-2000(e)(10).

This blatant murder in cold blood of a black man by this white defendant was racially motivated. A racially motivated murder evidences abnormal brutality and depravity not found in other murders. It is especially heinous, atrocious, or cruel. *State v. Stanley,* 310 N.C. 332, 312 S.E. 2d 393 (1984).

The majority concedes that for the purpose of evaluating the prosecution's jury argument, the evidence supports a finding that the murder was racially motivated. The deceased, Ransom Con-

nelly, was a sixty-two-year-old black man driving his car through a white community in the nighttime. He was accompanied by another black man, the witness Phillip Kincaid. When defendant and his women friends, Lynn Whisnant and Carolyn Bradshaw, left the American Legion Hut, they intended to go to Morganton. However, after following Connelly and Kincaid on Zion Hill Road for 1.3 miles, defendant changed his mind. Even though Lynn asked him to turn right on highway 64-70 toward Morganton, defendant turned left and continued to follow his intended victims. All during this travel, defendant had repeatedly honked the car horn, followed Connelly's Pontiac car very closely, and bumped the rear of the car at least twice.

The testimony of Ronnie Bowen supports a finding that defendant murdered Connelly for racial reasons. Bowen was in jail with defendant for about two months after the murder and before the trial. He testified that he talked with defendant several times about defendant's case and:

> Q. State whether or not you told him what you were charged with and if he told you about things he was changed [sic] with.
>
> A. Yes sir, I told him I was charged with forgery and he was in there for shooting a nigger, is what he told me. . . . He told me that he had followed a dude, that he followed a nigger into, down the road into a parking lot drug store and pulled up beside of him, that he shot the man with a shotgun out of the window, was rolled down on the truck. . . . Yes sir, he said something about it wasn't on his conscience and that he had killed the nigger, but since he was in jail he regreted [sic] it, but that it didn't bother him, though.
>
> . . . .
>
> Q. By what names did he refer to the person that he told you that he had shot; what did he call that person?
>
> A. Old man. Nigger; most of all nigger.
>
> . . . .
>
> Q. And did you tell me in that statement the names, or three different names that he referred to the dead man by? What he called the dead man.

A. Nigger. Old man and damn nigger. . . . [H]e told me that he did kill the damn nigger. . . .

. . . .

Q. Has he ever said that he was sorry that he shot the man?

A. Naw, he ain't never said that. He was sorry. He said that he wished it hadn't happened, but he never said that he was sorry.

This testimony as to what the defendant said evidences on his part a hatred for black people, a feeling of his superiority to them, and a cruel indifference to their fate. He was not sorry that he murdered the black man, it was not on his conscience. He only regretted being in jail. There is no other cause for this murder except defendant's racist attitude toward black people in general and toward Ransom Connelly in particular. Such evidence indicates abnormal brutality and depravity in the commission of the capital crime and is sufficient to submit the issue of especially heinous, atrocious, or cruel to the jury.

In analyzing this assignment of error, the majority only discusses the evidence that defendant stalked the deceased prior to the killing, thereby causing psychological torture to him. Contrary to the majority, I also find the evidence sufficient on this theory to submit the issue to the jury. Although the surviving witness failed to testify that Ransom Connelly was in panic because of the conduct of defendant in following Connelly's car, the evidence is sufficient to support a finding by the jury that Connelly suffered psychological torture during this period of time. When defendant failed to turn right on U.S. 64 toward Morganton as he had planned to do, it demonstrated an intent on his part to further inflict psychological torture on Connelly. The most potent evidence supporting this theory is that of the defendant ordering one of the women to hand him the shotgun, directing that the window be rolled down on the passenger side of his pickup truck, and coolly pointing the shotgun at Ransom Connelly's head for a period of five seconds before blowing him away. Five seconds is a short time in most circumstances, but when looking into the muzzle of a shotgun, it can be as an eternity. Ransom Connelly's remarks during the drive and as he faced the shotgun manifest

the mental torture he was suffering. He said he wished they would go ahead and pass and leave us alone; maybe we could make it on to Fender's store; we will be safe if we can get to Fender's; I'll just pull in here (at the Drexel Discount Drugstore) and maybe whoever it is will go on by. Finally, as the gun was levelled at his head, Connelly said, "Oh God, what are they going to do?" The majority characterizes the last statement as being one of incredulity. I find it to be a despairing prayer. Just as the hunter stalks his frightened and cornered prey, defendant stalked Connelly for the kill.

Further, the conduct of defendant after the murder, which I will not repeat, also supports a finding of depravity on the part of defendant within the holding of *State v. Oliver*, 309 N.C. 326, 307 S.E. 2d 304 (1983).

The majority correctly states the rule to be applied in determining the sufficiency of the evidence to submit an aggravating circumstance to the jury. Upon applying the rule to the evidence in this case, I find it sufficient to support the issue on the theories that (1) defendant stalked his victim, causing him to suffer psychological torture; (2) the conduct of defendant was abnormally depraved under *Oliver*; and (3) the capital crime was a racially motivated murder. The evidence was sufficient to submit the aggravating circumstance of especially heinous, atrocious, or cruel to the jury for its determination.

I am authorized to state that Justices COPELAND and MITCHELL join in this dissenting opinion.

STATE OF NORTH CAROLINA v. WILLIAM PAUL MARLOW

No. 199PA83

(Filed 3 April 1984)

1. Criminal Law § 91— request for voluntary discovery—tolling of statutory speedy trial period

A criminal defendant's request for voluntary discovery tolls the running of the statutory speedy trial period pursuant to G.S. 15A-704(b)(1) until the occurrence of the earlier of the following events: (1) the completion of the requested discovery; (2) the filing by the defendant of a confirmation of volun-

tary compliance with the discovery request; or (3) the date upon which the court, pursuant to G.S. 15A-909, has determined that discovery would be completed.

2. Criminal Law § 91— statutory speedy trial—exclusion of period of discovery

Where defendant, after his arrest for murder in March 1981 but prior to his indictment in September 1981, filed a comprehensive request for discovery on 10 June 1981; the district attorney, upon receiving certain laboratory reports on 23 October, complied with defendant's discovery request at a 10 November 1981 meeting with defense attorneys; and the State's efforts positively to identify the corpus deliciti and to gather evidence incriminating defendant were severely and intentionally complicated by defendant's surreptitious attempt to conceal his criminal acts, the State's delay in providing discovery was justifiable and reasonable, and the period of discovery time between defendant's indictment in September and the completion of discovery on 10 November will be excluded from the statutory speedy trial period.

3. Criminal Law § 91— formal joinder for trial—delay caused by co-defendant's physical incapacity—exclusion from statutory speedy trial period

Defendant and a co-defendant were not formally joined for trial until the State made an oral motion for joinder on the date of trial, and a period of delay caused by the co-defendant's physical incapacity could not properly be excluded from defendant's statutory speedy trial period under G.S. 15A-701(b)(4) and (6).

4. Criminal Law § 92— oral motion for joinder

The district attorney's motion to join two defendants' cases for trial, made at the beginning of trial, came within the purview of G.S. 15A-951(a) and was thus not required to be in writing, since the language, "upon written motion of the district attorney," found in G.S. 15A-926(b)(2), applies only in those instances in which joinder of defendants is requested prior to trial.

5. Criminal Law § 92.1— joint trial—defenses not antagonistic

A joint trial of defendant and a co-defendant on a murder charge did not deny defendant a fair trial on the ground that he and the co-defendant presented antagonistic defenses where defendant claimed self-defense and the co-defendant's defense related to duress and coercion by defendant, since these defenses did not rise to the level of antagonistic defenses which would prevent the jury from rendering a fair adjudication of defendant's individual guilt.

6. Criminal Law § 92— denial of joinder for trial—protection of right to speedy trial

As used in the statute providing that the court must deny a joinder for trial if "it is found necessary to protect a defendant's right to a speedy trial," G.S. 15A-927(c)(2)a, the language "right to a speedy trial" refers to defendant's constitutional right to a speedy trial and not to his statutory right.

7. Constitutional Law § 30— speedy trial—pre-indictment delay—delay between indictment and trial

A delay of 147 days between defendant's indictment and trial on a murder charge did not, standing alone, constitute an unreasonable and prejudicial

delay so as to violate defendant's constitutional right to a speedy trial. Nor was an additional delay of six months between defendant's arrest and indictment unreasonable so as to violate defendant's constitutional right to a speedy trial where the State required more time to gather evidence and to present its case to the grand jury because of the condition of the victim's body and the attempted destruction of evidence. Sixth Amendment to the U.S. Constitution.

8. Constitutional Law § 30— speedy trial—faded memory

A general allegation that a delay caused defendant's memory to fade is insufficient to carry defendant's burden of showing prejudice from the delay. Rather, defendant must show that the resulting lost evidence or testimony was significant and would have been beneficial to his defense.

9. Homicide § 20.1— photographs of deteriorated body

Photographs of a homicide victim's body were not inadmissible for illustrative purposes because they showed only a deteriorated body and a witness had already testified that the body was in an advanced state of decomposition when found several months after the crime.

10. Bills of Discovery § 6— fingerprints—failure to provide to defendant

Evidence of a homicide victim's fingerprints were not inadmissible because they appeared on a piece of acetate which had not been furnished to defendant during voluntary discovery where defendant had received a copy of the report from the fingerprint expert.

11. Criminal Law §§ 79.1, 89.3— *guilty plea by State's witness—prior consistent statements*

The trial court in a murder case did not err in permitting the prosecutor to ask a State's witness on redirect examination if she had pled guilty to the offense of accessory after the fact of murder where the question was propounded for the purpose of eliciting evidence of prior consistent statements by the witness.

12. Criminal Law § 162.5— failure to move to strike portion of answer—waiver of *objection*

Failure to move to strike a portion of an answer, even though the answer is objected to, results in waiver of the objection.

13. Criminal Law § 71— use of word "murder"—shorthand statement of fact

An officer's testimony in a murder case that the occupants of the house where the murder allegedly occurred moved from the house "several months after the murder" was competent as a shorthand statement of fact.

14. Criminal Law § 85— limiting number of character witnesses

The trial court did not abuse its discretion in limiting defendant to four character witnesses, especially where the record does not reflect what the fifth character witness would have said if allowed to testify.

15. Homicide §§ 28.1, 30.2— second degree murder—failure to instruct on self-defense and manslaughter

The trial court in a second degree murder prosecution did not err in failing to instruct on self-defense, defense of others and manslaughter where the evidence showed without contradiction that defendant and another male stood in the doorway of the room where the victim lay either sleeping, unconscious, or pretending to be unconscious; the two men did all they could to arouse the victim, including setting off firecrackers in the bedroom; after they could not arouse the victim, the defendant expressed disgust by cursing and then pulled a gun out and shot the victim in the head five times; the victim made no sounds or movements prior to being shot; and there was no testimony that defendant was in any danger.

16. Criminal Law § 99.11— court's interruption of jury argument—no expression of opinion

The trial court did not express an opinion in interrupting defense counsel's jury argument that defendant would not be guilty of murder if he had just cause or excuse and in stating that there was no evidence of justification or excuse.

Justice EXUM dissenting.

ON petition for discretionary review of the decision of the Court of Appeals, 61 N.C. App. 300, 300 S.E. 2d 567 (1983), vacating defendant's conviction of second degree murder and remanding the cause to superior court; judgment entered by *Rousseau, J.*, at the 8 February 1982 Criminal Session of Superior Court, WILKES County.

Defendant was tried upon an indictment, proper in form, charging him with the second degree murder of Dennis Philmore Wyatt. Upon the jury finding the defendant guilty of second degree murder, the trial court sentenced him to an imprisonment of forty (40) years minimum, forty-five (45) years maximum. On appeal, the Court of Appeals held that the defendant's statutory right to a speedy trial had been violated and that he had been improperly joined for trial with co-defendant Tena Marion. We allowed the State's petition for discretionary review on 18 April 1983.

The State's evidence tended to show that in the fall of 1980, defendant was living with Ricky Marion, his wife Tena Marion and their small child in Elkin, North Carolina, and had been residing with them for several months. Defendant had known the Marions since 1979.

During the month of July 1980, the deceased Dennis Philmore Wyatt met Sharon Short in Michigan, and subsequently began living with her. In August 1980, Wyatt and Short traveled to North Carolina. Upon their arrival Wyatt and Short spent several nights sleeping either in the car or in various motels. They occasionally shared the motel rooms with other people, including Ricky and Tena Marion and a man known as Carlos. Wyatt and Ricky Marion had become acquainted earlier during their simultaneous incarceration in a North Carolina prison. During this period the deceased Wyatt supported himself and Short by selling LSD and caffeine pills.

In September of 1980, the deceased Dennis Philmore Wyatt, Sharon Short and the man named Carlos moved into the two bedroom home shared by the Marions and the defendant. Carlos left shortly thereafter.

For the next three weeks following the move of Wyatt and Short into the Marion house, up to the time of the killing on 28 September 1980, Wyatt, the defendant and Ricky Marion constantly drank intoxicating beverages. At times Wyatt and the defendant injected wine into their veins with a syringe.

On 28 September 1980, an argument erupted between Sharon Short and the deceased Wyatt, whose behavior became violent and abusive. The group decided that Wyatt had to leave and thereupon escorted the resisting Wyatt to his mother's house. After leaving Wyatt there, the Marions, Short and defendant returned to the Marion house approximately three hours later, having spent the intervening time drinking several pitchers of beer and shooting billiards at a local pool hall.

Shortly after their arrival at the Marion residence, they discovered Wyatt lying face upward on a bed in the bedroom previously shared by Wyatt and Short. The defendant and Ricky entered the room and attempted to arouse Wyatt. Although Ricky "hollered and shook him a little bit" Wyatt did not move. Ricky left defendant watching Wyatt in the bedroom while he secured some firecrackers. He threw at least two lighted firecrackers under the bed. Wyatt did not respond or make any sound or movement. Immediately thereafter the defendant said "F— this s—," pulled out a gun and shot the victim Wyatt in the head. Upon hearing defendant cock the gun, Ricky fled the room.

He told the two women that "Paul's (defendant) gone crazy," and that "He's shot him." They heard several more gunshots. An autopsy disclosed that the deceased had five bullet holes in his head and died as a result.

Thereupon, the defendant Marlow walked into the bedroom where the other three stood dazed. He told the group they were "all in this thing together." He further stated that first degree murder carries a life sentence and they were just as involved as if they had shot Wyatt like he had. Defendant then encouraged Ricky to "go in there and shoot him with that old big gun," referring to Ricky's Army .45 caliber pistol.

The group placed Wyatt's body in the trunk of a car, drove onto the Blue Ridge Parkway, stopped, and threw the body into a creek. They then drove to another location where they burned not only the victim's clothes, but also the sheets used to wrap the body and Ricky Marion's shoes. They returned to the Marions' house where the defendant remade the bed on which the victim was killed, lay on the bed and went to sleep.

Wyatt's body was found in a stream by a fisherman in the North Carolina mountains on 17 February 1981. A warrant was issued for the arrest of the defendant on 17 March 1981 and executed the next day. The defendant was indicted on 14 September 1981. The trial commenced during the week of 8 February 1982.

Other facts necessary to the decision of this case will be discussed in the opinion.

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

Samuel C. Evans, for the defendant.

COPELAND, Justice.

The State brings forward two assignments of error addressing the two issues ruled upon by the North Carolina Court of Appeals. That court held that the defendant's statutory right to a speedy trial had been violated and that he also had been improperly joined for trial with co-defendant Tena Marion. For the reasons discussed below, we find error with regard to the Court

of Appeals' determination of the speedy trial issue, but not with their improper joinder holding.

The defendant, in his brief to this Court, not only replied to the State's two assignments of error, but also brought forth issues presented to the Court of Appeals, which that court deemed unnecessary to reach or determine in light of their ruling. In the interest of justice, we shall address these remaining issues, none of which, however, constitute prejudicial error.

The record discloses that on 8 February 1982, prior to trial, defendant presented several motions to the trial court, including the motion to dismiss for violation of the Speedy Trial Act. At the hearing on this motion to dismiss the State offered evidence tending to show that at the trial term immediately preceding the 8 February 1982 term, co-defendant Tena Marion was in the late stages of pregnancy and, as such, was not physically able to withstand the rigors of a lengthy murder trial. The State also tendered evidence that Wilkes County was a county with a limited number of court sessions.

After hearing all the evidence, the trial court made several findings of fact, including a delineation of the specific terms of court in Wilkes County and the types of cases calendared. The court also found that co-defendant Tena Marion was pregnant at the December term and expected to give birth to a child sometime in January 1982 and did deliver the child on 1 January 1982; that the District Attorney did not place the case on the trial calendar for the week of 14 December 1981 because he felt that the pregnant defendant was unable to stand trial at that time; and that the next session following the December term of court was 8 February 1982.

The trial court concluded:

> (T)hat the defendant has failed to show wherein he has been prejudiced in the delay of his trial or the delay in his indictment and has failed to show that the State deliberately failed to prosecute and that the Court concludes that the defendant has not shown any constitutional right or any constitutional denial of the right to a speedy trial. The Court further concludes that since the date of the indictment, September the 14th, 1981, that inasmuch as the codefendant, Tena Marion,

was expecting to deliver childbirth, that the time from December 14th, 1981 to February the 8th, should be excluded for the reason that the codefendant was not physically able to appear in court; and the Court further concludes by excluding this time from the date of indictment the defendant has not been denied his statutory right to a speedy trial. Therefore, the defendant's motion to dismiss is denied.

First, the State contends that the Court of Appeals erred in holding that the defendant's statutory right to a speedy trial had been violated. Under North Carolina's Speedy Trial Act, N.C. Gen. Stat. § 15A-701(a1), "[t]he trial of the defendant charged with a criminal offense shall begin . . . (1) [w]ithin 120 days from the date the defendant is arrested, served with criminal process, waives an indictment, or is indicted, whichever occurs last." If the defendant is not tried within the time prescribed, then the charge shall be dismissed, pursuant to N.C. Gen. Stat. § 15A-703(a).

According to the record, defendant's trial commenced on 8 February 1982, 147 days after the issuance of the indictment. The 120 day period expired on 12 January 1982. However, the State argues that the exclusions provided in N.C. Gen. Stat. §§ 15A-701 (b)(1), (4), (6) and (8) apply to the case *sub judice* and serve to bring this trial within the required 120 day period.

Under the provisions of N.C. Gen. Stat. § 15A-701(b)(1) the trial court may exclude "[a]ny period of delay resulting from other proceedings concerning the defendant . . ." from the 120 day period in which a criminal defendant must be tried. Although this provision enumerates certain specific proceedings which may be excluded from the statutory period, this section explicitly provides that this list is not inclusive, to wit, the statutory exclusion is not limited to these listed proceedings. Thus, the legislature has deemed it appropriate, in this particular instance, to allow judicial discretion when the ends of justice would be served.

The State urges this Court to interpret N.C. Gen. Stat. § 15A-701(b)(1) as excluding discovery time from the 120 day period. With particular regard to the case at bar, the State argues that the excludable period should run from the time of the indictment, 14 September 1981, until at least the time the district attorney received the final laboratory report on 23 October 1981. Such an interpretation, of course, would bring this defendant's

trial well within the 120 day period. Never before has our Court determined the effect a defendant's request for discovery would have upon the Speedy Trial Act.

The basic purpose of the Speedy Trial Act is to provide for the efficient administration of justice, which, according to our legislature, is best effectuated through a prompt determination of a criminal defendant's guilt or innocence. The Act's delineation of specific time limits and exclusions serves as a guideline for processing cases, and thus provides a technical defense for criminal defendants. This statute is quite distinguishable from a defendant's Sixth Amendment fundamental right to a speedy trial under the United States Constitution, and in no way should it be interpreted as a bar to this constitutional right. See N.C. Gen. Stat. § 15-704. We shall discuss this distinction in more detail later in this opinion.

While the Speedy Trial Act explicitly defines the specific procedural limitations and exclusions, it also provides, by way of Section 701(b)(1), a means with which the courts could augment the types of proceeding which should merit exclusion.

[1] After careful consideration, we have determined that the Speedy Trial Act's rule of exclusion, specifically subsection (b) of section 701, should include the period of delay resulting from a defendant's request for discovery. This excludable discovery period shall commence upon the service of defendant's motion for request for discovery upon counsel for the State, and shall encompass only such time which occurred after the speedy trial period has been triggered. In this case, the excludable time began upon the issuance of an indictment on 14 September 1981. Thereupon, the statutory time, within which the trial of a criminal case must begin, would cease to run until the occurrence of the earlier of the following events: (1) the completion of the requested discovery; (2) the filing by the defendant of a confirmation of voluntary compliance with the discovery request; or (3) the date upon which the court, pursuant to N.C. Gen. Stat. §15A-909, has determined that discovery would be completed. This holding is consistent with our purpose to ensure a fair and judicious determination of the issues. Without possession of all the vital information to which he is entitled, the defendant could possibly be deprived of the benefit of necessary evidence. Presumably, a defendant would

not be ready for trial until the needed material was received. Furthermore, there are various circumstances in which the investigative process is hindered by the secretion, disposition or attempted elimination of evidence by not only interested parties, but also by innocent persons unaware of the significance of such information.

Our decision to exclude discovery time does not force the defendant to anxiously await, at the mercy of the State, the completion of discovery within a reasonable time. The State remains bound not only by requirements of good faith to proceed in a timely manner, but also by the defendant's ability to compel earlier discovery, pursuant to N.C. Gen. Stat. § 15A-909. Under this statute, a defendant may petition the court to declare a specific time, place and manner for completing discovery. If the defendant pursues this available course of action, then, of course, the statutory time begins to run again upon the court ordered date of compliance.

[2] The record before us reveals that the defendant, after his arrest in March, but prior to his indictment in September, filed a comprehensive request for discovery on 10 June 1981. Included in this request were the results of various laboratory examinations conducted by the State Bureau of Investigation. The district attorney, upon receiving these relevant and material laboratory reports on 23 October 1981, complied with defendant's discovery request at the 10 November 1981 meeting with the defense attorneys. We find the delay in providing discovery was reasonable, especially considering the unusual circumstances involved in this case. The State's efforts to positively identify the *corpus delicti* and the evidence incriminating the defendant were severely and intentionally complicated by the defendant's surreptitious attempt to conceal his criminal acts. The defendant and his co-defendants disposed of the victim's body by throwing it into a creek. Approximately five months later, an unsuspecting fisherman discovered the badly decomposed body. Items of evidence linking the defendants to the killing were burned by the defendants. These conscious acts of concealment serve to support our conclusion that the delay prompted by the discovery process was justifiable as well as reasonable. In accordance with our determination to allow discovery time as an excludable period, we hold that the defendant tolled the Speedy Trial Statute with his 10 June 1981 re-

quest for discovery. However, because this discovery request was filed prior to the running of the speedy trial clock, which was started by the issuance of the indictment in September, we shall not consider, for the purpose of exclusion, discovery time which occurred prior to the commencing of the Speedy Trial Statute. We shall exclude only that portion of time, resulting from the ongoing discovery proceedings, which occurred after the issuance of the indictment. The defendant's receipt on 10 November 1981 of the discovery material from the district attorney triggered the running of the Speedy Trial Statute. Thus, upon excluding the time from 14 September to 10 November 1981, defendant's trial was properly held within the statutory 120 day period.

Inasmuch as we are holding that the trial occurred within the statutory time period, it is not necessary that we discuss the State's claim of exclusion based on Wilkes County's limited number of court sessions.

The State next contends that the Court of Appeals erred in its determination that the trials of defendant and his co-defendant Tena Marion had been improperly joined. Prior to trial the defendant filed a written motion to dismiss based upon constitutional and statutory speedy trial grounds. Nothing concerning the issue of the joinder of the co-defendants was raised in that motion, nor is there any evidence in the record of a motion to sever. In orally arguing defendant's motion to dismiss at trial, the defense attorney again failed to raise a claim of improper joinder. He objected only to the trial court's finding of fact that co-defendant Tena Marion was not physically able to stand trial. Because the State orally moved during the pre-trial hearing to consolidate the trials of the defendants, it is apparent that counsel for these defendants had adequate notice of the district attorney's intention to try these defendants together for the murder of the deceased Wyatt. However, counsel for defendant sufficiently preserved defendant's objection to the consolidation by joining in co-defendant Ricky Marion's objection to the State's motion to consolidate the trials.

This issue of joinder is an important aspect in two of the State's arguments. First, the State proposes that a combined reading of N.C. Gen. Stat. § 15A-701(b)(4) and (6) results in a permissible period of exclusion to the Speedy Trial Act. Subsection

four (4) provides that a period of delay resulting from the mental or physical incapacity of a defendant may be excluded. Subsection six (6) excludes a delay when the defendant is joined for trial with a co-defendant for whom the time for trial has not run, provided that no motion for severance has been granted.

Thus, the State argues, the delay caused by Tena Marion's pregnancy is specifically excludable in determining defendant's speedy trial time period as long as the two parties were joined in a manner which satisfies N.C. Gen. Stat. §§ 15A-701(b)(6) and 15A-926. The Court of Appeals held that the trial judge erred in excluding the time which resulted from the joinder, since defendant Marlow and Tena Marion were not formally joined as co-defendants between 14 December 1981 and 8 February 1982.

[3] A determination of the question of whether the delay, resulting from the joinder of the co-defendants, should be excluded from the defendant Marlow's 120 day period is not necessary, in light of our previous holding that defendant had been tried within the statutory speedy trial time limit. However, the Court of Appeals correctly held that the defendant and Tena Marion were not formally joined until 8 February 1982, when the State made its oral motion for joinder. Thus, the time period from 14 December 1981 until 8 February 1982 could not properly be excluded from the defendant's statutory 120 days.

The second aspect concerning the issue of joinder which the State argues involves the propriety of joining for trial two or more co-defendants pursuant to N.C. Gen. Stat. § 15A-926. Under the foregoing statute, joinder is proper when each defendant is charged with accountability for the same offense. *See also State v. Lake*, 305 N.C. 143, 286 S.E. 2d 541 (1982). The charges against each co-defendant directly pertained to the murder of Dennis Wyatt, the victim in this case.

[4] Defendant presents his contention that N.C. Gen. Stat. § 15A-926 precludes the making of an oral motion for joinder by the State. Based on the following reasoning, the State's motion for joinder need not be encompassed in a formal writing when made during a hearing or trial.

In determining the necessity of a formal written motion for joinder prior to trial, we must read N.C. Gen. Stat. § 15A-926(b)(2)

in *pari materia* with N.C. Gen. Stat. § 15A-951(a)(1). Section 926(b)(2) states that "upon written motion of the prosecutor, charges against two or more defendants may be joined for trial. Section 951(a)(1) in pertinent part provides that a motion must *"unless made during a hearing or trial,* be in writing." (Emphasis added.)

In *State v. Slade,* 291 N.C. 275, 229 S.E. 2d 921 (1976) we held that the district attorney's motion to join defendants for trial, made at the beginning of trial, came within the purview of N.C. Gen. Stat. § 15A-951(a), and thus was not required to be in writing. We interpreted the language, "[u]pon written motion of the district attorney," found in section 926(b)(2) to apply "only in those instances in which joinder of defendants is requested prior to trial." *Id.* at 282, 229 S.E. 2d at 926.

The defendant complains that because the consolidation not only prevented him from obtaining a fair trial but also violated his right to a speedy trial, his motion to sever should have been granted according to N.C. Gen. Stat. § 15A-927(c)(2)a. "Ordinarily, motions to consolidate cases for trial are within the sound discretion of the trial court, . . . and absent a showing that the joint trial has deprived an accused of a fair trial, the exercise of the court's discretion will not be disturbed on appeal." (Citations omitted) *State v. Barnett,* 307 N.C. 608, 619, 300 S.E. 2d 340, 346 (1983).

[5] Defendant argues that the joint trial denied him a fair determination of guilt or innocence because he and the other co-defendants presented antagonistic defenses. The record discloses that all the defendants pled not guilty, and the evidence and testimony given by the State's witnesses as to the criminal offense in question was consistent, free from material conflicts.

We said in an opinion by Justice Exum in *State v. Nelson,* 298 N.C. 573, 587, 260 S.E. 2d 629, 640 (1979), *cert. denied,* 446 U.S. 929 (1980), that under N.C. Gen. Stat. § 15A-927(c)(2) antagonistic defenses do not necessarily warrant severance. "The test is whether the conflict in defendants' respective positions at trial is of such a nature that considering all of the other evidence in the case, defendants were denied a fair trial." *Id.; see State v. Boykin,* 307 N.C. 87, 296 S.E. 2d 258 (1982).

Defendant Marlow maintained a claim of self-defense as justification for the murder, while Tena Marion's defense related to duress, coercion and fear of the defendant Marlow. These defenses, though different, did not rise to the level of antagonistic defenses which would prevent the jury from rendering a fair adjudication of defendant's individual guilt.

[6] Finally with regard to this assignment of error concerning joinder, we must address the Court of Appeals erroneous application of N.C. Gen. Stat. § 15A-927(c)(2)a, which reads as follows:

> (2) The court, on motion of the prosecutor, or on motion of the defendant other than under subdivision (1) above must deny a joinder for trial or grant a severance of defendants whenever:
>
> a. If before trial, it is found necessary to protect a defendant's right to a speedy trial, or it is found necessary to promote a fair determination of the guilt or innocence of one or more defendants;

The Court of Appeals reasoned that in order to protect the defendant's right to be tried within 120 days of indictment under N.C. Gen. Stat. § 15A-701(a1), the trial court would have to deny the State's motion for joinder. Such an interpretation of section 927(c)(2) would render absolutely meaningless the 701(b)(6) exclusion of delays for a defendant who is joined for trial with a co-defendant for whom the time for trial has not run.

We must assume that our Legislature in enacting the Speedy Trial Act, which includes section 701, was aware of the pre-existing section 927(c)(2). We must also assume that the legislature did not intend to do a vain act. Therefore, it is our belief that the provision "right to a speedy trial" found in section 927, refers to the defendant's constitutional right to a speedy trial, not his statutory right. This interpretation allows a harmonious existence between these statutes, and returns discretion to trial courts.

We conclude that the trial court did not abuse its discretion in joining the defendant and his co-defendants at trial. This assignment of error is overruled.

[7] Defendant also asserts a violation of his Constitutional Sixth Amendment right to a speedy trial. He claims that the State's intentional and capricious delaying of his indictment and trial unduly prejudiced him.

In considering whether a defendant has been denied his constitutional right to a speedy trial, we must consider factors such as the length of delay, reason for the delay, defendant's assertion of his right, and the resulting prejudice to the defendant. *Barker v. Wingo*, 407 U.S. 514, 33 L.Ed. 2d 101 (1972); *State v. Hill*, 287 N.C. 207, 214 S.E. 2d 67 (1975).

We do not find the length of the delay, a period of 147 days from the indictment to trial, inordinate or oppressive. This amount of time, standing alone, is insufficient to constitute an unreasonable and prejudicial delay. *State v. Shelton*, 53 N.C. App. 632, 281 S.E. 2d 684 (1981), *disc. rev. denied*, 305 N.C. 306, 290 S.E. 2d 707 (1982). Nor do we find the additional period of delay between defendant's arrest and indictment to be unduly overbearing and unreasonable. We must emphasize that the better practice is one where the indictment and arrest procedures occur within a short time of each other. In this case, it appears that due to the condition of the victim's body and the attempted destruction of the evidence the State may have required more time to gather the evidence to present its case to the grand jury.

We have held that "[t]he burden is on an accused who asserts denial of his constitutional right to a speedy trial to show that the delay was due to the neglect or willfulness of the prosecution." (Citations omitted.) *State v. Tann*, 302 N.C. 89, 94, 273 S.E. 2d 720, 724 (1981). The trial court determined that the State had not deliberately failed to prosecute the action and that defendant's Sixth Amendment right to a speedy trial had not been violated. Upon a careful review of the record and briefs, we agree that there is insufficient evidence of intentional and calculated delay.

[8] The defendant asserted his speedy trial right five days before trial. However, he failed to prove actual and substantial prejudice. Defendant alleges that the delay caused his memory to fade. In *State v. Dietz*, 289 N.C. 488, 223 S.E. 2d 357 (1976), we held that a defendant's *general* allegation of faded memory was insufficient to carry his burden of showing prejudice from the delay. The defendant must show that the resulting lost evidence or

testimony was significant and would have been beneficial to his defense. This assignment of error is without merit.

We shall now address the defendant's remaining assignments of error which were not adjudicated by the Court of Appeals.

[9] Defendant would concede that "in a homicide prosecution photographs showing the condition of the body when found, its location when found, and the surrounding scene at the time the body was found are not rendered incompetent by the portrayal of the gruesome events which the witness testifies they accurately portray." *State v. Elkerson*, 304 N.C. 658, 665, 285 S.E. 2d 784, 789 (1982). Defendant argues, however, that "[i]n the subject case the deceased had been slain several months before discovery and the photographs show only a deteriorated body," and because a witness had already testified that the body was in an advanced state of decomposition, the photographs had no probative value. We disagree. The photographs were relevant for identification purposes as they depicted tattoos on various portions of the victim's body. Furthermore, just as a stipulation as to cause of death does not render photographs irrelevant, likewise photographs are rendered no less relevant simply because a witness testifies as to what the photographs in fact depict. *See State v. Calloway*, 305 N.C. 747, 291 S.E. 2d 622 (1982). This assignment of error is without merit.

[10] The defendant next contends that the trial court erred in admitting evidence of the victim's fingerprints. The fingerprints appeared on a clear piece of acetate which had not been furnished to the defendant during voluntary discovery. Prior to trial, however, the defendant had received a copy of the report from the fingerprint expert. Thus, had defendant considered it necessary to inspect the actual fingerprints before trial, he was on notice of their existence and could have requested an inspection. This assignment of error has no merit.

[11] Defendant further contends that the trial court erred in allowing the State to ask a witness for the State if she had pled guilty to the offense of accessory after the fact of murder. The question was asked on redirect examination in an effort to establish that the witness, Sharon Short, had made statements which were consistent with her trial testimony. The defendant, however, characterizes the question as an effort by the State to impeach its

own witness and argues that the error is prejudicial in that "in the eyes of the jury, in order for Ms. Short to be guilty of accessory after the fact of murder, defendant Marlow must be guilty of murder." It is the defendant who is in error here. The question was not propounded for the purpose of impeachment, but rather to elicit evidence of a prior consistent statement, a proper subject on redirect examination. *See State v. Williams*, 305 N.C. 656, 292 S.E. 2d 243, *reh. denied*, 103 S.Ct. 839 (1982). Furthermore, in *State v. Rothwell*, 308 N.C. 782, 786, 303 S.E. 2d 798, 801 (1983) we stated:

> (E)vidence of a co-defendant's guilty plea is not competent as evidence of the guilt of the defendant standing trial. Thus, if such evidence is introduced for that illegitimate purpose—solely as evidence of the guilt of the defendant on trial—it is not admissible. Our case law indicates, however, that if evidence of a *testifying* co-defendant's guilty plea is introduced for a *legitimate* purpose, it is proper to admit it. In *State v. Potter*, 295 N.C. 126, 244 S.E. 2d 397 (1978), this Court held that it was not error to admit into evidence a co-defendant's testimony concerning his guilty plea when the State elicited that testimony on redirect examination in order to bolster the witness' credibility after the defendant, on cross-examination, had called the witness' credibility into question.

The assignment of error is overruled.

[12, 13] Defendant's next contention concerns testimony by an S.B.I. agent in which the witness used the word "murder." It is defendant's position that the witness was thereby permitted to express an opinion "on the question before the jury." Although defendant objected to the answer as given, he failed to move to strike. Failure to move to strike a portion of an answer, even though the answer is objected to, results in waiver of the objection. *See State v. Chatman*, 308 N.C. 169, 301 S.E. 2d 71 (1983); *State v. Jordan*, 305 N.C. 274, 287 S.E. 2d 827 (1982). Furthermore, in the context of the question, the witness's answer, including his use of the word "murder," may be classified as a shorthand statement of fact. The witness was asked when the Marions had moved from a particular house and the witness replied "several months after the murder." The inference drawn by the witness flowed naturally and logically from the facts and cir-

cumstances about which he testified. *See State v. Martin*, 309 N.C. 465, 308 S.E. 2d 277 (1983); *see also State v. Corbett*, 307 N.C. 169, 297 S.E. 2d 553 (1982) (witness's use of the words "rape" examination and "rape" kit held to be a shorthand statement of fact); *State v. Porter*, 303 N.C. 680, 281 S.E. 2d 377 (1981) (witness's testimony that he had been "robbed" properly admitted as a shorthand statement of fact). The assignment of error is overruled.

[14] As his next assignment of error defendant argues that the trial court erred in limiting him to four character witnesses "when this defendant had already used three character witnesses and the other two codefendants had not called any character witnesses." The record discloses that the defendant had, in fact, called four character witnesses, but had he not been limited, a fifth character witness would have been called. The record does not reflect what the fifth character witness would have said if allowed to testify.

Defendant concedes that "[g]enerally a trial court may, at its discretion, limit the number of witnesses a party may call," but argues that "the ruling by the Court must not materially affect the rights of the parties." Inasmuch as defendant has failed to reveal the nature of the excluded testimony, he has shown no prejudice. *State v. Wilson*, 304 N.C. 689, 285 S.E. 2d 804 (1982). Even assuming that this testimony would have been favorable to the defendant, it would have been merely cumulative in light of the testimony of his other four character witnesses. The trial judge has discretion to control how far the parties may go in corroborating witnesses on collateral matters in a trial. *State v. White*, 307 N.C. 42, 296 S.E. 2d 267 (1982). Thus, the trial judge acted well within his authority in excluding the testimony.

[15] It is defendant's contention that the trial judge erred by not including self-defense, defense of others and manslaughter in his charge to the jury. We disagree.

In order to justify the submission of an instruction on perfect self-defense it must be shown that, at the time of the killing

> (1) it appeared to defendant and he believed it to be necessary to kill the deceased in order to save himself from death or great bodily harm; and

(2) defendant's belief was reasonable in that the circumstances as they appeared to him at the time were sufficient to create such a belief in the mind of a person of ordinary firmness; and

(3) defendant was not the aggressor in bringing on the affray, i.e., he did not aggressively and willingly enter into the fight without legal excuse or provocation; and

(4) defendant did not use excessive force, i.e., did not use more force than was necessary or reasonably appeared to him to be necessary under the circumstances to protect himself from death or great bodily harm.

State v. Bush, 307 N.C. 152, 158, 297 S.E. 2d 563, 568 (1982).

With respect to the submission of an instruction on imperfect self-defense, in *Bush* we stated that:

> Imperfect self-defense arises when only elements (1) and (2) in the preceding quotation are shown. Therefore, if the defendant believed it was necessary to kill the deceased in order to save himself from death or great bodily harm, and the defendant's belief was reasonable because the circumstances at the time were sufficient to create such a belief in the mind of a person of ordinary firmness, but the defendant, although without murderous intent, was the aggressor or used excessive force, the defendant would have lost the benefit of perfect self-defense. In this situation he would have shown only that he exercised the imperfect right of self-defense and would remain guilty of at least voluntary manslaughter. *State v. Wilson*, 304 N.C. 689, 695, 285 S.E. 2d 804, 808 (1982). However, both elements (1) and (2) in the preceding quotation must be shown to exist before the defendant will be entitled to the benefit of either perfect or imperfect self-defense.

Id. at 159, 297 S.E. 2d at 568.

Applying this law to the facts, we do not believe that the evidence supports the submission of the requested instructions on self-defense, defense of others, or manslaughter. The evidence shows without contradiction that the defendant and another male stood in the doorway of the room where the victim lay either sleeping, unconscious, or pretending to be unconscious. The two

men did all they could to arouse the victim, including setting off firecrackers in the bedroom. After they could not arouse the victim, the defendant expressed disgust by cursing and then "pulled the gun out and shot (the victim)" in the head five times with a pistol. The victim made no sounds and no movements prior to being shot. There was no testimony that defendant was in any danger. It is clear that the defendant placed himself at the doorway of the bedroom and attempted to arouse the victim. Nor is there any evidence that the defendant acted in the heat of passion. In short, the evidence points unerringly to the fact that the killing was intentional and that defendant did not have a reasonable fear for his safety; that the defendant was the aggressor and that the force used was excessive. The assignment of error is without merit.

Defendant argues that the trial court erred by not allowing into evidence character evidence about the deceased with regard to his alleged reputation for violence and dangerousness.

This assignment is entirely based upon defendant's claim that he was entitled to an instruction on self-defense. Since we have concluded that he is not entitled to an instruction on self-defense, this assignment of error is without merit and overruled.

[16] Finally the defendant argues that Judge Rousseau erred by interrupting the closing argument of defense counsel.

The transcript does not contain the closing argument of defense counsel and the alleged interruption. The transcript does, however, disclose the following:

> MR. EVANS: So with that regard, Your Honor, I'd just like for the record to show that while I was arguing with regard to excuse, justification or just cause, I was interrupted and instructed by you that there was no evidence of just cause, excuse or justification in this case.
>
> COURT: Well, let the record show that you were arguing to the jury something to the effect that he would not be guilty if he had some just cause, excuse or justification—
>
> MR. EVANS: That's correct.

COURT: —And I interrupted you and said there is no evidence of any justification or excuse. All right, Sir.

Disregarding the confusion engendered by defense counsel's failure to include the closing argument and the alleged interruption in the record, and assuming that defense counsel took exception to the interruption or requested a curative instruction, we nevertheless find no error.

In *State v. Smith*, 305 N.C. 691, 292 S.E. 2d 264, *cert. denied*, 74 L.Ed. 2d 622 (1982), Judge Fountain made statements in the jury instructions similar to those allegedly made in this case during defense counsel's closing argument. We stated in that opinion:

> First, we do not believe that Judge Fountain's reference to the *complete absence* of certain evidence constituted an impermissible opinion upon a controverted fact. Rather, the contested statement was merely a legal recognition, correctly made upon the record, that the State's evidence had not disclosed the presence of just cause or adequate provocation to excuse the killing and that the defendant had not fulfilled his burden of going forward with or producing any such evidence either . . .
>
> Secondly, there is no indication that Judge Fountain's statement wrongfully or absolutely withdrew from the jury's consideration any circumstances which might have tended to negate premeditation, deliberation or malice in the charged killing, ... Simply put, there is no reason to believe that the jury was misled or confused by the trial court's remark; thus, we can perceive no ascertainable prejudice to defendant in any event.

Id. at 703, 292 S.E. 2d at 272.

This last assignment of error is without merit and overruled.

Defendant has received a fair trial and a fair sentence free of prejudicial error.

The opinion of the Court of Appeals is reversed.

Reversed.

Justice EXUM dissenting.

The majority's holding that a criminal defendant's request for voluntary discovery *automatically tolls* the running of the statutory speedy trial period until the state voluntarily responds finds no support in the statute, N.C. Gen. Stat. § 15A-701, or in reason; and it seriously undercuts the policy of the Speedy Trial Act and the criminal discovery statutes, N.C. Gen. Stat. § 15A-902, *et seq.*

The majority relies on that part of the Speedy Trial Act which provides:

> (b) The following periods shall be excluded in computing the time within which the trial of a criminal offense must begin:
>
> (1) Any period of delay resulting from other proceedings concerning the defendant including, but not limited to, delays resulting from:
>
> a. A mental or physical examination of the defendant, including all time when he is awaiting or undergoing treatment or examination, or a hearing on his mental or physical capacity; or
>
> b. Trials with respect to other charges against the defendant;
>
> c. Interlocutory appeals; or
>
> d. Hearings on any pretrial motions or the granting or denial of such motions.

N.C. Gen. Stat. § 15A-701(b). All of the listed "proceedings" involve court action. This is what makes them "proceedings." A request for voluntary discovery and the state's voluntary response thereto is not a "proceeding" within the meaning of the statute inasmuch as it involves no court action.

The statute requires that the proceeding be, in fact, the cause of a period of delay before that period is excluded from the statutory period. It provides that the period of delay must *result from* the proceeding in question. In holding that a motion for change of venue tolled the running of the statutory period until

the motion could be determined, we noted in *State v. Oliver*, 302 N.C. 28, 42, 274 S.E. 2d 183, 192 (1981):

> The state is in fact stymied in its scheduling of any case for trial until a ruling is made on such a motion. A motion for change of venue so long as it is pending must necessarily delay the setting of a case for trial until it is determined, and this is so whether the determination be soon after the 120-day period begins to run or at some later time within the period. We believe the legislature intended through G.S. 15A-701(b)(1)(d) to exclude from the 120-day speedy trial period all time reasonably required to determine any motion the determination of which must be made before a case can be scheduled for trial. A motion for change of venue, as we have noted, is such a motion.

A request for voluntary discovery does not necessarily delay the setting of any case for trial. Certainly it is clear in this case that the request did not in fact delay the scheduling of trial.

Should either the state or defendant be required to move the court for a discovery order so that discovery does become a court proceeding and if this proceeding results in a delay in scheduling the trial, I would have no quarrel with excluding the delay from the running of the speedy trial statutory period. This, however, is not the case before us.

To hold that defendant's mere request for voluntary discovery which did not in fact result in any delay in scheduling the trial nevertheless tolls the running of the Speedy Trial Act period both emasculates the act and places an extraordinarily high price on engaging in voluntary discovery, particularly for a defendant who, as here, is in jail awaiting trial. I am confident the legislature never envisioned such results when it provided for speedy trials and criminal discovery.

I note that the state did not assert either at trial or in the Court of Appeals that the Speedy Trial Act period should be tolled upon defendant's filing a motion for voluntary discovery. The state never contended in the trial court that the trial was delayed because of defendant's request for voluntary discovery. It makes the argument for the first time in this Court.

My vote, therefore, is to conclude, as did the Court of Appeals, that the matter should be remanded to the trial court to determine whether to dismiss the indictment with or without prejudice because trial was not had within the 120-day period prescribed by the Speedy Trial Act.

Justice FRYE joins in this dissenting opinion.

STATE OF NORTH CAROLINA v. REGINALD L. ROBINSON

No. 515A83

(Filed 3 April 1984)

1. **Rape and Allied Offenses § 11— rape in first degree—insufficiency of evidence**

In a prosecution for rape in the first degree of a female child under 12 years of age, defendant being over the age of 12 and more than four years older than the child, the evidence was insufficient to withstand defendant's motion to dismiss the charge at the close of the State's evidence and was insufficient to withstand defendant's subsequent motion to set aside the verdict as contrary to the law and the evidence where the State failed to offer the requisite evidence to establish beyond a reasonable doubt the fact that defendant had vaginal intercourse with the child. A careful review of the statements made by the prosecuting witness regarding the events of the day of the crime and the sexual misconduct of the man who abused her revealed that the child nowhere described an act of sexual intercourse; defendant's statement that "I did it . . .," is ambiguous, requiring the jury to speculate what he meant by "it"; and the examining doctor's testimony that a male sex organ "could" cause the vaginal condition he found in the child was insufficient evidence to submit the charge of the crime of rape in the first degree to the jury.

2. **Rape and Allied Offenses § 17— ability to sentence on lesser offense on remand of rape case**

By its verdict of guilty of rape in the first degree, the jury necessarily found beyond a reasonable doubt all the elements of the lesser offense of attempt to commit rape, and pursuant to G.S. 15-170, and G.S. 14-27.6, where the evidence was insufficient to support the jury's verdict of rape in the first degree, the case is remanded for sentencing on the offense of attempt to commit rape in the first degree.

3. **Constitutional Law § 30— failure to disclose criminal record of State's witnesses—no denial of due process**

Defendant failed to show prejudice in the trial court's refusal to grant his motion in limine as to evidence of prior acts of misconduct and prior convictions of the State's witnesses, regardless of whether they resulted in criminal charges against the witness. G.S. 15A-903 does not grant the defendant the

right to discover the names and addresses, let alone the criminal records, of the State's witnesses and fundamental fairness and the right to due process does not compel disclosure absent a showing (1) that the witness had a significant record of degrading or criminal conduct; (2) that the impeaching information sought was withheld by the prosecution; and (3) that its disclosure considered in light of all the evidence would have created a reasonable doubt of his guilt which would not otherwise exist.

4. Criminal Law § 43— admission of photographs illustrating testimony proper

In a prosecution for first degree rape, the trial court did not err in allowing into evidence photographs of the area where the victim's clothes were found and photographs of the clothes as a means of illustrating the testimony of a witness concerning the location of the scene and the search for the victim's missing clothes.

5. Criminal Law § 53— medical expert testimony in rape case—proper

A physician's "speculative testimony concerning the possible cause" of a possible rape victim's injuries was properly admitted pursuant to G.S. 8-58.12 and 8-58.13 where the expert used the word "could" with respect to a penis being the cause of the victim's injuries and where he did not testify that the child had been raped, nor that defendant raped her, and where he did offer the quite proper opinion that she had been penetrated and that her internal injuries had been caused thereby.

6. Rape and Allied Offenses § 10— competency of four-year-old rape victim to testify

Where the record of a first degree rape trial disclosed that the court inquired into a four-year-old child's intelligence and understanding and admitted her testimony upon evidence which supported his conclusion of competency, the conclusion will not be disturbed on appeal.

7. Criminal Law § 162— failure to object to failure to swear in witness—waiver

Defendant's failure to object to a four-year-old witness being allowed to testify without being sworn as a witness was fatal to defendant's argument citing error by the trial court.

APPEAL by defendant from judgment of *Johnson, J.*, entered at the 23 May 1983 Criminal Session of the CUMBERLAND County Superior Court. Heard in the Supreme Court 16 February 1984.

Defendant was charged in an indictment proper in form with rape in the first degree of Selena McDonald, a female child under twelve years of age, defendant being over the age of twelve and more than four years older than Selena McDonald.

The state presented evidence tending to show the following:

The alleged rape took place on or about 14 August 1982 when Selena McDonald was three years old. At around 10:30 or 11:00 on

the evening of 13 August 1982, the child accompanied her aunt, fourteen-year-old Maritza James, her twenty-year-old uncle, and others to a party in the Riverside Trailer Park. Arriving at the location of the party, Maritza went to a nearby residence to visit, leaving Selena with a girlfriend, Connie. When Connie appeared later without Selena, a search of the area was begun to locate the child.

After a period of time, Selena was heard crying near a tree next to the trailer park. She was found by Terry McLean. McLean picked up the child, who was clad only in a little shirt, her face bruised and her hair mussed. As he did so, he saw defendant emerge from the trees with his pants unzipped. Other witnesses testified that they observed Selena with McLean, that she was missing all of her clothes but a shirt, and that defendant's penis was out of his pants. Defendant was heard to say, "I did it, but don't let them hurt me." Selena's uncle testified that he went back to the trailer park two months later, accompanied by two investigating officers, and found the missing items of clothing Selena had been wearing on the night in question.

Dr. Perry Harmon, testifying as an expert in the field of obstetrics and gynecology, examined Selena thoroughly under general anesthesia on the morning of 14 August 1982. His examination revealed vaginal abrasions, a laceration, and stretching, caused in his opinion by a "blunt instrument" which "could" mean "a male sex organ" and would "require an object larger than say a finger." He discovered no internal damage in the upper vagina.

Selena McDonald testified at trial, having been found competent at a voir dire hearing. She was not sworn as a witness. When questioned by the trial court in the presence of the jury, she testified, in part, as follows:

Q. All right. You say this man grabbed you?

A. (*Nodded head affirmatively.*)

Q. All right. You tell us what happened.

A. He—he put his ding-a-ling in my mouth. He stuck his finger in my thing right there (indicating).

Q. All right.

A. And then he—he put his—I mean, he slapped me four different times like this (indicating), and then he—then he tell me he don't—don't do nothing and don't say nothing. And don't—he rolled over. He rolled over about that many.

She did not identify defendant as the person who abused her.

The defendant presented no evidence. From the mandatory life sentence imposed upon his conviction of rape in the first degree, defendant now appeals to this Court.

Rufus L. Edmisten, Attorney General, by H. A. Cole, Jr., Special Deputy Attorney General, and Fred R. Gamin, Assistant Attorney General, for the State.

Mary Ann Tally, Public Defender, Twelfth Judicial District, for defendant.

MARTIN, Justice.

[1] At the close of the state's evidence in this case, counsel for the defendant moved to dimiss the charge for insufficiency of the evidence. The defendant has assigned as error the trial judge's refusal to grant the motion, as well as his subsequent denial of defendant's motion to set aside the verdict as contrary to the law and the evidence in this case.

There is merit in these arguments.

Considering the testimony favorable to the state and assuming it to be true, *State v. Bowman*, 232 N.C. 374, 61 S.E. 2d 107 (1950), we find that this evidence is not sufficient to sustain the allegation of the indictment that defendant raped Selena McDonald. The state has not offered the requisite evidence to establish beyond a reasonable doubt the fact that defendant had vaginal intercourse with the child. *State v. Jones*, 249 N.C. 134, 105 S.E. 2d 513 (1958); *State v. Cope*, 240 N.C. 244, 81 S.E. 2d 773 (1954); N.C. Gen. Stat. § 14-27.2 (Cum. Supp. 1983). *See also* 75 C.J.S. *Rape* § 67 (1952).

It is true that the law does not require the complaining witness to use any particular form of words in stating that defendant had carnal knowledge of her, *State v. Bowman, supra*, and further that "vaginal intercourse" in a legal sense is proven if there is the

slightest penetration of the sexual organ of the female by the sexual organ of the male. *State v. Jones, supra* (and cases cited therein).

However, it is equally true that "[n]o matter how disgusting and degrading defendant's conduct as depicted by the witness may have been, his conviction should not be sustained unless the evidence suffices to prove the existence of each essential ingredient of the crimes for which he was being tried." *State v. Whittemore*, 255 N.C. 583, 586, 122 S.E. 2d 396, 398 (1961). The corpus delicti in a prosecution for rape may be proved, inter alia, by the testimony of the prosecutrix and corroborating circumstances or by circumstantial evidence. 75 C.J.S., *supra*, § 67.

A careful review of every statement made by Selena McDonald regarding the events of the night of 13 August 1982 and the sexual misconduct of the man who abused her reveals that the child nowhere described an act of sexual intercourse. There remain the statements by defendant at the time he was discovered with Selena, the examining doctor's testimony that a male sex organ "could" cause the vaginal condition he found in the child, and the circumstantial evidence of defendant's compromising appearance. Defendant's statement, "I did it . . .," is ambiguous, requiring the jury to speculate what he meant by "it."

We hold as a matter of law that the evidence is insufficient to submit the charge of the crime of rape in the first degree to the jury. We therefore vacate the judgment in this case.

[2] N.C.G.S. 15-170 provides: "Upon the trial of any indictment the prisoner may be convicted of the crime charged therein or of a less degree of the same crime, or of an attempt to commit the crime so charged, or of an attempt to commit a less degree of the same crime." It is well settled that this statutory section is applicable only when there is evidence in the case tending to show that the defendant may be guilty of a lesser offense. *State v. Weaver*, 306 N.C. 629, 295 S.E. 2d 375 (1982); *State v. Murry*, 277 N.C. 197, 176 S.E. 2d 738 (1970); *State v. Jones, supra*, 249 N.C. 134, 105 S.E. 2d 513.

Pursuant to N.C.G.S. 15-170 and N.C.G.S. 14-27.6, hereinafter explained, we are remanding this case for sentencing on the offense of attempt to commit rape in the first degree.

"An attempt to commit first-degree rape as defined by G.S. 14-27.2 . . . is a Class F felony." N.C. Gen. Stat. § 14-27.6 (1981).[1] In order to prove this offense the state must show that the defendant had the intent to commit the crime and committed an act that goes beyond mere preparation but falls short of actual commission of the offense. *State v. Boone*, 307 N.C. 198, 297 S.E. 2d 585 (1982). In his charge to the jury, Judge Johnson included an instruction on the offense of attempt to commit rape in the first degree.

On this charge, the state is required to prove beyond a reasonable doubt that defendant intended to have sexual intercourse with the child. "Intent is an attitude or emotion of the mind and is seldom, if ever, susceptible of proof by direct evidence, it must ordinarily be proven by circumstantial evidence, *i.e.*, by facts and circumstances from which it may be inferred." *State v. Gammons*, 260 N.C. 753, 756, 133 S.E. 2d 649, 651 (1963). In order to convict defendant on this charge, it is not necessary for the state to prove an actual physical attempt forcibly to have sexual intercourse with the child. *State v. Hudson*, 280 N.C. 74, 185 S.E. 2d 189 (1971), *cert. denied*, 414 U.S. 1160 (1974). From the totality of the evidence in this case, the jury could properly infer that the defendant intended to have sexual intercourse with Selena. *Id.; State v. Mehaffey*, 132 N.C. 1062, 44 S.E. 107 (1903); *State v. Lang*, 46 N.C. App. 138, 264 S.E. 2d 821 (1980). Likewise, the evidence fully supports the conclusion that defendant committed acts upon Selena that fall short of actual commission of the offense. *State v. Boone, supra*, 307 N.C. 198, 297 S.E. 2d 585.

We hold that by its verdict of guilty of rape the jury necessarily found beyond a reasonable doubt all of the elements of the lesser offense of attempt to commit rape. *See State v. Small*, 301 N.C. 407, 272 S.E. 2d 128 (1980).

[3] We turn next to a consideration of defendant's remaining assignments of error. Defendant has assigned as error the trial court's refusal to grant his motion in limine as to evidence of prior acts of misconduct and prior convictions of the state's witnesses, regardless of whether they resulted in criminal charges

1. This section was enacted to replace the former crime of assault with intent to commit rape. *State v. Boone*, 307 N.C. 198, 297 S.E. 2d 585 (1982).

against the witness. At the hearing on this motion, immediately following the trial court's denial, the assistant district attorney acknowledged that certain of his witnesses "have not denied anything they've been convicted of to me yet that I know of." Defendant argues that this admission only strengthens his position on the question of the necessity of this impeaching information for an effective defense.

The relevant statute, N.C.G.S. 15A-903, does not grant the defendant the right to discover the names and addresses, let alone the criminal records, of the state's witnesses. Furthermore, a provision authorizing the discovery of such material was included in the draft of the original bill and subsequently deleted. N.C. Gen. Stat. § 15A-903 official commentary (1978); *see State v. Brown*, 306 N.C. 151, 293 S.E. 2d 569 (1982); *accord, State v. Smith*, 291 N.C. 505, 231 S.E. 2d 663 (1977).

Defendant concedes that the statute does not entitle him to the requested information but argues that "fundamental fairness and the right to due process" should nevertheless compel a decision in his favor. We find this due process argument to have been carefully addressed in *State v. Ford*, 297 N.C. 144, 254 S.E. 2d 14 (1979). Writing for this Court, Chief Justice Sharp framed the question as follows:

> The only issue, therefore, is whether the information which defendant sought from the prosecution was of such significance that the prosecutor's failure to disclose it resulted in the denial of the defendant's due process right to a fair trial. *United States v. Agurs*, 427 U.S. 97, 49 L.Ed. 2d 342, 96 S.Ct. 2392 (1976). . . .
>
> To establish a denial of due process defendant would have had to show (1) that Smith *had* a significant record of degrading or criminal conduct; (2) that the impeaching information sought was withheld by the prosecution; and (3) that its disclosure considered in light of all the evidence would have created a reasonable doubt of his guilt which would not otherwise exist. *United States v. Agurs, supra* at 112, 49 L.Ed. 2d at 354-55; 96 S.Ct. at 2401-2.

297 N.C. at 148-49, 254 S.E. 2d at 17. Assuming, arguendo, that defendant has satisfactorily proven (1) and (2) above, he clearly has made no showing of prejudice as required by (3).

This assignment of error must fail.

[4] Defendant next assigns as error the trial court's admission into evidence, over his objections, of state's Exhibits I through IV. These were, respectively: a photograph of the area at the Riverside Trailer Park depicting the tree where Selena McDonald's uncle located her clothes two months after her abduction; two photographs of the clothing itself—underwear, shorts, and a sandal; and a photograph of the trailer park depicting the layout of the park. Each exhibit was offered to illustrate the testimony of Selena's uncle, Abraham James, as he related facts concerning the location of the party and the search for Selena's missing clothes. Judge Johnson gave the proper limiting instructions concerning the illustrative purpose of these exhibits as they were presented at trial and again in his final charge to the jury. The photographs were properly admitted as evidence. *See generally* 1 Brandis on North Carolina Evidence § 34 (1982).

[5] The next two assignments of error concern the expert medical testimony of Dr. Perry Harmon. Defendant argues that the trial court erred in allowing Dr. Harmon to testify about Selena's injuries prior to the state's establishing the corpus delicti of the offense and in allowing Dr. Harmon's "speculative testimony concerning the possible cause" of these injuries.

Defendant concedes that a party may ordinarily call his witnesses in such order as he desires and departure from the regular order is within the sound discretion of the court. *See id.* § 24. Defendant having thereby waived the corpus delicti argument, we here consider only the following portion of trial testimony to which defendant objected:

> Q. What kind of instruments, Dr. Harmon, would cause the injuries, the abrasions and the stretching that you—and the laceration that you observed, sir?
>
> . . . .
>
> A. A blunt instrument.
>
> Q. And what do you mean by "a blunt instrument"?
>
> . . . .
>
> A. Well, a male sex organ could.

. . . .

Q. And what do you base that opinion on, Dr. Harmon?

. . . .

A. —just the arrangement and the distance between the—what I found. The distance from the—from the abrasions on the labia minora to the laceration in the vagina to the stretching of the hymenal ring would require an object (indicating) larger than say a finger. It—I don't think that you could do what I found with a single finger.

. . . .

Q. And would it require penetration of the vaginal area to inflict those injuries, sir?

. . . .

A. I believe so.

. . . .

Q. And you were able to insert your finger without causing any damage, is that correct, sir?

A. Absolutely. Um-hum. Because, as I said, the hymenal ring had already been traumatized. The upper vagina was very small, a normal caliber. It was just the hymenal ring and the lower, or vestibule, the lower part of the vagina, that had been traumatized and stretched.

We find no error in the admission of this testimony. N.C. Gen. Stat. §§ 8-58.12 and -58.13 (1981). Dr. Harmon's use of the word "could" is significantly weaker than a "probably" with respect to a penis being the cause of Selena's injuries. *State v. Atkinson*, 278 N.C. 168, 179 S.E. 2d 410, *death sentence vacated*, 403 U.S. 948 (1971). He did not testify that the child had been raped, nor that defendant raped her. He did offer the quite proper opinion that she had been penetrated and that her internal injuries had been caused thereby. *State v. Starnes*, 308 N.C. 720, 304 S.E. 2d 226 (1983); *State v. Galloway*, 304 N.C. 485, 284 S.E. 2d 509 (1981); *State v. Hunter*, 299 N.C. 29, 261 S.E. 2d 189 (1980).

[6] We next consider the defendant's argument that four-year-old Selena McDonald should not have been found competent to testify in this case. The record contains twenty-five pages of voir dire examination of Selena by Judge Johnson, the assistant district attorney, and the public defender. Based thereon, the trial court ruled that the child was competent to testify in this matter. We find no error in this ruling.

It is true that Selena was only three years old when she was abducted and four years old at the time of trial. It is also true that certain of her answers during the voir dire were as vague, even nonsensical, as one might expect from a little child of such tender years. "The test of competency is not age but capacity to understand and relate under the obligation of an oath a fact or facts which will assist the jury in determining the truth with respect to the ultimate facts which it will be called upon to decide." *Artesani v. Gritton*, 252 N.C. 463, 466, 113 S.E. 2d 895, 897 (1960). The competency of a witness to testify is a matter resting within the sound discretion of the trial judge. The record of this trial discloses that the court inquired into the child's intelligence and understanding and admitted her testimony upon evidence which supports his conclusion of competency. We will not disturb this discretionary action of the trial court. *See State v. Bowden*, 272 N.C. 481, 158 S.E. 2d 493 (1968); *McCurdy v. Ashley*, 259 N.C. 619, 131 S.E. 2d 321 (1963); *State v. Gibson*, 221 N.C. 252, 20 S.E. 2d 51 (1942).

[7] Defendant next argues that the trial court committed error by allowing Selena McDonald to testify without having her sworn as a witness.

This Court held in *State v. Dixon*, 185 N.C. 727, 117 S.E. 170 (1923), that in a criminal prosecution the defendant is entitled to have the testimony offered against him given under the sanction of an oath. This is a part of his constitutional right of confrontation. N.C. Const. art. I, § 23. Lawful oaths for the discovery of truth and establishment of right are necessary for good government. N.C. Gen. Stat. § 11-1 (1981). Every witness in a criminal prosecution must be sworn in accordance with the statute. *State v. Davis*, 69 N.C. 383 (1873). Sound as these rules of law are, they do not provide this defendant with relief. He did not object to Selena's being allowed to testify without being sworn as a wit-

ness. This failure to object is fatal to defendant's argument. This Court resolved this precise question in *State v. Gee*, 92 N.C. 756 (1885). In *Gee*, a witness testified for the state without being sworn. No objection was made by defendant. After a verdict of guilty, defendant made a motion for a new trial based upon the witness's testifying without being sworn. This Court found no error. The Court stated that *Gee* was a case of first impression and held that the failure to object constituted a waiver. If an objection had been made, the trial court could have corrected the oversight by putting the witness under oath and allowing him to redeliver his testimony, if necessary. The Court in *Gee* further stated that it would be detrimental to public justice to allow a defendant to remain silent, awaiting the chances of an acquittal, and, if disappointed in the result, fall back upon a reserved objection. Although *Gee* is ninety-nine years old, we find no reason to depart from its wisdom.

This is not a case calling for this Court to consider application of the "plain error rule," defendant's arguments to the contrary notwithstanding. Neither the trial judge's examination of Selena McDonald nor the absence of an oath was such "plain error" as would have had a probable impact on the jury's finding in this case. *See State v. Black*, *supra*, 308 N.C. 736, 303 S.E. 2d 804; *State v. Odom*, 307 N.C. 655, 300 S.E. 2d 375 (1983).

The defendant's next two assignments of error have to do with the trial judge's refusal to instruct the jury (1) that the state must prove defendant's guilt "beyond *all* reasonable doubt"; (2) that evidence of defendant's presence at or near the scene of the crime "may not be considered as proof that the defendant in fact committed the crime"; and (3) that the state must prove beyond a reasonable doubt the identity of the defendant as the perpetrator of the crime. With respect to (1) above, defendant cites no authority for the requested substitution of the word "all" for the standard "a" in the pattern jury instructions. We are in no way persuaded that the trial court erred in refusing to so alter the proper instruction. The trial court did agree to instruct, with respect to (2) and (3) above, that: "a person is not guilty of a crime merely because he is present at the scene or near the scene." Given the fact that the evidence in this case has established more than defendant's mere presence at or near the scene of these events, we find no error in the court's refusal to extend the in-

struction as requested. We need analyze defendant's arguments no further as we overrule these assignments of error.

Defendant's remaining assignments of error concern (1) the trial court's failure to include in his summary of the evidence the fact that Selena McDonald had never testified with regard to having engaged in vaginal intercourse; and (2) the trial court's refusal to grant defendant's motion for a new trial. These issues have been resolved in our foregoing analysis of the proper disposition of this case.

We, therefore, leave the verdict in this case undisturbed but recognize it as a verdict of guilty of the lesser included offense of an attempt to commit rape in the first degree. The judgment imposed upon the verdict of guilty of rape in the first degree is vacated, and the cause is remanded to the Superior Court, Cumberland County, for resentencing upon the verdict of guilty of an attempt to commit rape in the first degree.

Judgment vacated and case remanded for resentencing.

STATE OF NORTH CAROLINA v. JAMES HENRY MURRAY

No. 11A83

(Filed 3 April 1984)

1. **Constitutional Law § 62; Criminal Law § 135.3— first degree murder—death qualification of jurors—no denial of fair trial**

The procedure of "death qualifying" the jury in the guilt-innocence phase of a first degree murder trial did not result in a guilt prone jury so as to deprive defendant of a fair trial.

2. **Criminal Law § 117.4— instruction on accomplice *testimony*—no plain error**

Error, if any, in the trial court's instruction prior to an accomplice's testimony that the jury should examine such testimony with great care and caution if it found that the accomplice testified for the State in exchange for a charge reduction did not constitute "plain error" so as to permit appellate review of the instruction even though defendant failed to object thereto at the trial, since a cautionary instruction was not required at all prior to the accomplice's testimony where the accomplice had not been formally granted immunity, and since the jury was sufficiently instructed to consider the accomplice's testimony carefully in light of his possible bias.

3. **Criminal Law § 26.5— convictions of armed robbery and larceny—no double jeopardy**

Defendant was not twice placed in jeopardy for the same offense when he was tried and convicted for both the armed robbery of the victim by taking his wallet and keys and the felonious larceny of the victim's automobile since each crime charged contained an element not required to be proved in the other.

4. **Criminal Law § 86.2— circumstances of prior convictions of defendant**

The prosecutor was properly permitted to cross-examine defendant about prior convictions by asking whether defendant had been convicted on certain dates of particular crimes involving specified conduct against named persons.

5. **Criminal Law § 169.3— admission of evidence—error cured by other evidence**

Where evidence is admitted over objection, but the same evidence has theretofore or thereafter been admitted without objection, the benefit of the objection is ordinarily lost.

6. **Criminal Law § 162— admission of evidence not plain error**

In a prosecution for first degree murder, armed robbery and felonious larceny, error, if any, in the admission of testimony concerning defendant's live-in relationship with two women and his failure to support his illegitimate children was not such "plain error" as would have had a probable impact on the jury at trial.

7. **Criminal Law §§ 33.2, 162— evidence of motive—no plain error**

In a prosecution for first degree murder, armed robbery and felonious larceny, cross-examination of defendant regarding his lack of employment and income prior to the crimes, if error, was not sufficiently prejudicial to warrant a finding of "plain error."

8. **Criminal Law § 102.10— jury argument concerning defendant's prior convictions**

The prosecutor's jury argument concerning defendant's prior convictions and defendant's release from prison on 17 December and his subsequent killing of the victim on 28 December did not improperly imply that defendant's prior convictions should be considered as substantive evidence of defendant's guilt of the crimes charged where the prosecutor repeatedly reminded the jury that such evidence was to be considered only in evaluating defendant's credibility, and where the references to defendant's release from prison and his subsequent killing of the victim were supported by competent evidence.

9. **Criminal Law § 138— pecuniary gain aggravating circumstance**

The trial court erred in finding as an aggravating circumstance that a larceny was committed for pecuniary gain where there was no evidence that the larceny was committed for hire. G.S. 15A-1340.4(a)(1)(c).

Justice MARTIN concurring.

BEFORE *Stevens, Judge,* presiding, a jury found the defendant guilty of first degree murder, armed robbery, and felonious

larceny of an automobile. Judgment was entered on October 4, 1982 in Superior Court, NEW HANOVER County. The defendant was sentenced to life imprisonment on the murder conviction and to ten years on the conviction for felonious larceny, to begin at the expiration of the life sentence. Judgment was arrested on the armed robbery conviction. The defendant appealed his conviction and life sentence for murder directly to the Supreme Court as a matter of right pursuant to G.S. 7A-27(a). The Supreme Court allowed the defendant's motion to bypass the Court of Appeals on the larceny conviction on September 9, 1983. Heard in the Supreme Court on December 12, 1983.

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

Adam Stein, Appellate Defender, by Marc D. Towler, Assistant Appellate Defender, for the defendant appellant.

MITCHELL, Justice.

Through several assignments of error, the defendant contends the trial court committed error in a cautionary instruction to the jury and in allowing certain cross examination and argument by the State. The defendant also argues that his convictions for both armed robbery and felonious larceny violated his constitutional right to be free from double jeopardy. We find no merit in these assignments of error.

The defendant's convictions arose out of events which occurred on December 28, 1981 and which resulted in the death on the following day of Kauno Lehto, aged 70, owner of the Wilmington Bonded Warehouse. Four men were indicted for the offense and two defendants, Ricky Benbow and Lorenzo Thomas, agreed to testify at the trial of the defendant. In exchange for his testimony, Benbow was allowed to plead guilty to second degree murder. *See State v. Benbow*, 309 N.C. 538, 308 S.E. 2d 647 (1983) for a more detailed recitation of the facts surrounding the case.

At the trial of the defendant, the evidence for the State tended to show that the defendant and three other men, Benbow, Thomas and Freddy Stokes, met in the late afternoon of December 28, 1981 and agreed to go to the Wilmington Bonded Warehouse to rob Lehto, the warehouse owner. The evidence tended to

show that the men went to the warehouse on foot just as darkness fell and that Stokes and the defendant carried sticks. When they arrived at the warehouse, Stokes and the defendant positioned themselves on either side of the ramp which led into the office portion of the warehouse, while the other two men served as lookouts. Lehto emerged from the office between 6:05 and 6:15 p.m. on December 28. Both witnesses testified that Stokes took Lehto down the ramp and, along with the defendant, appeared to struggle with Lehto and to go through his pockets. Benbow testified that, when Stokes came down the ramp leading into the office, Stokes had the keys to Lehto's car which was parked at the foot of the ramp. The defendant, Stokes and Benbow got in the car and drove it away. Thomas testified that Stokes gave him marijuana for his participation in the robbery and that Stokes told the other two men that they would split the money.

Friends of Lehto's family found Lehto on the ramp of his warehouse at about 8:15 p.m. on December 28 after he failed to appear at home at his usual time. When they found him, Lehto's face was beaten beyond recognition and covered with blood. Lehto died the following morning in a hospital. An autopsy revealed that he had died of head injuries and brain swelling caused by blows with a blunt or semi-sharp object.

The defendant's evidence tended to show that, on December 28, 1981, he lived with his mother in Wilmington. He had been released from prison on December 17, 1981 after serving eight months of a two year prison sentence for assault. The defendant Murray denied that he saw Stokes, Benbow and Thomas on the night of December 28, 1981. Murray also denied beating or robbing Kauno Lehto or stealing his car on that night. Murray and alibi witnesses testified that from mid-afternoon until about 7:00 or 7:30 p.m. on December 28 the defendant was upstairs in his mother's home. He testified that after arriving at the home in mid-afternoon he did not leave the house again that day.

[1] In his first assignment of error, the defendant contends that the procedure of "death qualifying" the jury in the guilt-innocence phase of his trial deprived him of his right to a fair trial. Although the defendant received a life sentence in this case, his trial began as a capital case and the jury was selected pursuant to G.S. 15A-2000(a)(2). The defendant maintains that the procedure

of death qualifying a jury results in a guilt prone jury. We have found this argument to be without merit on numerous occasions, and we now reaffirm our previous holdings. *State v. Pinch*, 306 N.C. 1, 292 S.E. 2d 203, *cert. denied*, 459 U.S. 1056, 103 S.Ct. 474, 74 L.Ed. 2d 622 (1982), *reh'g denied*, --- U.S. ---, 103 S.Ct. 839, 74 L.Ed. 2d 1031 (1983); *State v. Avery*, 299 N.C. 126, 261 S.E. 2d 803 (1980); *accord Hutchins v. Woodard*, No. 84-8050 (4th Cir. March 13, 1984); *Barfield v. Harris*, 540 F. Supp. 451 (E.D.N.C. 1982), *aff'd* 719 F. 2d 58 (4th Cir. 1983). *Contra Keeten v. Garrison*, No. CC-77-193-M (W.D.N.C. Jan. 12, 1984).

[2] The defendant next assigns as error the trial court's instructions before the testimony of Richard Benbow, one of the two accomplice witnesses who linked the defendant to the crimes. Immediately prior to Benbow's testimony the court instructed the jury as follows:

> Now, members of the jury, the court instructs you that the testimony of this witness, Richard Benbow, is given under an agreement with the prosecution whereby the witness has agreed to testify for the State in exchange for a charge reduction. If you find that the witness testified in whole or in part for this reason, you should examine every part of his testimony with great care and great caution in deciding whether or not to believe him.

The defendant contends the court should have instructed the jury that Benbow was in fact testifying because of a plea agreement and that the jury was required to consider his testimony with care. In support of his argument, he cites *State v. Hardy*, 293 N.C. 105, 235 S.E. 2d 828 (1977) and *State v. Harris*, 290 N.C. 681, 228 S.E. 2d 437 (1976) in which this Court held that instructions at the close of the evidence which directed the jury to consider the witness's testimony with caution only if it found the witness to be an accomplice were erroneous.

The defendant did not object to this instruction at trial. As we have stated on numerous occasions, failure to object to errors at trial constitutes a waiver of the right to assert the errors on appeal. *State v. Oliver*, 309 N.C. 326, 307 S.E. 2d 304 (1983). In *State v. Odom*, 307 N.C. 655, 300 S.E. 2d 375 (1983) we adopted the "plain error rule" with regard to situations in which no objection or exception is made at trial to jury instructions. In *State v.*

Black, 308 N.C. 736, 303 S.E. 2d 804 (1983), we adopted the plain error rule for the situations in which no objection or exception is made to evidence admitted. Absent an exception preserved by objection or which by rule of law is deemed preserved, our review is limited to determining whether plain error was committed at trial. We have stated that plain error will be found

> 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 the error is such as to "seriously affect the fairness, integrity or public reputation of judicial proceedings" or where it can fairly be 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 (quoting *United States v. McGaskill*, 676 F. 2d 995, 1002 (4th Cir.), *cert. denied*, 459 U.S. 1018, 103 S.Ct. 381, 74 L.Ed. 2d 513 (1982) (emphasis original)).

Assuming for the sake of argument that the trial judge's cautionary instruction was error in this case, the mistake did not reach the level of plain error. The instruction was not required at all prior to Benbow's testimony. Unless a witness has been formally granted immunity there is no statutory requirement for any such cautionary instruction prior to testimony. *State v. Bare*, 309 N.C. 122, 305 S.E. 2d 513 (1983). Furthermore, in *Hardy* and *Harris*, cases cited by the defendant, we found similar instructions to be harmless. We note, too, that the trial court in its charge to the jury at the close of all of the evidence instructed that Thomas and Benbow were accomplices, and that the jury "should examine every part of the testimony of each of these witnesses with the greatest care and caution in deciding whether or not to believe him." The jury was clearly instructed to consider Benbow's testimony carefully in light of his possible bias. While we detect no error, any possible error certainly did not rise to the level of having "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. This assignment of error is rejected.

[3] The defendant next contends that he was twice placed in jeopardy for the same offense in violation of his rights under the Fifth and Fourteenth Amendments to the Constitution of the United States and Article I, Section 19 of the Constitution of North Carolina. He claims that because he was charged and tried for both the armed robbery of Lehto by taking his wallet and keys and the felonious larceny of Lehto's automobile, he was twice placed in jeopardy for the same offense.

The protections against double jeopardy provide that a person may not be unfairly subjected to multiple trials for the same offense. Nor may a defendant be punished twice for the same statutory offense. *State v. Pinch*, 306 N.C. 1, 292 S.E. 2d 203, *cert. denied*, 459 U.S. 1056, 103 S.Ct. 474, 74 L.Ed. 2d 622 (1982), *reh'g denied*, --- U.S. ---, 103 S.Ct. 839, 74 L.Ed. 2d 1031 (1983). A person's right to be free from double jeopardy is violated not only when he is tried and convicted twice for the same offense but also when one is charged and convicted for two offenses, one of which is a lesser included offense of the other. *See State v. Walden*, 306 N.C. 466, 293 S.E. 2d 780 (1982).

The defendant argues that the taking of the car in this case was actually a part of the armed robbery and that he was therefore tried for two crimes arising out of the same transaction. Since the defendant was tried for both offenses at a single trial, his objection, presumably, is that he has been subjected to multiple punishments for the same offense.

We note that the Supreme Court of the United States has held that, where a legislature clearly expresses its intent to proscribe and punish exactly the same conduct under two separate statutes, a trial court *in a single trial* may impose cumulative punishments under the statutes. *Missouri v. Hunter*, 459 U.S. 359, 103 S.Ct. 673, 74 L.Ed. 2d 535 (1983). We need not rely on *Hunter* here, however, since it is clear for other reasons that the defendant's protections against double jeopardy were not violated.

In a case involving facts very similar to this case, we have held that a defendant's protections against double jeopardy were not violated. In *State v. Revelle*, 301 N.C. 153, 270 S.E. 2d 476

(1980) the defendant was also tried and convicted of armed robbery and felonious larceny of an automobile after he took money and wallets from the inhabitants of a trailer before going outside and taking their car. This Court ruled that the crimes in that case represented separate actions by the defendant and held that, even where evidence to support two or more offenses overlaps, double jeopardy does not occur unless the evidence required to support the two convictions is identical. If proof of an additional fact is required for each conviction which is not required for the other, even though some of the same acts must be proved in the trial of each, the offenses are not the same. *State v. Perry*, 305 N.C. 225, 287 S.E. 2d 810 (1982).

In this case each crime charged contains an element not required to be proved in the other. The elements of armed robbery under G.S. 14-87 and our case law are:

(a) the unlawful taking or attempted taking of personal property from another person or in his presence;

(b) by use or threatened use of a dangerous weapon, implement or means;

(c) whereby the life of a person is endangered.

State v. Beaty, 306 N.C. 491, 293 S.E. 2d 760 (1982); *State v. Porter*, 303 N.C. 680, 281 S.E. 2d 377 (1981).

To convict for the crime of larceny there must be proof that a defendant

(a) took the property of another;

(b) carried it away;

(c) without the owner's consent; and

(d) with the intent to deprive the owner of his property permanently.

State v. Perry, 305 N.C. 225, 287 S.E. 2d 810 (1982). Larceny of goods having a value of more than $400.00 is a felony. G.S. 14-72(a).

It is clear then, that here at least one essential element of each crime is not an element of the other. We find no merit,

therefore, in the defendant's contentions that he was subjected to double jeopardy.

The defendant also assigns as error portions of the prosecutor's cross examination of him at trial. The defendant concedes that he did not object to most of the portions of the cross examination of which he now complains. The defendant contends he is nonetheless entitled to a new trial because of the questioning. Because the defendant failed to object to most of the cross examination, we must examine the portions of the record complained of for plain error. We find none.

[4] The defendant contends that three types of questions propounded to him by the prosecutor were improper. First, the defendant objects to questions concerning his prior convictions, claiming the prosecutor went beyond the proper limits of cross examination and attempted to use the convictions as substantive evidence of guilt. The questioning is fairly represented by the following excerpt from the transcript:

> Q. And on the same day, the 26th of April, 1976, were you convicted of assaulting Nathanial Mosely, by hitting him with your fists?
>
> A. Yes, I was.
>
> Q. On the 18th of April, 1976 were you convicted of assaulting Linda Diane Andrews by hitting her with your hands and fists?
>
> A. Yes, sir.
>
> Q. On the 18th of April, 1978, were you convicted of communicating threats by threatening to kill Wayne Watkins, and blow up his store?
>
> A. No, sir. I got charged with it, but I didn't do that. I got probation on that, but I didn't do that.
>
> Q. Well, were you convicted of that?
>
> A. I was with some friends, I guess yeah.
>
> Q. You were with some friends so you got convicted with them?
>
> A. Yes, sir.

* * *

Q. On the 18th of April, 1978, were you convicted of malicious damage to real property by breaking windows with an iron brace?

A. Yes.

Q. And on the 18th of April, 1978, were you convicted of malicious damage to the personal property of Rusty Butler, and assaulting George Dooer by striking him on the arm with an iron brace?

A. Same charge, yes, sir.

* * *

Q. On the 20th of November, 1974 were you convicted of unauthorized use of a motor vehicle?

A. Yes, sir. That's the same charge, yes, sir.

Q. Was that the taking of a 1963 Chevrolet from Odell Patterson?

A. Yes, sir.

* * *

Q. On the 22nd of July, 1981, July a year ago, were you convicted of assault with a deadly weapon inflicting serious injury by beating Charles Elbert Corbett on the head with a pistol on April the 11th, 1981?

A. Yes, sir.

Q. And you were sentenced to prison for that, is that correct?

A. Two year sentence.

Q. And did you, in fact, hit Charles Elbert Corbett on the head with that pistol?

A. No, sir.

Such questions were proper, and the trial court did not err by allowing them. A criminal defendant who elects to testify in his own behalf is subject to questions relating not only to his con-

victions for crimes but also to prior acts of misconduct which tend to discredit his character or challenge his credibility. *State v. Foster*, 293 N.C. 674, 239 S.E. 2d 449 (1977).

The defendant also complains that the prosecutor was permitted to question him in unnecessary detail instead of limiting his inquiry to the time, place and punishment for the defendant's convictions. We have stated that, rather than phrasing questions only in terms of convictions, the prosecutor may ask about the circumstances of a prior conviction in the same way he would ask about any specific prior misconduct. *State v. Mack*, 282 N.C. 334, 193 S.E. 2d 71 (1972). In *Mack* this Court ruled that such questions related to matters within the witness's knowledge and, when asked in good faith, were permissible. *See also State v. Lynch*, 300 N.C. 534, 268 S.E. 2d 161 (1980).

The prosecutor's questions clearly were proper. We note, too, that the trial court in this case properly instructed the jury that the evidence of prior convictions went only to the credibility of the defendant.

The defendant also claims the prosecutor's questions regarding the defendant's relationship with various women and his failure to support his illegitimate children were improperly allowed. The testimony responsive to the questioning revealed that the defendant had a live-in relationship with two women, that he had three illegitimate children and that he paid no support for the children or their mothers.

[5] The defendant made a general objection to three of the questions. They concerned why one of the women had moved out of the defendant's mother's home, how many times the defendant slept with one woman, and how one of the three children was supported. The defendant objected, however, to only three questions out of more than thirty similar ones. This Court has long held that where evidence is admitted over objection, but the same evidence has theretofore or thereafter been admitted without objection, the benefit of the objection is ordinarily lost. *See State v. Corbett*, 307 N.C. 169, 297 S.E. 2d 553 (1982); *State v. Reynolds*, 307 N.C. 184, 297 S.E. 2d 532 (1982); 1 *Brandis on North Carolina Evidence* § 30 (1982).

[6] The defendant has not shown that the error, if any, was such plain error as would have had a probable impact on the jury at trial. After thorough examination of the evidence presented against the defendant, we do not find a reasonable probability that the testimony concerning his relationship with women and his illegitimate children "tilted the scales" in favor of his conviction. *State v. Black*, 308 N.C. 736, 303 S.E. 2d 804 (1983).

[7] The defendant argues that the cross examination regarding his lack of employment and income prior to these crimes was improper because it implied a motive for robbery. The defendant objected when the prosecutor asked how much he had paid a year and a half before for a black blazer that he said he wore on the morning of the crime. The objection was overruled and the defendant answered, "$69.00." The remainder of the questions about income or financial status were admitted without objection.

This Court has held that generally such questioning is not considered improper. *State v. Ham*, 224 N.C. 128, 29 S.E. 2d 449 (1944); *State v. Cain*, 175 N.C. 825, 95 S.E. 930 (1918). Even if such questioning was error, the defendant has not shown that the admission of the evidence of lack of employment or money was sufficiently prejudicial to warrant a finding of plain error. Two witnesses gave eyewitness accounts of the defendant's involvement in the robbery and murder. We hold that the trial court's error, if any, did not create a reasonable probability that the testimony had an impact on the jury's verdict, and there was no plain error.

[8] The defendant finally argues that the prosecutor's argument at the close of the evidence improperly inferred that the defendant's prior convictions should be considered as substantive evidence of the defendant's guilt of the charged offenses. The prosecutor argued in pertinent part:

> . . . and again a person's record is to be considered by you in determining whether they're credible, whether they're believable.
>
> The Judge will tell you, and I will tell you, you can consider a person's record for one purpose, to determine whether or not that person is believable; his credibility.

> You know, something significant happened in this case on the 17th of December, 1981 when the prison authorities let that man out of prison. The evidence shows that they let him out the 17th of December, 1981. What happened? The 28th of December, 1981, he's already killed a man, killed Mr. Kauno Lehto.

Later in the same argument the prosecutor urged the following:

> A person's record is to be considered in considering his credibility, whether they are believable. You heard the things he admitted being convicted of. On the 17th of December he got out of prison. He had been convicted of beating a man in the head with a pistol. Beating a man in the head with a pistol. That goes to his credibility. You heard him admit other assaults that he had been convicted of. That goes to his credibility. Have you heard of Thomas being convicted of assault? Have you heard of Ricky Benbow being convicted of assault? You know, their convictions were for stealing things, but it goes to their credibility. Who had you heard being convicted of assaults? Why that defendant; beating a man in the head with a pistol. Convicted of an assault with a deadly weapon inflicting serious injury, and other assaults you heard about.

The argument of counsel must be left largely to the control and discretion of the presiding judge. Counsel for both sides are entitled to argue the law and facts in evidence and all reasonable inferences to be drawn therefrom. *State v. Lynch*, 300 N.C. 534, 268 S.E. 2d 161 (1980). Counsel may not argue to the jury incompetent and prejudicial matters, however, and may not "travel outside the record" by inserting facts not in evidence. *State v. Forney*, 310 N.C. 126, 310 S.E. 2d 20 (1984).

The defendant did not object to the arguments he now contends were erroneously allowed. Upon failure to object to statements made in closing arguments, the standard we employ is whether the statements amounted to such gross impropriety as to require the judge to act *ex mero motu*. *State v. Oliver*, 309 N.C. 326, 307 S.E. 2d 304 (1983); *State v. Craig*, 308 N.C. 446, 302 S.E. 2d 740, *cert. denied*, 104 S.Ct. 263, 78 L.Ed. 2d 247 (1983).

When he took the stand the defendant put his credibility in issue. The prosecutor could properly impeach his credibility by eliciting testimony about prior convictions. In reminding the jury of the defendant's prior convictions, the prosecutor also repeatedly reminded them that the evidence was to be considered only in evaluating the defendant's credibility. Furthermore, the prosecutor's references to the defendant's release from prison on December 17, 1981 and to his subsequent killing of a man by December 28 were supported by competent evidence. The defendant testified to the date of his release from prison, and two witnesses testified to his part in the crime on December 28. There was no error at all in the prosecutor's argument and clearly none so grossly improper as to require the trial court's intervention *ex mero motu*. We find the defendant's contentions in this regard to be without merit.

[9] As his final assignment of error, the defendant contends that in the sentencing phase of the trial the trial court improperly found as an aggravating circumstance that the defendant committed the larceny charged for hire or pecuniary gain. G.S. 15A-1340.4(a)(1)(c). The State has conceded that there was no evidence that the larceny in this case was committed for hire. As a result of our holding in *State v. Abdullah*, 309 N.C. 63, 306 S.E. 2d 100 (1983), without such evidence, the finding of the aggravating factor is error. Under our ruling in *State v. Ahearn*, 307 N.C. 584, 300 S.E. 2d 689 (1983), the larceny conviction must be remanded for a new sentencing hearing.

In summary we find no error in the guilt-innocence phase of the trial, and we remand the larceny conviction to the Superior Court, New Hanover County, for a new sentencing hearing.

Case No. 82CRS10111—Larceny—remanded for resentencing.

Case No. 82CRS10109—Murder—no error.

Justice MARTIN concurring.

I concur in the excellent opinion by Justice Mitchell, except in the application of the "plain error" rule to alleged evidentiary errors. I remain convinced that this rule should not be applied to

evidentiary questions, for the reasons stated in *State v. Black*, 308 N.C. 736, 744, 303 S.E. 2d 804, 809 (1983) (Martin, J., concurring).

STATE OF NORTH CAROLINA v. DONALD LEE HOBSON

No. 258A83

(Filed 3 April 1984)

1. **Criminal Law § 99.4— comment by trial judge in ruling on objection—no prejudicial error**

In a prosecution for first degree rape, incest and first degree sexual offense, the trial judge did not commit prejudicial error in stating that a prosecuting witness did not "have the benefit of the transcript in front of her to help her refresh her recollection" during the cross-examination of the witness concerning certain inconsistencies between the testimony she gave in district court in an earlier hearing and her testimony given at trial on direct examination. G.S. 15A-1232.

2. **Rape and Allied Offenses § 4.1— evidence of alleged prior rape admissible**

In a prosecution for rape, sexual offense, and incest involving defendant's 16-year-old daughter, the trial court properly allowed the State to introduce evidence tending to show that the defendant had raped his daughter about two years before when she was fourteen years of age.

3. **Rape and Allied Offenses § 6-- instructions concerning jury's use of evidence of prior rape**

There was no error in a trial court's instructions in a prosecution for first degree rape that the jury could use evidence of a prior rape to determine defendant's intent in this case.

4. **Rape and Allied Offenses § 6-- instructions—summary of evidence sufficient**

In a prosecution for first degree rape, a trial judge's summary of the evidence in his instructions which excluded testimony of witnesses to the effect that tests of material collected during a pelvic examination of a victim shortly after the crime were negative for either sperm or pubic hair was not erroneous in that the evidence was not substantive evidence which would clearly exculpate the defendant and since an absence of the summary of this evidence did not affect the outcome of the trial in any manner.

ON appeal by defendant as a matter of right from the judgments of *Strickland, Judge*, entered at the 7 February 1983 Session of WILSON County Superior Court. Defendant was charged in indictments, proper in form, with first degree rape, in-

cest and first degree sexual offense. The cases were joined for trial and the jury returned verdicts of guilty as charged. Defendant received mandatory life sentences to run consecutively for the first degree rape and first degree sexual offense convictions. After the sentencing hearing on the incest conviction, he received four years and six months to run concurrently.

In relevant part, the State presented evidence that Janice Hobson and the defendant had been married for about sixteen years. They had one daughter, Janet Lee, who was sixteen years old at the time of the incident. On 20 September 1982, the three of them were living together in the Wilson County town of Stantonsburg. The husband and wife had been separated for five years prior to 14 February 1982, when the marital relationship resumed.

During the morning and afternoon of 20 September 1982, Janice Hobson and her husband, the defendant, were at home. However, about 2:30 p.m. on that date, the defendant left and Janice remained at home alone until the daughter, Janet Lee, returned at about 9:00 p.m. Janet Lee went to bed about 11:00 p.m., while her mother waited another hour before going to bed. Sometime later, defendant came home and Janice let him in through the living room door. He sat on a chair beside the television and asked Janice to help him pull his clothes off. She removed his boots and his pants. Defendant took off his shirt leaving him clothed only in underwear. Janice testified that the defendant appeared to be intoxicated but he did not smell of alcohol.

Defendant told his wife Janice to awaken Janet Lee. She complied. Soon after Janet Lee entered the room, the defendant told Janet Lee to take her clothes off. She protested but he told her not to talk back to him or he would hit her in the face with his fist. Janice, being afraid of what the defendant would do, told Janet Lee to do what he said. After Janet Lee removed her clothes, defendant forced his wife to take her clothes off.

Defendant stepped into the kitchen and returned with a butcher knife. He forced first his daughter then his wife to perform fellatio on him. Then he made his daughter fondle her mother and perform cunnilingus on her, while he stood over them brandishing the butcher knife. Next the defendant forced his wife

to perform cunnilingus on Janet Lee. While both women were still lying on the floor, defendant rubbed the knife against their bodies and threatened to cut off Janice's nose. Janice attempted to seize the knife and is so doing badly cut her hand. A rag was secured and placed on the hand. Defendant commanded both his daughter and his wife to continue lying side by side on the floor. Using the knife as a pointer, defendant compared their bodies. He fondled Janet Lee's vagina prior to having intercourse with her. While the defendant was so occupied, Janice managed to escape and run out of the house.

Janice ran to a neighbor's house and Janet Lee followed within minutes. The naked women were given clothes by their neighbor, Mrs. Whitley, who summoned the police after being informed that the defendant had raped Janet Lee. Officers from the Wilson County Sheriff's Department arrived and transported the two women to their home to change clothes. No one was seen at the house at this time. They were taken to the hospital in Wilson where Janice received eight stitches on her hand. Janet Lee was examined by a doctor who collected the appropriate evidence for a rape kit.

Deputy Sheriff Hunt and two other deputies subsequently searched the Hobson house for the defendant, but were unable to find anyone. The next day, an officer returned to the residence to resume the search for the defendant. He found the defendant asleep on a blanket and pillow in the attic. The defendant had the odor of alcohol about him.

A forensic serologist for the State Bureau of Investigation, tested and examined the contents of the rape kit. The analyses of the evidence revealed no semen present on any of the items.

The daughter, Janet Lee, testified that this incident was not the first time the defendant had engaged in sexual intercourse with her. She related that when she was fourteen years old the defendant bought some champagne and carried her down a path. He then undressed her and had sexual intercourse with her even though she requested him not to. Janet Lee told her mother the next day and later told her aunt about this incident. She also talked with Officer Jordan of the Wilson Police Department, but no action was taken against defendant.

The State also introduced into evidence two social workers who told of statements made to them by Janet Lee. For the most part their testimony corroborated Janet Lee's.

Defendant offered evidence and testified on his own behalf. He related that he and his wife had reconciled in February 1982 after five years separation, during which time he had been living with another woman. Throughout the separation, defendant kept in touch with Janice and Janet Lee. He paid child support and when he had extra money he gave it to Janet Lee. After hearing from his sister that Janet Lee was "running wild," he moved back home.

All three lived in the same house after the reconciliation. Defendant indicated that he and his wife had trouble with Janet Lee lying to them. According to the defendant, Janet Lee would become upset when he and his wife slept together. Further, there were numerous books about sex in the house to which Janet Lee had access.

It appeared that two days before the incident in question, defendant and Janice had a quarrel concerning his old girl friend. There was some discussion about defendant moving out. Defendant did pack his clothes but never left.

At about 4:30 p.m., on the day of the alleged offenses, defendant testified that he left home and went to his girl friend's house. There he consumed four six-packs of beer and most of a fifth of vodka. He spent the rest of the day at various places drinking beer or playing cards. Later that night a friend drove him home. According to defendant, he entered the house through the door he normally used, the back door. When he went in the back door, defendant testified that he saw his wife and his daughter lying naked on the floor facing each other. Upon seeing this, he screamed causing them to scramble in their attempt to get up. About that time he said he grabbed a knife and Janice pushed up against him and cut her hand. Janice ran out the door with Janet Lee running behind her. Soon thereafter, defendant climbed into the attic to sleep, as was his custom when he was intoxicated. The next thing he remembered was Deputy Sheriff Mullins awakening him.

Defendant offered other evidence indicating that he was extremely intoxicated on the night in question when he went home. Defendant denied ever having sexual intercourse with his daughter and denied forcing Janice and Janet Lee to perform any sexual acts on each other or on him. It was his judgment that when he saw the two on the floor together they might have been engaging in a lesbian act.

Additional facts, which become relevant, will be incorporated into the opinion.

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

Nora Henry Hargrove, for the defendant.

COPELAND, Justice.

Defendant brings forward several assignments of error which he contends require a new trial. We disagree and affirm the sentences imposed.

[1] Under the first assignment of error, defendant argues that Judge Strickland's comment excusing Janice Hobson's inconsistent testimony expressed an opinion and deprived him of a fair trial in violation of N.C. Gen. Stat. § 15A-1232.

The record indicates that defendant's wife, Janice Hobson, one of the alleged victims of these crimes, was subjected to substantial cross-examination by counsel for defendant. At two points in this cross-examination, she was asked about discrepancies between testimony given in District Court in an earlier hearing and her testimony given at this trial on direct examination. She was not shown a transcript of her prior District Court testimony. She admitted certain inconsistencies between these two occasions with regard to when she removed her clothes and to whether the defendant was intoxicated at the time of the crime. It appears that at one time during the cross-examination, Judge Strickland, while sustaining an objection by the district attorney, said: "Well, she doesn't have the benefit of the transcript in front of her to help her refresh her recollection." The trial judge did, however, sustain the objection to the form of the question and afforded defense counsel an opportunity to rephrase the question.

Defendant now argues that this one comment constituted an expression of opinion by the trial judge in violation of N.C. Gen. Stat. § 15A-1232. The defendant contends that this was prejudicial to him because the opinion tended to bolster the credibility of the witness by providing an explanation for her difficulties in answering defense counsel's questions.

It is always proper, of course, to impeach a witness' testimony by showing it is inconsistent with prior statements by the same witness. 1 Brandis on North Carolina Evidence, § 45 (1982). Moreover, it is clear that the trial judge should refrain from making any remarks that would tend to express an opinion as to the credibility of the witness. *State v. Faircloth*, 297 N.C. 388, 255 S.E. 2d 366 (1979). However, when the trial judge does make a comment the burden is on the defendant to show prejudice. *State v. Arnold*, 284 N.C. 41, 199 S.E. 2d 423 (1973).

We conclude that the challenged remarks, read in context with all of the extensive cross-examination of Mrs. Hobson, does not constitute an expression of opinion concerning the witness' credibility. The trial judge merely stated the obvious, to wit, that Mrs. Hobson was testifying without the benefit of examining a transcript of her earlier testimony. Finally, defendant has failed to show any prejudice which would entitle him to a new trial. This assignment is without merit and is overruled.

[2] The defendant's second assignment of error contends that evidence of the alleged prior rape was inadmissible and extremely prejudicial to the defendant.

The defendant was charged with the rape, sexual offense, and incest involving his sixteen-year-old daughter. The State offered evidence tending to show that the defendant had raped his daughter about two years before when she was fourteen years of age. The defendant contends that this was improperly admitted because it was not relevant for any purpose and violated the principles of *State v. McClain*, 240 N.C. 171, 81 S.E. 2d 364 (1954). Justice Ervin in *McClain*, stated it was the general rule "that in a prosecution for a particular crime, the State cannot offer evidence tending to show that the accused has committed another distinct, independent or separate offense . . . even though the other offense is of the same nature as the crime charged." (Citations omitted.) *Id.* at 173, 81 S.E. 2d at 365. *See: State v. Moore*, 309

N.C. 102, 305 S.E. 2d 542 (1983). The defendant further argues that none of the exceptions to the general rule, which are enumerated in *McClain*, apply in this case.

In cases involving sex offenses, this Court has held numerous times that evidence of similar sex crimes is admissible. *State v. Effler*, 309 N.C. 742, 309 S.E. 2d 203 (1983); *State v. Shane*, 304 N.C. 643, 285 S.E. 2d 813 (1982); *State v. Greene*, 294 N.C. 418, 241 S.E. 2d 662 (1978); *State v. Arnold*, 284 N.C. 41, 199 S.E. 2d 423 (1973). *See also*, 1 Brandis on North Carolina Evidence, § 92 (1982). In particular, we have held admissible evidence which tends to show prior offenses of the same kind committed by the defendant with the prosecuting witness, such as occurred in the case at bar. *State v. Browder*, 252 N.C. 35, 112 S.E. 2d 728 (1960); *State v. Edwards*, 224 N.C. 527, 31 S.E. 2d 516 (1944); *State v. Broadway*, 157 N.C. 598, 72 S.E. 987 (1911). This assignment of error is overruled.

[3] Defendant next assigns as error the trial court's instructions that the jury could use evidence of the prior rape to determine defendant's intent in this case. Defendant argues that the instructions were "plain error" and deprived defendant of a fundamental right to a fair trial. *State v. Odom*, 307 N.C. 655, 300 S.E. 2d 375 (1983).

After defining the elements of first degree sexual offense, first degree rape and incest in his instructions to the jury, the trial judge specifically charged as follows:

> Now, in this case evidence has been received tending to show that Donald Lee Hobson had sexual intercourse with Janet Lee Hobson about two years ago. This evidence as received solely for the purpose of showing that the defendant had the intent which is a necessary element of the crime [sic] charged in this case. If you believe this evidence, you may consider it, but only for the limited purpose for which it was received.

We previously held the admission of evidence of the prior rape not to be error. We have examined the limiting instructions and found them appropriate to the evidence. Having found no error in the instructions we do not need to address the defendant's "plain error" argument. This assignment of error is overruled.

[4] Defendant finally asserts as error the trial judge's refusal to summarize the testimony of certain witnesses which the defendant deemed favorable to him.

In this connection, Judge Strickland, upon request, refused to summarize the testimony of three prosecution witnesses, Dr. Ederington, and S.B.I. Agents Spittle and Worsham. Their testimony was, in essence, that tests of material collected during a pelvic examination of Janet Lee Hobson shortly after the crime were negative for either sperm or pubic hair. Spittle and Worsham did testify, however, that such a result occurs at least fifty percent of the time.

Defendant argues that it was error for the judge to omit this testimony even though N.C. Gen. Stat. § 15A-1232 requires a summarization of only so much of the evidence as is necessary to apply the law thereto. *See: State v. Sanders,* 298 N.C. 512, 259 S.E. 2d 258 (1979), *cert. denied,* 454 U.S. 973, 70 L.Ed. 2d 392 (1981).

In the present case, the trial court adequately incorporated into his jury charge the substantive facts and contentions of both the State and the defendant. The evidence which defendant sought to have summarized was not substantive evidence which would clearly exculpate the defendant. This evidence was merely testimony which tended to impeach the prosecution's witnesses. *See: State v. Moore,* 301 N.C. 262, 271 S.E. 2d 242 (1980). Thus, the trial court was not required to summarize this evidence in order to explain the applicable law. We do not believe that the absence of this summary affected the outcome of the trial in any manner or that a different result would have occurred. We find no merit in defendant's final assignment of error.

Defendant received a fair trial free from prejudicial error.

No error.

STATE OF NORTH CAROLINA v. SOLOMON BROWN

No. 588A83

(Filed 3 April 1984)

1. Criminal Law § 104— consideration of evidence on motion to nonsuit

Upon a motion to dismiss in a criminal action, all the evidence admitted, whether competent or incompetent, must be considered by the trial judge in the light most favorable to the State, giving the State the benefit of every reasonable inference that might be drawn therefrom, and any contradictions or discrepancies in the evidence are for resolution by the jury.

2. Criminal Law § 106— sufficiency of evidence to support criminal conviction— standard to be applied

In determining whether there is sufficient evidence to support a criminal conviction, the standard to be applied is whether there is substantial evidence of each element of the offense charged, and substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. It is unnecessary also to apply the federal standard enunciated in *Jackson v. Virginia*, 443 U.S. 307 (1979), which states that there must be sufficient evidence to justify a rational trier of fact to find guilt beyond a reasonable doubt.

3. Narcotics § 1.3— manufacture of controlled substance—intent to distribute

The offense of manufacturing a controlled substance in violation of G.S. 90-87(15) does not require an intent to distribute unless the activity constituting manufacture is preparation or compounding. Therefore, where defendant was charged with manufacturing a controlled substance by packaging and repackaging cocaine, the State was not required to prove as an element of the offense of manufacturing that defendant intended to distribute the controlled substance.

4. Narcotics § 4.3— manufacture of cocaine—constructive possession—sufficiency of evidence

There was substantial evidence that defendant was in constructive possession of cocaine and other drug packaging paraphernalia so as to support his conviction of manufacturing a controlled substance by packaging and repackaging cocaine where the evidence tended to show that officers searched an apartment then occupied by defendant and two other persons; defendant was found standing 6-8 inches from a table upon which an officer observed two plastic packages containing a white powdery substance determined to be cocaine, several sandwich-type baggies, plastic bags containing flakes of a green vegetable substance, wire ties used to secure plastic containers of rice, a chemical used to absorb moisture, sheets of aluminum foil, a single-edge razor blade, and a plastic straw which is commonly used to ingest cocaine through the nose; the apartment was leased by defendant's brother and was a "drink house" used for parties rather than for living quarters; defendant had on his person a key to the apartment; defendant had over $1,700.00 in cash in his

pockets; and defendant had been under surveillance by the police for some time and, on every occasion that police observed him, he was at the apartment rather than at his claimed residence.

5. **Criminal Law § 173— opening door to evidence of conviction for which defendant on parole**

When, in a prosecution for the manufacture of cocaine, defendant elicited testimony on direct examination of his parole officer that defendant had been on parole for two years and was still on parole, he "opened the door" to the State's cross-examination of the parole officer concerning the conviction for which defendant was on parole, since evidence that defendant had been supervised for two years without revocation of parole created a favorable inference of a man who for at least two years had "walked the straight and narrow," and the State was free to probe into this evidence in an attempt to rebut the favorable inference which arose therefrom. Therefore, the trial court properly denied defendant's motion for mistrial made when the parole officer responded that defendant was on parole for possession and sale of heroin.

6. **Criminal Law § 173— opening the door to evidence**

The basis for the rule commonly referred to as "opening the door" is that when a defendant in a criminal case offers evidence which raises an inference favorable to his case, the State has the right to explore, explain or rebut that evidence.

Justice EXUM dissenting in part.

Justice FRYE joins in this dissenting opinion.

APPEAL by defendant pursuant to G.S. 7A-30(2) from a decision of the Court of Appeals, opinion by *Braswell, J.*, with *Johnson, J.*, concurring and *Becton, J.*, dissenting, 64 N.C. App. 637, 308 S.E. 2d 346 (1983), finding no error in the judgment entered by *Wood, Judge*, at the 10 March 1982 Criminal Session of FORSYTH Superior Court.

Defendant was charged in a bill of indictment with manufacturing a controlled substance by packaging and repackaging cocaine. Defendant entered a plea of not guilty and the State offered evidence which may be summarized as follows:

Officer Jerry D. Pittman of the Winston-Salem Police Department testified that he and Officers Hutchinson and Craig went to Apartment C at 1634 Chestnut Street, Winston-Salem, North Carolina armed with a search warrant to search that apartment. Upon entering, Officer Pittman called out, "Police—search warrant," and ran through the living room to the bedroom. He there observed defendant standing six to eight inches from a table upon which the officer observed an open brown paper envelope with

two plastic packages of white powdery substance, later determined to be cocaine, several sandwich-type baggies, plastic bags which contained flakes of a green vegetable substance, wire ties used to secure the plastic containers of rice, and a chemical used to absorb moisture in order to keep the powdery substance in high quality. There were also four sheets of aluminum foil, a single-edge razor blade, and a two-inch plastic straw which is commonly used to ingest cocaine through the nose. The testimony of Officers Hutchinson and Craig substantially corroborated Officer Pittman's testimony.

The State's evidence further tended to show that upon searching defendant, the officers seized a key to Apartment C and over $1,700 in cash from defendant's pocket. The State also offered evidence tending to show that this apartment was a "drink house" used for parties and that it was not used for living quarters.

Defendant offered evidence tending to show that the apartment was leased by defendant's brother, Lucious Brown, who also paid the utilities and other apartment expenses.

Nathaniel Small, who was one of the two men observed and arrested in the living room of Apartment C, testified for defendant. He stated that when the officers entered the apartment, defendant was not in the bedroom where the cocaine and other paraphernalia was located but was by the bar with him. Defendant also offered as a witness Mr. Jay Waller, defendant's parole officer, to establish that the apartment in question had not been defendant's residence for the past two years.

At the conclusion of all the evidence, defendant moved to set aside the verdict, renewed his motion to dismiss and his motion for mistrial, and also asked for a new trial. All motions were denied. Defendant appealed from a judgment imposing a prison sentence of ten years and a $10,000 fine.

The Court of Appeals found no error, Judge Becton dissenting. Defendant appealed as a matter of right pursuant to G.S. 7A-30(2).

Rufus L. Edmisten, Attorney General, by David S. Crump, Special Deputy Attorney General, for the State.

D. Blake Yokley for defendant-appellant.

BRANCH, Chief Justice.

Defendant assigns as error the trial judge's denial of his motion to dismiss.

[1] It is well settled that upon a motion to dismiss in a criminal action, all the evidence admitted, whether competent or incompetent, must be considered by the trial judge in the light most favorable to the State, giving the State the benefit of every reasonable inference that might be drawn therefrom. Any contradictions or discrepancies in the evidence are for resolution by the jury. *State v. Witherspoon*, 293 N.C. 321, 237 S.E. 2d 822 (1977). The trial judge must decide whether there is substantial evidence of each element of the offense charged. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *State v. Smith*, 300 N.C. 71, 78, 265 S.E. 2d 164, 169 (1980).

[2] We note in passing that the majority in the Court of Appeals stated that it was necessary to apply both the standard set forth in *State v. Smith, supra*, and the federal standard enunciated in *Jackson v. Virginia*, 443 U.S. 307, *reh. denied*, 444 U.S. 890 (1979), which states that there must be sufficient evidence to justify a rational trier of fact to find guilt beyond a reasonable doubt. We do not believe that it is necessary to apply both standards. *Jackson* related to a federal habeas corpus proceeding and set forth a standard which appears to be totally consistent with the well established North Carolina standard. We therefore hold that the application of our traditional standard in determining whether there is enough evidence to support a criminal conviction is sufficient.

Here defendant was charged in a bill of indictment with the manufacture of a controlled substance, cocaine, in violation of G.S. 90-87(15). That statute provides, in part, as follows:

> "Manufacture" means the production, preparation, propagation, compounding, conversion, or processing of a controlled substance by any means, whether directly or indirectly, artificially or naturally, or by extraction from substances of a natural origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis; and "manufacture" further includes any packaging or

> repackaging of the substance or labeling or relabeling of its container except that this term does not include the preparation or compounding of a controlled substance by an individual for his own use . . . .

The indictment in instant case specifically charged that the manufacturing consisted of packaging and repackaging cocaine.

In *State v. Childers*, 41 N.C. App. 729, 255 S.E. 2d 654, *disc. rev. denied*, 298 N.C. 302, 259 S.E. 2d 916 (1979), the North Carolina Court of Appeals considered the question of whether the State must prove beyond a reasonable doubt that a defendant was manufacturing a controlled substance *with the intent to distribute* in order to obtain a conviction under G.S. 90-95(a)(1). The defendant in *Childers* argued that because the statute excepts "preparation or compounding of a controlled substance by an individual for his own use," any manufacture of a controlled substance for personal use would not be "manufacturing" within the contemplation of the statute.

The Court of Appeals rejected this contention, reasoning that:

> The plain meaning of the exception is to avoid making an individual liable for the felony of manufacturing [a] controlled substance in the situation where, being already in possession of a controlled substance, he makes it ready for use (*i.e.*, rolling marijuana into cigarettes for smoking) or combines it with other ingredients for use (*i.e.*, making the so-called "Alice B. Toklas" brownies containing marijuana).

Id. at 732, 255 S.E. 2d at 656. The court noted that the activities not excepted by this proviso contemplate a higher degree of activity involving the controlled substance

> and thus are more appropriately made felonies without regard to the intent of the person charged with the offense as to whether the controlled substance so "manufactured" was for personal use or for distribution. The burden will, of course, be upon the State to prove from the evidence beyond a reasonable doubt that, in cases where the defendant is charged with manufacture of a controlled substance and the activity constituting manufacture is preparation or com-

> pounding, that the defendant intended to distribute the controlled substance. . . . In those cases where production, propagation, conversion or processing of a controlled substance are involved, the intent of the defendant, either to distribute or consume personally, will be irrelevant and does not form an element of the offense.

Id. at 732, 255 S.E. 2d at 656-57.

[3] We agree with the analysis of G.S. 90-87(15) articulated by the Court of Appeals in *Childers* and concur in its conclusion that the offense of manufacturing a controlled substance does not require an intent to distribute unless the activity constituting manufacture is preparation or compounding. We recognize, but have no explanation for, the omission of the activities of "packaging," "repackaging," "labeling," and "relabeling" from the court's list of those types of manufacture for which intent to distribute is not a necessary element. However, the plain language of the statute makes it clear that these activities are not included within the limited exception of those manufacturing activities (preparation, compounding) for which an intent to distribute is required. We therefore conclude that the State was not required to prove as an element of the offense of manufacturing that defendant intended to distribute the controlled substance.

[4] Nevertheless, there remains the question of whether there was a packaging and repackaging of cocaine and whether defendant performed these acts. Certainly the evidence adduced from the police officers concerning the presence of cocaine and other paraphernalia used in the packaging of drugs on the table by which defendant was standing is sufficient to support a reasonable inference that someone was in the process of packaging and repackaging the controlled substance of cocaine. Whether defendant was that person presents a more difficult question. This is so because the evidence does not reveal that defendant was in the actual physical possession of the drugs or the related paraphernalia. Therefore, the State must rely upon the doctrine of constructive possession. Constructive possession of contraband material exists when there is no actual personal dominion over the material, but there is an intent and capability to maintain control and dominion over it. *State v. Spencer,* 281 N.C. 121, 187 S.E. 2d 779 (1972).

Although it is not necessary to show that an accused has exclusive possession of the premises where contraband is found, where possession of the premises is nonexclusive, constructive possession of the contraband materials may not be inferred without other incriminating circumstances. *See, e.g., State v. Spencer,* 281 N.C. 121, 187 S.E. 2d 779 (1972).

We find *State v. Harvey,* 281 N.C. 1, 187 S.E. 2d 706 (1972) instructive. There, the defendant was observed by police officers in his home standing within three or four feet of two lots of marijuana. No one else was in the room. We held that this evidence was sufficient to support a reasonable inference that defendant was in possession of marijuana. In so holding, this Court stated:

> An accused's possession of narcotics may be actual or constructive. He has possession of the contraband material within the meaning of the law when he has both the power and intent to control its disposition or use. Where such materials are found on the premises under the control of an accused, this fact, in and of itself, gives rise to an inference of knowledge and possession which may be sufficient to carry the case to the jury on a charge of unlawful possession. Also, the State may overcome a motion to dismiss or motion for judgment as of nonsuit by presenting evidence which places the accused "within such close juxtaposition to the narcotic drugs as to justify the jury in concluding that the same was in his possession." *State v. Allen,* 279 N.C. 406, 183 S.E. 2d 680; *State v. Fuqua,* 234 N.C. 168, 66 S.E. 2d 667; *Hunt v. State,* 158 Tex. Crim. 618, 258 S.W. 2d 320; *People v. Galloway,* 28 Ill. 2d 355, 192 N.E. 2d 370.

Id. at 12-13, 187 S.E. 2d at 714.

Although this case differs from *Harvey* in that defendant was not in exclusive control of the searched premises, there are circumstances other than defendant's proximity to the contraband materials which tend to buttress the inference that defendant was the person engaged in the manufacture of cocaine.

Defendant had on his person a key to Apartment C located at 1634 Chestnut Street. He had over $1,700 in cash in his pockets. Defendant had been under surveillance by the police for some time and on every occasion that police observed him, he was at

1634 Chestnut Street in Winston-Salem rather than his claimed residence.

We are of the opinion that under the facts of this case, there was substantial evidence that defendant violated the provisions of G.S. 90-87(15) by packaging and repackaging the controlled substance cocaine. The trial judge therefore correctly denied defendant's motion to dismiss.

[5] By his second assignment of error, defendant contends the trial court erred in denying his motion to strike and motion for mistrial following his parole officer's testimony that defendant was on parole for previous drug violations.

At trial, defendant called as a witness his parole officer, Jay Waller, for the purpose of establishing that defendant did not reside at 1634 Chestnut Street. On direct examination, Waller stated that defendant lived at 3901 Logan Lane and stated that "[a]t the present time, I'm seeing him once every three months. That's the current supervision level he's under. And he's been on parole now approximately two years. And I would, I don't know the exact number, but I have seen him several times at that address."

Thereafter, the State cross-examined Waller as follows:

Q. Is he still under parole with you?

A. Yes, sir.

Q. What for?

[DEFENSE COUNSEL]: Objection.

COURT: Overruled.

* * * *

COURT: I'm not going to let him go into any other case except the one he's on parole for.

* * * *

Q. Mr. Waller, what's he on parole for?

A. He is on parole for sale of the controlled substance heroin and two counts of possession of the controlled substance heroin.

Counsel for defendant first asked that the answer be stricken and then moved for mistrial. Both motions were denied.

The Court of Appeals held that under the circumstances of this case, defense counsel "opened the door" to the facts surrounding defendant's parole and therefore it was not error to admit Waller's testimony that defendant was on parole for a drug conviction. Judge Braswell wrote that "[o]nce the defense witness had begun discussing the defendant's parole, the State could properly ask for what the defendant was on parole." 64 N.C. App. at 645-46, 308 S.E. 2d at 351.

Alternatively, the State argues that defendant's prior drug conviction of the possession and sale of heroin was admissible to show defendant's intent to commit the crime charged, to wit, the manufacture of cocaine in violation of G.S. 90-95(a)(1).

In view of our holding that intent was not an element of the crime of manufacturing cocaine by packaging and repackaging the drug, it follows that the evidence of defendant's conviction of possession and sale of heroin is not relevant or admissible to show intent in the charged violation in instant case.

We are thus brought to consideration of the Court of Appeals' holding that defense counsel "opened the door" to facts surrounding defendant's parole and therefore it was not error to admit the witness Waller's testimony that defendant was on parole for a drug conviction.

[6] The basis for the rule commonly referred to as "opening the door" is that when a defendant in a criminal case offers evidence which raises an inference favorable to his case, the State has the right to explore, explain or rebut that evidence. *State v. Albert*, 303 N.C. 173, 277 S.E. 2d 439 (1981).

In *Albert*, the defendant testified on direct examination that he had told police officers he was willing to take a polygraph examination. On recross-examination, the defendant was asked if he did not in fact take and fail a polygraph examination. He replied

that he did not know. Defense counsel's motion for a mistrial was denied and this Court, finding no error in the trial, stated:

> Here, defendant on direct examination had testified that he told the officers he would be willing to take a lie detector test. This testimony, unexplained, could well lead the jury to believe that the State had refused to give defendant such a test, or that defendant had taken the test with favorable results which the State had suppressed. Under such circumstances, the law wisely permits evidence not otherwise admissible to be offered to explain or rebut evidence elicited by the defendant himself. Where one party introduces evidence as to a particular fact or transaction, the other party is entitled to introduce evidence in explanation or rebuttal thereof, even though such latter evidence would be incompetent or irrelevant had it been offered initially. *State v. Patterson*, 284 N.C. 190, 200 S.E. 2d 16 (1973); *State v. Black*, 230 N.C. 448, 53 S.E. 2d 443 (1949).

Id. at 177, 277 S.E. 2d at 441. *Accord, State v. Small*, 301 N.C. 407, 272 S.E. 2d 128 (1980).

A similar question was considered in the case of *State v. Patterson*, 284 N.C. 190, 200 S.E. 2d 16 (1973). There, defense counsel elicited from the prosecuting witness, who was the defendant's stepdaughter, a statement that she disliked the defendant. Obviously this was done to show bias on the part of the prosecuting witness, and the State was permitted on redirect to question the victim as to why she did not like the defendant. Her answer was that she did not like him because he had raped her. Defendant objected to this evidence and the trial court overruled his objection. This Court found no error in the trial judge's ruling.

In the case before us for decision, defense counsel had established through the testimony of Nathaniel Small and Lucious Brown that defendant's residence was not Apartment C located at 1634 Chestnut Street in Winston-Salem. It is unclear to us why astute counsel would offer a *parole* officer to confirm the unchallenged evidence as to defendant's residence. The very fact that the witness was a parole officer raised an inference that defendant had previously been convicted of a crime. However, we conclude that defense counsel must have considered the effects of this testimony and determined that the evidence that defendant

had been supervised for two years without revocation of parole was favorable to his case. Obviously, the introduction of this evidence was favorable to defendant in that it created an image of a man who for at least two years had "walked the straight and narrow." Under these circumstances, the State was free to probe into this evidence and attempt to rebut the favorable inference which arose therefrom. We note that the trial judge restricted the State's inquiry to the crimes for which defendant was on parole.

We hold that under the circumstances of this case, the trial court did not err by admitting into evidence the fact that defendant was on parole for a drug conviction.

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

Affirmed.

Justice EXUM dissenting in part.

I dissent from that portion of the majority's decision which holds that it was not error to permit the state to put before the jury on cross-examination of the witness Waller that defendant was "on parole for sale of the controlled substance heroin and two counts of possession of the controlled substance heroin." The majority correctly notes that ordinarily this evidence would have been inadmissible but holds that defendant "opened the door" to its admission by eliciting other testimony from Waller that defendant was in fact on parole. I do not agree that this "opened the door" to the challenged testimony.

I do agree with the majority's statement of the principle to be applied, *i.e.*, that when a criminal defendant offers evidence which if left unexplained or unrebutted would create a favorable inference for his case, the state may offer such evidence as it has in explanation or rebuttal, even if such evidence might otherwise be inadmissible.

I disagree with the majority's application of this principle to the facts before us. That defendant was on parole gave rise to no inference favorable to defendant. The majority's assertion that the jury might draw an inference that inasmuch as defendant's

parole at the time of trial had not been revoked he had "walked the straight and narrow" is strained, to say the least. Defendant offered no evidence that he had been a particularly "good" parolee. Even if one assumes arguendo that Waller's testimony was designed to or did have this effect on the jury, a proposition I find difficult to accept, it is clear that the nature of the crime for which defendant was initially convicted, imprisoned, and later paroled, in no way explains or rebuts whatever the evidence tends to show about his good conduct while on parole. For this reason, admissibility of the evidence cannot be justified under the principle that defendant had opened the door.

Believing too that the evidence unfairly prejudiced the case against defendant and that there is "a reasonable possibility . . . that a different result would have been reached" at trial had the evidence not been admitted, N.C. Gen. Stat. § 15A-1443(a), I vote for a new trial because of its admission.

Justice FRYE joins in this dissenting opinion.

STATE OF NORTH CAROLINA v. LORENZO JOHNSON

No. 399PA83

(Filed 3 April 1984)

1. Robbery § 4.6— armed robbery—sufficiency of evidence

In a prosecution for the armed robbery of a Marine named Polk, the evidence was sufficient to withstand defendant's motion to dismiss where it tended to show that defendant accompanied two men, Hawkins and Carlos, during the robbery of a Marine in an open field near Jacksonville; later defendant accompanied Carlos, Hawkins, and his codefendant Lewis on three trips to a bus station in Jacksonville where a common pattern of crime was established in that Carlos, Lewis and defendant went into the bus station, approached a Marine, offered him a ride to the military base, brought him to Hawkins' car, and entered the car with two of the men flanking the Marine; Carlos then threatened the Marine with a knife and demanded his money as Hawkins drove; they put the Marine out of Hawkins' car after the robbery was completed; this pattern was broken only in the third instance when the Highway Patrol stopped the automobile. In each situation, defendant accompanied the other men, went into the bus station, came out with a Marine and rode in the car where the robberies occurred. In addition to these consistent, patterned actions defendant, according to Hawkins' testimony, asked the victim Polk,

"What else you got?" after Carlos had demanded his money. This evidence was sufficient to permit a reasonable inference that defendant intended to assist in the commission of the robbery of the victim and communicated this intent to the others involved.

2. Robbery § 5.6— failure to instruct on mere presence in armed robbery prosecution—no error

The Court of Appeals erred in reversing defendant's conviction in an armed robbery case on the basis that the trial court failed to instruct on mere presence at the scene of a robbery where a review of all the evidence demonstrated that defendant actually participated in the commission of the robberies.

ON petition for discretionary review of a decision by the North Carolina Court of Appeals, 63 N.C. App. 173, 304 S.E. 2d 248 (1983), ordering a new trial upon defendant's appeal of his conviction of armed robbery before *Judge Brown*, presiding at the 28 June 1982 Session of ONSLOW Superior Court. *See* N.C. Gen. Stat. § 7A-31(c) (1981).

Rufus L. Edmisten, Attorney General, by John R. Corne, Assistant Attorney General, for the state appellant.

Ellis, Hooper, Warlick, Waters and Morgan by Charles H. Henry for defendant appellee.

EXUM, Justice.

The questions presented are whether the evidence was sufficient to convict and whether the Court of Appeals erred in concluding that it was error warranting a new trial for the trial court to refuse defendant's request to instruct the jury that defendant's "mere presence" at the scene of the crime, standing alone, was an insufficient basis for conviction. We conclude the evidence was sufficient for conviction and did not warrant a "mere presence" instruction. We reverse the Court of Appeals' contrary decision.

I.

On the evening of 30 January 1982, Donnell Hawkins drove his father's car to a car wash in Kinston, North Carolina. At the car wash, Hawkins met defendant and another man whom Hawkins identified as Carlos. These three men, accompanied by a Marine who agreed to give Hawkins "some gas money" for a ride to Jacksonville, drove to Jacksonville.

After leaving the Marine at a military base near Jacksonville, Hawkins, accompanied by Carlos and defendant, parked the car at a nightclub across from an open field. Under Carlos' direction, the three men went into the open field. Shortly thereafter, a Marine came walking across the field. When the Marine approached them, Carlos brandished a knife and demanded his money. The Marine complied. As these three men were leaving the field, another Marine began chasing them. They ran to Hawkins' car and drove away.

After driving around the area, the three men drove to a bus station in Jacksonville. Carlos, defendant and another man, Tyrone Lewis, went into the bus station. Hawkins waited outside near the car. Soon the three men came out with another Marine, James Greathouse. These five men got into the car: Hawkins was driving, Carlos was in the front seat with him, and defendant and Lewis were on either side of Greathouse in the back seat. While they were riding, Carlos reached over the seat with a knife and demanded Greathouse's wallet. After he complied, Greathouse was put out of the car.

The four men again drove to the same bus station and parked in approximately the same place. Carlos, defendant, and Lewis again entered the bus station. Lewis approached another Marine, David Polk, and asked him if he needed a ride to the military base. Polk acknowledged that he did and left the bus station with the three men. They entered Hawkins' car, with Hawkins driving. Carlos again sat in the front seat while defendant and Lewis flanked Polk in the back seat. As they were driving, Carlos reached over the seat with his knife and demanded Polk's money and shoes. After Polk gave Carlos his wallet, one of the men in the back seat asked if he had anything else. Polk was also put out of the car.

The men again drove to the Jacksonville bus station. Another Marine was lured into the car under the guise of offering him a ride to the military base. This time, however, the Marine sat in the front seat between Hawkins, who was driving, and Carlos. A highway patrolman stopped the car and, with the aid of other law enforcement officers, arrested Hawkins, Carlos, Lewis and defendant.

Defendant, Lewis, and Hawkins were charged with two counts of armed robbery involving the victims Greathouse and Polk, respectively. Immediately before trial, Hawkins entered into a plea bargain through which he pled guilty to common law robbery and testified against defendant and Lewis. Defendant and Lewis were tried jointly on both counts. Hawkins testified for the state and related basically the facts set out above. Defendants offered no evidence. The trial court dismissed the armed robbery counts involving the victim Greathouse as to both defendants due to insufficient evidence. The jury convicted defendant of the armed robbery of David Polk, but acquitted Lewis of the same charge.

The North Carolina Court of Appeals ordered a new trial, holding that the trial court erred in failing to give defendant's requested jury instruction on the issue of "mere presence." We allowed the state's petition for discretionary review on 6 December 1983.

II.

[1] Initially, we must consider whether the state presented sufficient evidence from which the jury could find defendant guilty of the armed robbery of David Polk. On a motion to dismiss based upon insufficient evidence, the court must consider whether the state has presented substantial evidence of each element of the crime charged. *State v. Bates*, 309 N.C. 528, 533, 308 S.E. 2d 258, 262 (1983). This standard "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). The evidence must be evaluated in the light most favorable to the state, allowing the state every reasonable inference to be drawn from that evidence. *State v. Thomas*, 296 N.C. 236, 250 S.E. 2d 204 (1978).

In order for the state to survive defendant's motion to dismiss in this case, it must present evidence of each of the essential elements of the crime of armed robbery. Under N.C. Gen. Stat. § 14-87 (1978), armed robbery is "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." *Bates*, 309 N.C. at 534, 308 S.E. 2d at 262. Defend-

ant does not contend that Polk was not the victim of an armed robbery. The uncontroverted evidence establishes that he was. Rather, defendant contends that he was not a participant in the armed robbery. In essence, defendant claims that he was merely present and completely passive during the commission of this crime.

Certainly, defendant's presence at the scene of the crime, standing alone, does not make him guilty of the offense even if he sympathizes with the criminal act and does nothing to prevent it. *State v. Gaines*, 260 N.C. 228, 132 S.E. 2d 485 (1963); *State v. Hargett*, 255 N.C. 412, 121 S.E. 2d 589 (1961). To sustain defendant's conviction, the state's evidence must reasonably support a finding that defendant was present with the intent to aid the perpetrator in the armed robbery should his assistance have become necessary and that such intention was communicated to the perpetrator. This communication need not, however, be made expressly by defendant; it "may be inferred from his actions and from his relation to the actual perpetrator." *State v. Rankin*, 284 N.C. 219, 223, 200 S.E. 2d 182, 185 (1973).

The uncontroverted evidence shows that defendant accompanied Hawkins and Carlos during the robbery of the first Marine in the open field near Jacksonville. Later, defendant accompanied Carlos, Hawkins and his codefendant Lewis on three trips to the bus station in Jacksonville. These three trips to the bus station disclosed a common pattern: Carlos, Lewis, and defendant went into the bus station, approached a Marine, offered him a ride to the military base, brought him to Hawkins' car, and entered the car with two of the men flanking the Marine. Carlos then threatened the Marine with the knife and demanded his money as Hawkins drove. They put the Marine out of Hawkins' car after the robbery was completed. This pattern was broken only in the third instance when the highway patrolman stopped the automobile. In each situation, defendant accompanied the other men, went into the bus station, came out with a Marine, and rode in the car where the robberies occurred.

In addition to these consistent, patterned actions defendant, according to Hawkins' testimony, asked Polk "what else you got?" after Carlos had demanded his money. Hawkins also testified that defendant was the one who brought the fourth victim out of the

bus station. Polk testified that Lewis approached him in the bus station and offered him a ride.

Our standard of review of a motion to dismiss for insufficient evidence is whether the evidence is such that a reasonable mind might accept it as adequate to support the conviction. *State v. Smith*, 300 N.C. 71, 265 S.E. 2d 164 (1980). In this case, we hold that it is. Taking all these incidents together, we conclude the evidence is sufficient to permit a reasonable inference that defendant intended to assist in the commission of the robbery of Polk and communicated this intent to the others involved. The bus station robberies were clearly part of a common plan in which defendant was an active participant.

III.

[2] Defendant requested the trial court to instruct the jury that his mere presence at the scene of the Polk robbery would not be sufficient to render him guilty of this armed robbery. The trial court declined to so instruct the jury. The Court of Appeals reversed defendant's conviction on this basis, stating that the failure to give the requested instruction left the jury "without judicial guidance as to how to weigh and evaluate the presence of the defendant at the scene of the crime charged." 63 N.C. App. at 175, 304 S.E. 2d at 250. We disagree with this conclusion.

The Court of Appeals correctly noted that the mere presence of defendant at the scene of the crime, standing alone, is not a sufficient basis upon which to find him guilty.

> To render one who does not *actually participate* in the commission of the crime guilty of the offense committed, there must be some evidence to show that he, by word or deed, gave active encouragement to the perpetrator of the crime or by his conduct made it known to such perpetrator that he was standing by to render assistance when and if it should become necessary.

State v. Ham, 238 N.C. 94, 97, 76 S.E. 2d 346, 348 (1953) (emphasis added). A review of all the evidence demonstrates that defendant actually participated in the commission of the armed robbery of Polk. It shows that defendant not only accompanied the other men into the bus station, whether or not he actually spoke to

Polk, and returned with them and Polk to the car, but he also asked Polk if he had anything else once Polk had given Carlos his wallet. Further, at the time of the Polk robbery all the evidence shows defendant had willingly accompanied these men on an earlier trip to the Jacksonville bus station in which another Marine, like Polk, was offered a ride to the military base, robbed at knifepoint during the trip, and put out of Hawkins' car after the robbery. In addition, defendant had earlier accompanied Carlos and Hawkins during the robbery of still another Marine in an open field near Jacksonville. Finally defendant accompanied Lewis, Carlos and Hawkins after the Polk incident in a robbery attempt of a fourth Marine using the same *modus operandi* as was used on Polk and in which defendant himself actually brought the Marine back to the car.

This evidence will permit no reasonable conclusion other than that defendant actively participated in the Polk robbery and "by his conduct made it known to [Carlos] that he was standing by to render assistance when and if it should become necessary." *Id.* No evidence adduced at trial will reasonably support an inference that defendant was merely present during and not an active participant in the robbery of Polk. Therefore defendant was not entitled to a "mere presence" instruction. *See generally State v. Davis*, 291 N.C. 1, 229 S.E. 2d 285 (1976); *State v. Bock*, 288 N.C. 145, 217 S.E. 2d 513 (1975).

The decision whether to believe the witness Hawkins was a matter solely and properly left to the jury. It is the jury's duty and prerogative to assess the credibility of a given witness. In this case, the jury apparently chose to believe Hawkins when he testified that defendant was the person in the back seat who asked Polk "what else you got?" and that defendant went in the bus station the final time and returned with another potential victim. Based upon this belief, the jury convicted defendant while acquitting Lewis.

We conclude that the trial court did not err in declining to give defendant's requested instruction on mere presence. Finding no error in defendant's trial, we reverse the decision of the North Carolina Court of Appeals and remand this case for reinstatement of the conviction and judgment against defendant.

Reversed and remanded.

STATE OF NORTH CAROLINA v. YOULES JOHNSON, JR.

No. 536A83

(Filed 3 April 1984)

Searches and Seizures § 10— warrantless entry and seizure—exigent circumstances—insufficient evidence and findings

In a prosecution for felonious possession of heroin wherein the evidence and findings upon a motion to suppress showed that officers had warrants for the arrest of two fugitives, one male and the other female; the officers had been informed and, at some point, had probable cause to believe that the fugitives were at defendant's house; when officers approached defendant's house with the arrest warrants, there were six persons standing in the driveway area, and one female began to run to the rear of defendant's house; the officer pursued such female because he suspected that she might be the female fugitive; and while in "hot pursuit" of the female, the officer went through the rear door and into the den of defendant's house, where he saw packets containing heroin, it was *held* that the evidence and findings did not support the conclusion of the Court of Appeals that there was an unjustified delay or failure to obtain a search warrant after the existence of probable cause as to the whereabouts of the fugitives so that the officer's warrantless entry into defendant's house and his seizure of the heroin was not justified by exigent circumstances where there was no evidence or findings concerning (1) the circumstances surrounding verification by the officers that the fugitives were at defendant's house and when officers had probable cause to believe that the fugitives were at such house, and (2) the officers' intent in going to defendant's residence other than the intent to arrest the fugitives. Therefore, the case will be remanded for further evidence, findings and conclusions.

ON appeal from decision of the Court of Appeals, 64 N.C. App. 256, 307 S.E. 2d 188 (1983), which reversed the judgment of *Hobgood, Judge*, entered at the 16 February 1982 Session of CUMBERLAND County Superior Court.

Defendant was charged in an indictment, proper in form, with felonious possession of more than 14 but less than 28 grams of heroin. Defendant entered a plea of not guilty.

The State's case rested primarily upon evidence of a quantity of heroin seized at defendant's residence. Prior to trial, defendant moved to suppress the seized evidence. After hearing evidence and arguments of counsel on 6 August 1981, Judge Winberry entered the following order on 9 February 1982:

> That the parties hereto stipulated that the residence located at 1605 Grandview Drive, Fayetteville, North Caro-

lina, is owned and occupied by the Defendant, Youles Johnson, Jr.

That J. D. Bowser is a Deputy Sheriff assigned to the City/County Bureau of Narcotics and that he has known the Defendant, Youles Johnson, Jr. for approximately 1-½ years and knew that he resided at 1605 Grandview Drive, Fayetteville, North Carolina.

That about noon on Wednesday, September 17, 1980, Deputy Bowser was contacted by a Bondsman named Collins from Wake County. That Mr. Collins provided Deputy Bowser with certified copies of arrest warrants from Wake County for two (2) persons, Edith Mae Williams and John Wortham. That the arrest warrants for Williams and Wortham were for failure to appear upon charges of possession of heroin and possession of phenmetrazine. That, additionally, there were warrants for Wortham for assault on a Police Officer by firing a gun and for being an habitual felon.

That the Bondsman, Collins, requested assistance from Deputy Bowser in apprehending Williams and Wortham and advised Deputy Bowser that he had reliable information that both Williams and Wortham were at 1605 Grandview Drive at that time. That Deputy Bowser and Sgt. Baker of the City/County Narcotics Bureau verified the information received from Mr. Collins by placing various telephone calls and by Sgt. Baker going to the area of 1605 Grandview Drive.

That Mr. Collins provided Deputy Bowser with a photograph showing the head and face of a black female said to be Edith Mae Williams and with a photograph showing the head and face of a black male said to be John Wortham. That Deputy Bowser received no other description of Williams and Wortham.

That, at approximately 3:45 p.m., Deputy Bowser in an unmarked car accompanied by uniformed officers in marked patrol cars, went to the residence at 1605 Grandview Drive. That Mr. Collins was not with Deputy Bowser at this time. Upon his arrival, Deputy Bowser observed approximately six (6) people standing in the driveway area of the house. These

people consisted of several black males and several black females. Deputy Bowser was approximately six feet from the nearest person when his car was brought to a halt and he got out. That the marked patrol cars also came to halt.

That as soon as he got out of his car, he observed a black female begin to run toward the rear of the residence. Deputy Bowser began to pursue her because he thought she might be Edith Mae Williams. As Deputy Bowser ran behind her into the back yard, he identified himself as a police officer and ordered her to halt by calling out, "police, halt." That Deputy Bowser hollered, "halt, police officer," several times as he ran. That the black female did not halt, but proceeded into the back yard of the residence and ran through the back door into the house. That Deputy Bowser was approximately ten feet behind her and followed her into the house, through a utility room and into the den area of the house where she stopped. That there were two (2) black females and two (2) black males also in the den.

That Officer Bowser saw a tinfoil packet on the floor with a white powdery substance spilling out of it. Near the black female he had followed into the house, Deputy Bowser observed a clear plastic packet containing white powder and another tinfoil packet containing white powder. That one of the black females in the room which Deputy Bowser entered was Edith Mae Williams. That the black female who ran into the house turned out to be Ruby Wright. That Deputy Bowser determined that Edith Mae Williams weighed approximately 200 pounds and was approximately 5½ feet tall. That Ruby Wright weighs approximately 140 pounds and is 5'7" tall.

That Deputy Bowser did not have a search warrant to search the residence of Youles Johnson, Jr. for Edith Mae Williams and John Wortham. That no one gave Deputy Bowser permission to enter the residence.

BASED UPON THE FOREGOING FINDINGS OF FACT, THE COURT MAKES THE FOLLOWING CONCLUSIONS OF LAW:

(1) That Deputy Bowser had probable cause to believe that Edith Mae Williams and John Wortham were located at the residence at 1605 Grandview Drive.

(2) That under all the circumstances as appeared to him at the time, and particularly in light of the meager descriptions provided of Williams and Wortham and the nature of the assault charges against Wortham, Deputy Bowser acted reasonably in pursuing the black female into the back yard and into the house. That exigent circumstances existed which justified Deputy Bowser's entry into the residence at 1605 Grandview Drive, even though he had no search warrant for the residence.

(3) That the discovery of a controlled substance in the residence at 1605 Grandview Drive was inadvertent.

(4) That the Defendant's rights under the Constitution of the United States, and the Constitution of the State of North Carolina and the General Statutes of North Carolina were not violated.

Therefore, the Defendant's Motion to Suppress is denied.

At trial, Officers J. D. Bowser and Roy Baker testified for the State and related the circumstances surrounding the seizure of the evidence in substantial conformity with the facts as found by Judge Winberry upon the motion to suppress. The jury returned a verdict of guilty and defendant was sentenced to imprisonment for a minimum term of 12 years and a maximum term of 15 years. Defendant was also fined one hundred thousand dollars.

Upon appeal, the Court of Appeals in an opinion by Judge Johnson, with Judge Braswell concurring, reversed the judgment on the ground that the seizure of the evidence from defendant's residence in this case violated defendant's fourth amendment rights. Judge Hedrick dissented, and the State appealed to this Court as a matter of right pursuant to G.S. 7A-30(2).

Rufus L. Edmisten, Attorney General, by Henry T. Rosser, Assistant Attorney General, for the State appellant.

Brown, Fox & Deaver, P.A., by Bobby G. Deaver, for defendant appellee.

BRANCH, Chief Justice.

The sole issue presented for review is whether the seizure of heroin under the circumstances of this case violated defendant's fourth amendment rights. Defendant contends that the officer's warrantless entry into his home, without consent and without any accompanying exigent circumstances, was barred by the mandates of the fourth amendment as set forth in *Steagald v. United States*, 451 U.S. 204 (1981) and *Payton v. New York*, 445 U.S. 573 (1980). The State, on the other hand, maintains that the officer entered defendant's home while engaged in "hot pursuit" of a fugitive and thus the entry was justified under the exigent circumstances exception to the fourth amendment warrant requirement. Consequently, the State argues that the seizure of the heroin constituted the seizure of evidence in "plain view" of an officer who was lawfully inside the residence. *See State v. Allison*, 298 N.C. 135, 257 S.E. 2d 417 (1979).

The fourth amendment prohibits the entry into a home in order to make a felony arrest, absent a valid search warrant, consent or exigent circumstances. *Steagald v. United States*, 451 U.S. 204 (1981); *Payton v. New York*, 445 U.S. 573 (1980). In the instant case, the officers were armed with warrants for the arrest of two fugitives. The officers had been informed and, at some point, presumably had probable cause to believe these fugitives to be at defendant's home. The United States Supreme Court in *Steagald* clearly held that, absent exigent circumstances or consent, a search warrant was required before officers could enter the residence of a third person to arrest a suspect. *Steagald v. United States*, 451 U.S. 204.

There is no question in this case that there was neither a search warrant nor consent to enter defendant's home. Thus, the sole question is whether the entry and its concomitant seizure were accompanied by such exigency as to have rendered it impracticable for the officers to have obtained a search warrant.

In *State v. Allison*, 298 N.C. 135, 257 S.E. 2d 417 (1979), we noted that a warrantless search may be justified upon a showing that there is probable cause to search and upon the State's satisfying its "burden of demonstrating that the exigencies of the situation made search without a warrant imperative." *Id.* at 141, 257 S.E. 2d at 421.

Facts and circumstances sufficient to constitute "exigent circumstances" in the context of fourth amendment searches vary widely and have been the subject of a significant number of cases. *See State v. Allison*, 298 N.C. 135, 257 S.E. 2d 417 (1979). *See e.g., United States v. Santana*, 427 U.S. 38 (1976); *United States v. Minick*, 455 A. 2d 874 (D.C. App. 1983) (en banc); *Dorman v. United States*, 435 F. 2d 385 (D.C. App. 1970) (en banc).

Despite the numerous fact situations giving rise to the characterization of "exigency," it appears to be the essence of "exigent circumstances" that there was "the lack of time to obtain a warrant without thwarting the arrest or making it more dangerous. *Where time was adequate, failure to obtain a warrant should not be excused.*" Latzer, Enforcement Workshop: Police Entries to Arrest—*Payton v. New York*, 17 Crim. L. Bull. 156, 165 (1981) (emphasis added). Thus, while in this case, it is evident that, at the time of entry into defendant's home, Officer Bowser was engaged in the "hot pursuit" of a person he suspected to be a fugitive, the issue remains as to whether there was an unjustified delay or failure to obtain a search warrant after the existence of probable cause as to the whereabouts of the suspects.

The Court of Appeals in this case construed the facts surrounding the warrantless entry to be as follows:

> From the record here, it is apparent that over three and a half hours elapsed between the time that the police were supplied with arrest warrants and the time the arrest was made. Although copies of the warrants are not in the record, it appears that the police were supplied at the same time with the information that the person named in the arrest warrants could be found at defendant's home. Officer Bowser testified that he had received information from the bondsman, Sgt. Baker and several other sources that Williams and Wortham were located at defendant's residence; that he knew defendant and knew his address and that his specific purpose in going to defendant's residence was to arrest Williams and Wortham. From the time the warrants were received until they were executed, no attempt was made to procure a warrant authorizing entry into defendant's house. Thus, it would appear that the arrest raid was in fact a planned raid. There was ample time to secure a search war-

> rant and ample reason to anticipate the need for one. That the subject of the arrest warrants were believed to be at defendant's house is sufficient by itself to put the police on notice that they might need to gain entry to the house in order to effect the arrest. With these facts in mind, we need not consider whether Officer Bowser was in "hot pursuit" and whether that alone was sufficient to justify his entry into defendant's home. The need for a search warrant should have been anticipated in this case.

64 N.C. App. at 263, 307 S.E. 2d at 192.

While we do not disagree with the Court of Appeals' recapitulation of certain facts as found by the trial judge, we do take issue with some of the conclusions that the court drew. In our opinion, the *voir dire* evidence and the trial judge's findings are insufficient to permit adequate review by the appellate courts.

For example, it is clear from the record that "over three and a half hours elapsed between the time that the police were supplied with arrest warrants and the time the arrest was made." 64 N.C. App. at 263, 307 S.E. 2d at 192. It is also undisputed that the bondsman informed Officer Bowser that "he had a confidential source which had furnished him with information to the fact that they were at that residence." (Transcript of *voir dire* hearing 11.)[1] In addition, Officer Bowser testified that he and Sergeant Baker "attempted to verify the information that [they] had received from Mr. Collins through telephone calls, [and] through Sergeant Baker going out to the area where the residence is." (Transcript of *voir dire* hearing 14.) However, we do not believe that the evidence of findings of fact are sufficient to support the Court of Appeals' conclusion that "it would appear that the arrest raid was in fact a planned raid." 64 N.C. App. at 263, 307 S.E. 2d at 192. We likewise do not believe the evidence or findings are sufficient to support the conclusion that "[t]here was ample time to secure a

1. Despite the fact that the sole issue in this case involved a review of the trial judge's order denying defendant's motion to suppress, neither party saw fit to include in the record a transcript of the *voir dire* hearing. Consequently, this Court was constrained to contact the District Attorney's Office in Cumberland County in order to complete the record in this regard. It is inconceivable that litigants expect the appellate courts to conduct effective review without the benefit of a complete record.

search warrant and ample reason to anticipate the need for one." Finally, we believe that the evidence and findings are insufficient to support the conclusion by the Court of Appeals that, "[t]he need for a search warrant should have been anticipated in this case." *Id.*

From the testimony of Officer Bowser at the *voir dire* hearing, and likewise from the findings of the trial judge, there is little upon which the conclusions drawn by the Court of Appeals can rest. There is no finding as to when the officers had probable cause to believe that the suspects were indeed at the home of the defendant. The Court of Appeals assumed probable cause existed when the bondsman informed the officers that he had reliable information to that effect. However, the testimony of Officer Bowser that he and Sergeant Baker proceeded to verify that information could just as reasonably lead to the conclusion that the existence of probable cause was dependent upon that verification. Depending upon the time required to obtain verification, the officers likely did not have a full "three and a half hours" between the time they had probable cause to believe the suspects to be at defendant's home, and the time at which they arrived there. In addition to there being no evidence with respect to the time it took to verify the suspects' whereabouts, there is no evidence as to the circumstances surrounding the verification. For example, no testimony was elicited showing the manner in which Sergeant Baker verified the information; whether, at the time of verification, the suspects were inside or outside defendant's house; whether Baker radioed the information to the police station; or the whereabouts of the other officers when they received word of verification. Absent, too, are any findings regarding the officers' intent in going to the residence other than the intent to arrest the suspects. It is conceivable that, had the officers intended to stake out the residence and at the same time seek a search warrant, their actions might be deemed "reasonable" within the meaning of the fourth amendment.

The determinations necessary for our review of the legality of the instant search simply cannot be made upon the findings and conclusions contained in Judge Winberry's order. Were we to attempt to uphold or condemn the search, we would be engaging in mere speculation.

The lack of sufficient findings in this case, as well as the lack of evidence in the transcript upon which to base any findings, compels us to remand the case for new *voir dire* proceedings consistent with this opinion. *See State v. Booker*, 306 N.C. 302, 293 S.E. 2d 78 (1982). Upon its determination, the superior court shall enter its findings, conclusions, and order which shall be certified to this Court. The parties may file exceptions and assignments of error to the order, if applicable, and may file additional briefs with this Court, if deemed appropriate by them. *See State v. Prevette*, 39 N.C. App. 470, 250 S.E. 2d 682, *appeal dismissed*, 297 N.C. 179 (1979).

Remanded.

JOSIE PHILLIPS TICE v. WILLIAM HALL

No. 410A83

(Filed 3 April 1984)

Negligence § 26.1; Physicians, Surgeons, and Allied Professions § 18— medical malpractice action—plaintiff entitled to rely on doctrine of res ipsa loquitur

In a medical malpractice action in which defendant was accused of leaving a sponge in plaintiff's body after surgery for a hiatal hernia, the trial court erred in granting defendant's motion for a directed verdict since plaintiff was entitled to rely upon the doctrine of *res ipsa loquitur* to take her case to the jury on the question of negligence of defendant. Contrary to defendant's contention the doctrine of *res ipsa loquitur* and G.S. 90-21.12 are not in conflict. The statute establishes the standard of care in medical malpractice cases, and the application of *res ipsa loquitur* allows the issue of whether defendant has complied with the statutory standard to be submitted to the jury for its determination.

APPEAL by defendant pursuant to N.C.G.S. 7A-30(2) from the decision of the Court of Appeals (*Judge Wells*, with *Judge Eagles* concurring and *Judge Becton* dissenting) reported at 63 N.C. App. 27, 303 S.E. 2d 832 (1983). The Court of Appeals reversed the judgment of *Bowen, J.*, entered at the 8 February 1982 Civil Session of Superior Court, CUMBERLAND County, granting defendant's motion for a directed verdict, and remanded the case for a new trial. Heard in the Supreme Court 7 November 1983.

Plaintiff's evidence in this medical malpractice action tended to show the following:

Defendant performed an operation upon Josie Phillips Tice on 8 September 1976 in Cape Fear Valley Hospital. The surgery was for a hiatal hernia. Defendant also had been monitoring Mrs. Tice for the past ten years for the possible recurrence of a cancer for which she had undergone radical mastectomies in 1952 and in 1960. At the time of her hernia surgery, Mrs. Tice was sixty-five years old. In routine post-operative visits to defendant at his Fayetteville office, Mrs. Tice complained to Dr. Hall that "the pain and discomfort from the hernia was relieved but still there was something in there that I felt was not just right." She was experiencing nausea, the pressure of "a blockage" that caused difficulty in swallowing, and sufficient discomfort at night to disturb her sleep. Dr. Hall continued to reassure plaintiff that her symptoms were not unusual given her previous operations. He did not X-ray Mrs. Tice.

Over the course of the next three years, the plaintiff returned to her general practitioner, Dr. Izurieta, to whom she had been originally referred by defendant. She was experiencing constant pain and discomfort from the above symptoms.

In May 1979, defendant moved to Oklahoma. In September 1979, Dr. Izurieta had Mrs. Tice X-rayed at the Cape Fear Hospital. When she called his office for a report, she was told he wanted to see her in a couple of months.

It was not until November 1979 that plaintiff was told that the X rays had revealed the presence of a surgical sponge in her abdominal area. This information was not conveyed to plaintiff by Dr. Izurieta, the physician ordering the X rays, but by the defendant who telephoned Mrs. Tice from Oklahoma the day after the November 1979 visit to Dr. Izurieta. In testifying about this telephone call, Mrs. Tice related the following:

> Q. Just tell us what he said.
>
> A. Well, when I answered the phone he said, "Hello, Mrs. Tice." Said, "I am Dr. Hall. Do you remember me?" I said, "Indeed I do. And how have you been?" And he chatted a minute or two and then he said, "What I called for, Dr.

Izurieta just called me and said the minute he called me and started talking and mentioned your name I knew exactly what happened."

Q. And he said what, ma'am?

A. He said, "I knew what happened when Dr. Izurieta called your name." He said, "Back when I did the surgery," he said, "there was a sponge" or sponges, I'm not sure which word he used, but he said there was some left inside. He said, "I don't know how it could have happened. They were counted before and after surgery, but I know it is in there." I must have gone into shock or dazed or something.

MR. BROADFOOT: Objection.

COURT: Overruled.

A. Anyway, I do remember saying—(witness crying), "Well, you put it there. What are you going to do about it? Will you take it out?" And he laughed and he said, "No. I cannot come back to Fayetteville but if you will come here I will remove it." Then he went on to tell me about his evangelistic work and talked a long time.

On 20 November 1979, Dr. Harold Newman surgically removed the foreign body that was in plaintiff's abdominal cavity. He testified as follows about the surgery:

"Well, in the upper abdomen on the left-hand side there was a mass, which is circumscribed mass—lesion that had a fiberous [sic] capsule around it and it was adhered rather firmly to the other underside of the rib cage and on top of the structures in that area of the body. And it was about ten centimeters in diameter, which is about four and a half inches or so. A large orange or a small grapefruit size or something about that big. A small grapefruit or a large orange, yes. And the capsule contained a foreign body which was a fragmented, somewhat degenerated piece of cloth, you might say, which is what a sponge is." . . .

. . . The sponge was in the area that I would have expected one to be put there in the course of—during a hiatal hernia repair, yes.

> . . . The sponge was in front of the spleen and was to the left of the—and somewhat in front of the stomach. It was superior or above the transverse colon and it was below the diaphragm. I removed the spleen along with the sponge, the entire spleen. A small area of the diaphragm was very firmly adhered to the sponge and a small portion of it was removed. The left-hand part of the omentum was stuck on top of the sponge and a portion of that was removed with it. The fibrous capsule was very firmly adhered to the structures and the spleen is a real fragile organ. I don't think it would have been possible to get this capsule removed without removing the spleen.

Evidence presented by the defendant included a comprehensive detailing by Dr. Hall of the surgical procedures involved in plaintiff's hernia operation. In particular, defendant described the intricate process of accounting for surgical sponges used in the course of her operation. There was further testimony from Dr. Franklin Clark regarding the community standard of care in such operations prevailing at the time of Mrs. Tice's surgery.

Clark, Shaw, Clark & Bartelt, by Jerome B. Clark, Jr., and Teague, Campbell, Conely & Dennis, by John W. Campbell, for plaintiff appellee.

Anderson, Broadfoot, Anderson, Johnson & Anderson, by Hal W. Broadfoot, for defendant appellant.

MARTIN, Justice.

The determinative issue on this appeal is whether Josie Phillips Tice is entitled to rely upon the doctrine of res ipsa loquitur to take her case to the jury on the question of the negligence of defendant Hall. We hold that the plaintiff is so entitled. The defendant's motion for a directed verdict was erroneously granted.

"Uniformly, in this and other courts, *res ipsa loquitur* has been applied to instances where foreign bodies, such as sponges, towels, needles, glass, etc., are introduced into the patient's body during surgical operations and left there." *Mitchell v. Saunders*, 219 N.C. 178, 182, 13 S.E. 2d 242, 245 (1941); *Pendergraft v. Royster*, 203 N.C. 384, 166 S.E. 285 (1932) (and cases cited

therein); *Hyder v. Weilbaecher*, 54 N.C. App. 287, 283 S.E. 2d 426 (1981), *disc. rev. denied*, 304 N.C. 727 (1982).

Despite testimony of defendant and his expert concerning the scrupulous sponge counting and recounting procedures employed by the surgical team in this and other cases and the reliance by surgeons on the sponge count provided by the nurses in assistance, the well-settled law in this jurisdiction is and has been that "a surgeon is under a duty to remove all harmful and unnecessary foreign objects at the completion of the operation. Thus the presence of a foreign object raises an inference of lack of due care." *Hyder v. Weilbaecher, supra*, 54 N.C. App. at 289, 283 S.E. 2d at 428. When a surgeon relies upon nurses or other attendants for accuracy in the removal of sponges from the body of his patient, he does so at his peril. By defendant's own admission, the surgical sponge removed from the body of Mrs. Tice in November 1979 was left inside the surgical cavity during the September 1976 operation over which he presided as surgeon.

If the facts of the case justify, as here, the application of the doctrine of res ipsa loquitur, the nature of the occurrence and the inference to be drawn supply the requisite degree of proof to carry the case to the jury without direct proof of negligence. *Young v. Anchor Co.*, 239 N.C. 288, 79 S.E. 2d 785 (1954); *Mitchell v. Saunders, supra*, 219 N.C. 178, 13 S.E. 2d 242. Equally well settled is the effect of the presumption thus established of defendant's negligence.

> The decisions are contrary to the proposition that any explanation which the defendant may see fit to furnish of matters which are supposed to be peculiarly within his knowledge is sufficient to rebut the *prima facie* case which *res ipsa loquitur* has made, or to repel the presumption, or, rather, inferences, which the jury may draw from it. It is still a matter for the jury.

Mitchell v. Saunders, supra, 219 N.C. at 183, 13 S.E. 2d at 246.

The defendant argues that the law of res ipsa loquitur as cited above has been superseded by the enactment of N.C.G.S. 90-21.12 which became effective 1 July 1976. The statute provides:

> 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.

See Hunt v. Bradshaw, 242 N.C. 517, 88 S.E. 2d 762 (1955). Defendant interprets the above to be "the definitive law of medical malpractice in North Carolina" and therefore controlling in this case. Defendant further argues the incompatibility of the statute with the res ipsa doctrine in cases such as this:

> Assume that the applicable standard requires a search prior to closing the surgical incision and sponge counts as well. Assume further that all of the evidence shows that the operating surgeon made a meticulous search and that all sponge counts were reported to him as correct. At that point he has complied fully with the applicable standard of care. However, under the ruling of the Court of Appeals he could still be held responsible under *res ipsa loquitur* if a sponge were left behind, contrary to the statute.

The defendant misapprehends the effect of the application of the doctrine of res ipsa loquitur. The doctrine of *res ipsa loquitur* and the statute are not in conflict. The statute establishes the standard of care in medical malpractice cases. The application of res ipsa loquitur allows the issue of whether defendant has complied with the statutory standard to be submitted to the jury for its determination. Although the application of the doctrine requires the submission of the issue to the jury, the burden remains upon the plaintiff to satisfy the jury that the defendant has failed to comply with the statutory standard. Defendant's evidence that he complied with the statutory standard does not remove the case from the jury's determination. As the trier of the facts, the jury remains free to accept or reject the testimony of defendant's witnesses. *Mitchell v. Saunders, supra*, 219 N.C. 178, 13 S.E. 2d

242. *See generally* Comment, *Medical Malpractice in North Carolina*, 54 N.C.L. Rev. 1214 (1976).

The trial court failed to properly apply the above rules in deciding defendant's motion for a directed verdict. On such motion, plaintiff's evidence must be taken as true and considered in the light most favorable to plaintiff, giving her the benefit of all reasonable inferences to be drawn therefrom. *Dickinson v. Pake*, 284 N.C. 576, 201 S.E. 2d 897 (1974). The evidence of the defendant, whether contradicted or uncontradicted, cannot be considered by the court, except insofar as it may tend to support plaintiff's case. *Mitchell v. Saunders, supra.* The enactment of N.C.G.S. 90-21.12 did not alter the above rules. When they are applied to the facts of this appeal, plaintiff has established a case for the twelve. The Court of Appeals properly reversed the directed verdict for defendant.

This holding is consistent with the legislative intent giving rise to N.C.G.S. 90-21.12. This statute and N.C.G.S. 90-21.11 were derived from recommendations of the Professional Liability Insurance Study Commission created by the 1975 General Assembly to study malpractice insurance rates and to submit a written report with recommended legislation.[1] 1975 N.C. Sess. Laws ch. 623. *See generally* Comment, *Statutory Standard of Care for North Carolina Health Care Providers*, 1 Campbell L. Rev. 111 (1979). This commission specifically declined to recommend legislation on the doctrine of res ipsa loquitur in this state. *See* Report of the North Carolina Professional Liability Insurance Study Commission (1976).

The Court of Appeals decision in this case is hereby

Affirmed.

1. The commission was composed of two insurance company representatives, two health professionals, and eight members of the General Assembly drawn equally from the House and Senate membership.

State v. Price

STATE OF NORTH CAROLINA v. ROBERT LEWIS PRICE

No. 397A83

(Filed 3 April 1984)

1. **Homicide § 12; Indictment and Warrant § 12.2— change of date in murder indictment**

The trial court did not err in allowing the State to change a murder indictment to allege the date of the offense rather than the date of the victim's death since time was not of the essence of the offense charged, and the change of date did not substantially alter the charge set forth in the indictment and thus was not an amendment proscribed by G.S. 15A-923(e). G.S. 15-155.

2. **Criminal Law § 163— failure to object to charge**

Defendant's failure to object to the court's charge constituted a waiver which precluded defendant from assigning as error any portion of the charge or omission therefrom. App. R. 10(b)(2).

3. **Criminal Law § 163— assignments of error to charge—propriety of exceptions**

Defendant could not properly bring forward assignments of error concerning the jury instructions, to which no objection was taken at trial, by inserting the term "exception" throughout the record and the trial transcript.

4. **Criminal Law § 163— no "plain error" in instructions**

The trial court's summary of the evidence and statement of defendant's contentions did not constitute "plain error" such as to require a new trial despite defendant's failure to object to the instructions as given.

DEFENDANT appeals as a matter of right from judgment of *Fountain, J.*, entered at the 14 March 1983 Criminal Session of Superior Court, JOHNSTON County.

The defendant was charged in bills of indictment, proper in form, with armed robbery and murder in the first degree. The charges were consolidated for trial. At trial the defendant entered a plea of not guilty to both charges. The jury subsequently found the defendant guilty of felony murder and armed robbery. The court arrested judgment in the armed robbery conviction and sentenced defendant to the mandatory term of life imprisonment.

The State's evidence tended to show that on 17 December 1982, Milton E. Ferrell was operating a store known as Miller's Grocery Store, located in rural Johnston County approximately eight miles west of Smithfield, North Carolina. The evidence fur-

ther established that Jesse Earl Sanders and the defendant, Robert Lewis Price, agreed to rob Miller's Grocery Store and did in fact complete their plan.

The primary witness for the State was Jesse Earl Sanders, the other principal participant involved in this robbery and murder. Prior to this trial, Sanders was sentenced to life imprisonment plus fourteen years upon his plea of guilty to this murder and robbery.

Sanders testified that on the afternoon of 17 December 1982, he and defendant Price were driving around town in a borrowed car belonging to a friend, Tilghman Williams. In the course of the afternoon, Sanders agreed to assist defendant in his plan to rob Miller's Grocery. Upon arriving at a point near the store, defendant handed Sanders a loaded .25 caliber pistol and a halloween mask with instructions that the defendant would wait in the car for Sanders.

Sanders further related that after the store cleared of customers, he entered the store alone and pointed the gun at Milton Ferrell. When Ferrell moved toward him, he fired the gun. Sanders then took about eighty dollars from the cash register and quickly fled. He ran up the road to where defendant was waiting for him.

On the way back to Smithfield, defendant threw the mask out the car window. Before returning the borrowed car to Tilghman Williams, the two stopped at a Shell gas station to replenish the car's gas supply and to divide the stolen money.

Soon after the defendant and Sanders picked up Williams from work, the Smithfield police stopped the car occupied by Williams, Sanders and the defendant. The three were detained and questioned by the law enforcement officers. Defendant subsequently waived his Miranda rights and made a statement implicating himself. He informed the officers that he had concealed the weapon used in the robbery in the springs behind the back seat of the car.

The State introduced testimony of other witnesses which tended to corroborate Sanders' account of what transpired. At the conclusion of the evidence for the State, the defendant elected

not to testify or offer evidence in his own behalf. The defendant now appeals from his jury conviction for first degree murder.

Attorney General Rufus L. Edmisten by Assistant Attorneys General J. Michael Carpenter and Daniel C. Higgins, for the State.

Allen H. Wellons, for the defendant.

COPELAND, Justice.

The defendant brings forward two assignments of error. We find no merit in either assignment.

[1] The defendant first contends that the trial court erred in allowing the State to amend the bill of indictment for murder to allege the date of the offense rather than the date of death. The bill of indictment, as returned by the Johnston County grand jury on 21 February 1983, charged the defendant with the murder of Milton Ferrell on 5 February 1983, which was the date Ferrell died. At trial the district attorney moved to change the date to reflect the date the offense occurred, which was 17 December 1982. Defendant argues that the amending of this indictment denied him his constitutional and statutory rights to be indicted by the grand jury.

Defendant offers in support of his argument, N.C. Gen. Stat. § 15A-923(e) which provides that "A bill of indictment may not be amended." This statute fails to include a definition of the word "amendment." The North Carolina Court of Appeals has ruled upon the interpretation of this subsection in *State v. Carrington*, 35 N.C. App. 53, 240 S.E. 2d 475, *cert. denied*, 294 N.C. 737, 244 S.E. 2d 155 (1978). That court defined the term " 'amendment' to be any change in the indictment which would substantially alter the charge set forth in the indictment." *Id.* at 58, 240 S.E. 2d 478. *See also State v. Rotenberry*, 54 N.C. App. 504, 284 S.E. 2d 197 (1981), *cert. denied*, 305 N.C. 306, 290 S.E. 2d 705 (1982). We believe the Court of Appeals, in its diligent effort to avoid illogical consequences, correctly interpreted this statute's subsection.

This change of the date of the offense, as permitted by the trial court, did not amount to an amendment prohibited by N.C.

Gen. Stat. § 15A-923(e), because the change did not "substantially alter the *charge* set forth in the indictment." The change merely related to time, which in this particular case was not an essential element of the charge.

Generally, when time is not of the essence of the offense charged, an indictment may not be quashed for failure to allege the specific date on which the crime was committed. *See State v. Tessnear*, 254 N.C. 211, 118 S.E. 2d 393 (1961); *State v. Andrews*, 246 N.C. 561, 99 S.E. 2d 745 (1957). This holding is in accord with N.C. Gen. Stat. § 15-155, which provides as follows:

> *Defects which do not vitiate.* — No judgment upon any indictment for felony or misdemeanor, whether after verdict, or by confession, or otherwise, shall be stayed or reversed for the want of averment of any matter unnecessary to be proved . . . *nor for omitting to state the time at which the offense was committed in any case where time is not of the essence of the offense, nor for stating the time imperfectly, nor for stating the offense to have been committed on a day subsequent to the finding of the indictment, or on an impossible day, or on a day that never happened* . . . (emphasis added).

The State may prove that an offense charged was committed on some date other than the time named in the bill of indictment. *State v. Wilson*, 264 N.C. 373, 141 S.E. 2d 801 (1965). *State v. Whittemore*, 255 N.C. 583, 122 S.E. 2d 396 (1961). Thus, pursuant to section 15-155, it was not necessary for the district attorney in the case *sub judice* to move to change the indictment date. Although not necessary, the correction was proper.

A variance as to time, however, becomes material and of the essence when it deprives a defendant of an opportunity to adequately present his defense. *Wilson*, 264 N.C. 373, 141 S.E. 2d 801. It is apparent from the record that defendant Price did not rely on alibi defense. Nowhere is there any indication that defendant contested his presence with Jesse Sanders in the vicinity of Miller's Grocery on 17 December 1982. Furthermore, prior to his indictment for murder, defendant had been indicted for armed robbery of Miller's Grocery, which was the transaction out of which the fatal shooting of Milton Ferrell occurred. Defendant cannot claim surprise and resulting prejudice from the change of

dates. In this case, the date on the indictment for murder, if erroneous, was not an essential element of the offense.

Moreover, we have also held that when the exact time and place are not essential elements of the offense itself, the defendant must move for a bill of particulars if he desires more definite information in respect thereto. *See, e.g., State v. Rogers*, 273 N.C. 208, 159 S.E. 2d 525 (1968). Defendant did not move for a bill of particulars here.

Finally, with regard to this assignment of error, we note that defendant did not object to this change of dates and, in fact, agreed that the original date used was a clerical error.

We conclude that the change of date in this indictment was not an amendment proscribed by N.C. Gen. Stat. § 15A-923(e) since it did not substantially alter the charge in the indictment. Time was not of the essence of the offense charged here. Defendant's right to be indicted by the grand jury was not violated. This assignment of error is overruled.

The defendant next claims that the trial court committed prejudicial error in its charge to the jury through its summary of the evidence and in stating the defendant's contentions. Particularly, the defendant contends that the trial court failed to summarize evidence which was favorable to him and to accurately or completely state his contentions. For the reasons stated below, we find no merit to these assignments of error.

Upon a careful review, we find the record devoid of evidence of any objection by the defendant to the trial court's recapitulation of the evidence or review of defendant's contentions. The only matter in the record susceptible of being called an objection, is what appears to have been a request by defense counsel for elaboration on a point of law. The court gave that further instruction apparently to the satisfaction of the defendant. This request did not in any way concern the defendant's contentions or evidence favorable to him.

We believe that Rule 10(b)(2) of the North Carolina Rules of Appellate Procedure is applicable to this situation. Rule 10(b)(2) provides, in pertinent part, as follows: "No party may assign as error any portion of the jury charge or omission therefrom unless

he objects thereto before the jury retires to consider its verdict, stating distinctly that to which he objects and the grounds of his objection. . . ."

This rule promulgated by the Supreme Court is in accord with the general rule that objections to the charge must be made before the jury retires in order to afford the trial court an opportunity to make corrections; otherwise these objections are deemed to have been waived and will not be considered on appeal. *State v. Smith*, 305 N.C. 691, 292 S.E. 2d 264 (1982); *State v. Hewett*, 295 N.C. 640, 247 S.E. 2d 886 (1978); *State v. Virgil*, 276 N.C. 217, 172 S.E. 2d 28 (1970); *State v. Goines*, 273 N.C. 509, 160 S.E. 2d 469 (1968).

[2] The mandatory requirements of Rule 10(b)(2) prevail over conflicting statutes and cases, as emphasized in our recent opinion, *State v. Bennett*, 308 N.C. 530, 302 S.E. 2d 786 (1983). We hold that defendant's failure to make objection to the court's charge constitutes a waiver which precludes defendant from bringing these matters forward on appeal.

[3] We further note that defendant's assignments of error concerning the jury instructions, to which no objection was taken at trial, were brought forward by defendant's subsequent insertions of the term "exception" throughout the record and the trial transcript. We stated in *State v. Oliver*, 309 N.C. 326, 335, 307 S.E. 2d 304, 312 (1983), that "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)" of our Rules of Appellate Procedure. However, such an exception is deemed preserved if the error amounted to "plain error." *State v. Odom*, 307 N.C. 655, 300 S.E. 2d 375 (1983).

[4] Defendant argues that the trial court's instruction does in fact constitute "plain error." After reviewing this instruction and the entire record, we find nothing which amounts to the sort of "fundamental error" mandated by *Odom* which would require a new trial.

In summary, we believe the defendant waived any right to challenge on appeal those aspects of the trial court's charge as to which no objection was offered at trial, as required by Rule

10(b)(2) of the Rules of Appellate Procedure. Further, none of defendant's contentions constitute "plain error."

This case was tried free of prejudicial error.

No error.

STATE OF NORTH CAROLINA v. DAVID BUCK

No. 277A83

(Filed 3 April 1984)

Homicide § 30.3— second degree murder case—error in failure to submit involuntary manslaughter

In a prosecution for second degree murder in which the case was submitted to the jury on theories of second degree murder, voluntary manslaughter and not guilty by reason of both self-defense and accident, the trial court committed prejudicial error in failing to submit involuntary manslaughter as a possible verdict on the theory that the killing was the result of defendant's reckless but unintentional use of a butcher knife where defendant presented evidence tending to show that deceased, intoxicated and armed with a pocketknife, aggressively advanced first upon a third person and next upon defendant; defendant then picked up the butcher knife to defend himself against deceased's advances; and although defendant was wielding the butcher knife generally to defend against a felonious assault upon him, the actual infliction of the fatal wound was not intentional.

APPEAL by right from a judgment imposing a life sentence entered by *Judge Bruce*, presiding at the 28 February 1983 Session of CRAVEN Superior Court, upon defendant's conviction of second degree murder. *See* N.C. Gen. Stat. § 7A-27(a).

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

Adam Stein, Appellate Defender, by Lorinzo L. Joyner, Assistant Appellate Defender, for defendant appellant.

EXUM, Justice.

The question dispositive of this appeal is whether the trial court erred in failing to instruct the jury on involuntary man-

slaughter as a possible verdict. Concluding that it did, we order a new trial.

I.

The victim, Rudolph Saunders, died on 20 November 1982 from a stab wound to the chest which he suffered during a struggle with defendant in the home of Janie Richardson. Other than the deceased, three people, including defendant, were present when the wound was inflicted. All three testified, describing two conflicting accounts of the deceased's death.

Ms. Richardson, Saunders' girl friend, testified that defendant and his girl friend, Irma Clark, were temporarily living with her on 20 November 1982. That day a disagreement developed between Saunders and defendant regarding some damage defendant had done to Ms. Richardson's apartment. According to Ms. Richardson, she and Saunders walked into the kitchen where defendant was standing near a counter. Defendant picked up a butcher knife off the counter and advanced on Saunders, who was unarmed. Defendant stabbed Saunders in the face, tripped him, and stabbed him several times while Saunders was on the floor. Ms. Richardson told defendant to put the knife down, which he did. Saunders then arose and left the apartment. He died shortly thereafter from the stab wounds.

Defendant's account of the incident was different. According to defendant, Saunders came from the upstairs of the apartment into the kitchen where defendant was standing. Saunders had an open pocketknife in his hand and was acting abusively, threatening to kill Ms. Richardson. Saunders' conduct scared defendant, and defendant told Saunders that he should not harm Ms. Richardson. According to defendant, Saunders came toward him brandishing the open pocketknife. Defendant instinctively grabbed the butcher knife off the counter, hoping to scare Saunders. The two men struggled, each holding a knife. Defendant testified that he threw Saunders to the floor and fell on top of him. Defendant said, "When I fell down the [butcher] knife was in my hand. I must have fell [sic] on top of the knife because when I fell down I noticed the knife had wounded" Saunders. Defendant said he observed the butcher knife sticking in Saunders' left chest, "pulled it out" and "tossed it on the table." He and Saunders continued to struggle on the floor. Finally defendant

told Saunders, "Drop the [pocket] knife and I'll let you up." Saunders said, "Let me up." Defendant said, "Throw the knife down." Saunders dropped the knife and defendant threw it over to the other side of the room by a cabinet in the corner. Saunders then got up and walked out of the apartment. Defendant testified that he did not intentionally stab Saunders with the knife. Defendant learned that Saunders had died later that day.

Ms. Clark also testified. She essentially corroborated defendant's testimony regarding how the struggle ensued and that Saunders was armed with a pocketknife.

Within hours of Saunders' death, a New Bern police officer interviewed Ms. Richardson, went with her to her apartment, searched the kitchen, and retrieved the butcher knife used by defendant. He testified that he did not see a pocketknife. The day after the killing, Ms. Richardson and her son, James Nelson, returned to the apartment and went into the kitchen. Nelson testified that he found an open pocketknife "jammed against the cabinet" on the kitchen floor underneath the cabinet's overhanging ledge. The police eventually came and seized the pocketknife.

Other evidence showed that on autopsy Saunders' blood alcohol content was 250 milligrams percent which would have produced a breathalyzer reading of .25 percent. The autopsy also revealed Saunders had two superficial lacerations—one on his forehead one inch long and another on his neck three-eighths of an inch long—in addition to the fatal stab wound in his chest.

The jury found defendant guilty of second degree murder.

II.

Defendant assigns two errors to the trial court's charge to the jury, one error to the prosecutor's closing argument, and one error to the sentencing hearing regarding the finding of certain aggravating circumstances. Because we conclude that the trial court committed reversible error in failing to submit involuntary manslaughter as a possible verdict, we find it unnecessary to reach defendant's other assignments of error inasmuch as they are not likely to arise on a new trial.

At a conference between court and counsel on jury instructions held at the close of evidence and before final arguments,

defendant, through counsel, requested that the trial court charge only on second degree murder and not guilty by reason of self-defense. The court concluded that a charge on voluntary manslaughter should be given. Defendant then requested that a charge on involuntary manslaughter also be given. The trial court, after considerable discussion with counsel, finally determined that it would not submit involuntary manslaughter as an alternative verdict. Defendant excepted. The case was submitted to the jury on theories of second degree murder, voluntary manslaughter and not guilty by reason of both self-defense and accident.

The question whether involuntary manslaughter should have been submitted in this case is controlled by *State v. Wallace*, 309 N.C. 141, 305 S.E. 2d 548 (1983), and *State v. Fleming*, 296 N.C. 559, 251 S.E. 2d 430 (1979). These cases, among many others, support the proposition that involuntary manslaughter can be committed by the wanton and reckless use of a deadly weapon such as a firearm (*Wallace*) or a knife (*Fleming*). In *Fleming* the state's evidence tended to show that defendant intentionally stabbed deceased to death with a knife. Defendant's evidence, on the other hand, tended to show the deceased was stabbed while she and defendant struggled with a knife. Defendant said he did not intentionally stab deceased. This Court concluded that defendant's testimony "would support a finding of either (1) an accidental killing or (2) perhaps an unintentional homicide resulting from the reckless use of a deadly weapon under circumstances not evidencing a heart devoid of a sense of social duty." 296 N.C. at 564, 251 S.E. 2d at 433.[1] In *Wallace* the state's evidence tended to show an intentional, malicious shooting of the deceased. Defendant's evidence, however, tended to show that defendant grabbed a gun from the deceased's hand and as he was attempting to throw it across the room it fired accidentally, the bullet striking and killing the deceased. The trial court there submitted possible verdicts of guilty of second degree murder, guilty of voluntary manslaughter, or not guilty by reason of both self-defense and accident. The jury convicted Wallace of second degree murder. This

1. A killing resulting from an act which is so reckless that it evidences a heart devoid of social duty is second degree murder, even though the killing be unintentional. *State v. Wilkerson*, 295 N.C. 559, 247 S.E. 2d 905 (1978); *State v. Wrenn*, 279 N.C. 676, 185 S.E. 2d 129 (1971).

Court held it was error warranting a new trial for the trial court not to submit involuntary manslaughter as an alternative verdict. We concluded expressly that the error was not cured by defendant's having been found guilty of second degree murder nor by the judge's instructions on accidental killing.

In the present case defendant's evidence, if believed, could support a verdict of involuntary manslaughter on the theory that the killing was the result of his reckless, but unintentional use of the butcher knife. In essence, defendant's position in the case is that the killing was unintentional and accidental for which no criminal responsibility should attach. At most, the killing was the result of his reckless use of the knife which would amount to involuntary manslaughter. If, however, the jury should conclude that he intentionally wielded the knife, then it should acquit him on the grounds of self-defense. We think all of these alternatives are supported by the evidence in addition to second degree murder and voluntary manslaughter.

This case differs from *Fleming* where we held there was no evidence of self-defense or voluntary manslaughter. In *Fleming* defendant's evidence tended to show that he chased the deceased who was running away from him, unarmed and naked; he picked up a knife which the deceased had dropped during her flight; he caught the deceased, they struggled with the knife, and the fatal stabbing occurred during the struggle. The Court said, "Defendant in his testimony makes no contention that he cut the deceased in the heat of passion or in self-defense." 296 N.C. at 563-64, 251 S.E. 2d at 433. This case also differs from *Wallace* where we also held the evidence would not support instructions on voluntary manslaughter or self-defense. In *Wallace* defendant's evidence tended to show that he was in the act of throwing a gun across the room when it accidentally discharged, killing deceased.

In the instant case defendant's evidence tends to show that the fatal stabbing occurred during a struggle in which both deceased and defendant were armed with knives and in which deceased so armed aggressively advanced first upon Ms. Richardson and next upon defendant. Deceased, who "was very intoxicated . . . and acted like he was going out of his head or something," told Ms. Richardson, "I ought to kill you"; he told defendant, "Well, I [sic] f--k you up man." Defendant also testified, "I was

scared . . . I didn't know what [the deceased] was going to do." Defendant then picked up the butcher knife to defend himself against deceased's advances. Although defendant was wielding the butcher knife generally to defend against a felonious assault upon him, the actual infliction of the fatal wound, according to defendant, was not intentional.[2]

While we find it unnecessary to address defendant's other assignments of error, we reiterate that it is important for the trial court to include the possible verdict of not guilty by reason of self-defense in its final mandate to the jury.

> The failure of the trial judge to include not guilty by reason of self-defense as a possible verdict in his final mandate to the jury was not cured by the discussion of the law of self-defense in the body of the charge. By failing to so charge, the jury could have assumed that a verdict of not guilty by reason of self-defense was not a permissible verdict in the case.

State v. Dooley, 285 N.C. 158, 165-66, 203 S.E. 2d 815, 820 (1974).

Concluding that the trial court committed reversible error in failing to charge the jury on involuntary manslaughter, we order a

New trial.

2. This case also differs from *State v. Ray*, 299 N.C. 151, 261 S.E. 2d 789 (1980), where we held it reversible error to submit involuntary manslaughter as a permissible verdict. In *Ray* all the evidence demonstrated that defendant intentionally shot deceased after deceased had shot and wounded defendant's brother and had threatened to shoot defendant. There was no evidence of an unintentional shooting. The entire defense was self-defense.

STATE OF NORTH CAROLINA v. ANTHONY Z. WHITFIELD

No. 288A83

(Filed 3 April 1984)

1. **Rape and Allied Offenses § 3— indictment—two separate counts of first degree rape—no double jeopardy**

There was no merit to defendant's argument that he was placed in jeopardy twice for the same offense where he was indicted, tried and convicted on two separate counts of first degree rape, involving two separate incidents; defendant was convicted under the first count as a principal; he was convicted under the second count as an aider and abettor and was therefore guilty as a principal.

2. **Jury § 5— failure to excuse prospective jurors for cause—no error**

Defendant failed to show the trial court abused its discretion in denying his motion to strike for cause two prospective jurors. One prospective juror was the father of an assistant district attorney and the second was an employee of the Fayetteville Police Department. Both indicated that he or she would render a fair and impartial decision based solely upon the evidence presented from the witness stand.

APPEAL by defendant from *Farmer, J.*, at the 14 March 1983 Criminal Session of Superior Court, CUMBERLAND County. Defendant was convicted of two counts of first degree rape and one count of assault with a deadly weapon with intent to kill inflicting serious injury. He received two consecutive life sentences on the rape convictions, to be followed by a six-year sentence on the assault conviction. We allowed defendant's motion to bypass the Court of Appeals on the assault conviction on 14 September 1983. Heard in the Supreme Court 15 March 1984.

Rufus L. Edmisten, Attorney General, by Christopher P. Brewer, Assistant Attorney General, for the State.

Ann B. Petersen, Assistant Appellate Defender, Office of the Appellate Defender, for the defendant-appellant.

MEYER, Justice.

The charges against defendant arose out of the 2 May 1982 sexual assault and beating of Bridget Merkley. Mrs. Merkley testified that after making a call from a telephone booth, she was hit on the head and dragged behind the Master Tune Station off Bragg Boulevard in Fayetteville. Her assailants were two men

she had seen earlier as she was using the telephone. Both men raped her, one holding her down as the other committed the offense. During and following the rape she was severely beaten about the head with a concrete block. A third man, whom she had also seen earlier, did not participate in the rape.

Nicky Byrd testified for the State. He admitted being present during the rape and acting as a lookout. He identified the defendant as one of the men who raped and beat the victim. He further admitted initially hitting the victim on the head with a rock to facilitate her removal from the area of the telephone booth.

As a result of the beatings inflicted by her assailants, Mrs. Merkley suffered multiple lacerations to her forehead, face, and scalp; fractures of the skull, jaw, and bones around her eyes; fracture of the arm, ribs, and thumb; a collapsed lung; and multiple other contusions. Her face was beaten beyond recognition.

Two of defendant's three assignments of error challenge the sufficiency of the indictment charging him with the offenses. By his third assignment of error defendant contends that the trial court abused its discretion in denying defendant's motion to strike two jurors for cause. We find no error.

The indictment upon which defendant now bases his first two assignments of error reads as follows:

STATE OF NORTH CAROLINA County of Cumberland	In The General Court of Justice—Superior Court Division

The State of North Carolina
vs.
Anthony Z. Whitfield, Defendant

THE JURORS FOR THE STATE UPON THEIR OATH PRESENT that on or about the 2nd day of May, 1982, in Cumberland County Anthony Z. Whitfield unlawfully and wilfully did feloniously rape Bridget A. Merkley by engaging in vaginal intercourse by force and against her will, in violation of North Carolina General Statutes Section 14-27.2(a)(2).

AND THE JURORS FOR THE STATE UPON THEIR OATH PRESENT that on or about the 2nd day of May, 1982, in Cumber-

land County Anthony Z. Whitfield unlawfully and wilfully did feloniously rape Bridget A. Merkley by engaging in vaginal intercourse by force and against her will, in violation of North Carolina General Statutes Section 14-27.2(a)(2).

AND THE JURORS FOR THE STATE UPON THEIR OATH PRESENT that on or about the 2nd day of May, 1982, in Cumberland County Anthony Z. Whitfield unlawfully and wilfully did feloniously rape Bridget A. Merkley by engaging in vaginal intercourse by force and against her will, in violation of North Carolina General Statutes Section 14-27.2(a)(2).

AND THE JURORS FOR THE STATE UPON THEIR OATH PRESENT that on or about the 2nd day of May, 1982, in Cumberland County Anthony Z. Whitfield unlawfully and wilfully did feloniously assault Bridget A. Merkley with a deadly weapon, to wit: a blunt instrument, with intent to kill the said Bridget A. Merkley, inflicting serious injuries by beating her about the head, in violation of North Carolina General Statutes Section 14-32(a).

s/MARTHA H. CLARK
Assistant District Attorney

WITNESSES:
X B. Daws, CCSD

The witnesses marked "X" were sworn by the undersigned foreman and examined before the grand jury, and this bill was found to be (X) a true bill by twelve or more grand jurors.

This 16 day of August, 1982.

s/GENE D. FREEMAN
Grand Jury Foreman

Prior to trial, the third count of the indictment, charging the defendant with rape, was dismissed. Included in the State's notice to dismiss count three was the following:

NOW COMES the State of North Carolina, by and through Assistant Attorneys General Christopher P. Brewer and Donald W. Stephens, Special Prosecutors in the above entitled action, and give notice to the defendant that the State in-

tends to call for trial Counts One, Two and Four of the Bill of Indictment returned against this defendant on 16 August 1982; the State intends to dismiss Count Three of the Bill of Indictment; the State provides additional information concerning Count Two of the Bill of Indictment, as in the nature of a Bill of Particulars (See G.S. 15A-925) as follows:

> "That on or about the 2nd day of May, 1982, in Cumberland County, Anthony Z. Whitfield did unlawfully, wilfully and feloniously aid and abet and act in concert with Charles E. Crocker in the unlawful, wilfull and felonious rape of Bridget A. Merkley by Charles E. Crocker in that Charles E. Crocker did unlawfully, wilfully and feloniously engage in vaginal intercourse with Bridget A. Merkley on or about the 2nd day of May, 1982, by force and against her will, in violation of N.C.G.S. Sec. 14-27.2(a)(2)."

[1] Defendant contends that "an indictment alleging multiple counts of the same offense by the same defendant against the same victim at the same place and time will not support multiple convictions and multiple punishments."

Defendant's argument is academic. It is clear that defendant was indicted, tried, and convicted on two separate counts of first degree rape, involving two separate incidents: defendant was convicted under the first count as a principal; he was convicted under the second count as an aider and abettor and therefore guilty as a principal. *State v. Johnson*, 226 N.C. 671, 40 S.E. 2d 113 (1946). It is defendant's contention, nevertheless, that disregarding the evidence at trial, including the obvious fact that his convictions were based on two different theories, and disregarding the fact that the State particularized the nature of the second count, the indictment raises the possibility that he might have been twice put in jeopardy for the same offense. We do not agree.

Each count in the indictment was sufficient to allege first degree rape. *See State v. Roberts*, 310 N.C. 428, 312 S.E. 2d 477 (1984); *State v. Effler*, 309 N.C. 742, 309 S.E. 2d 203 (1983). The theory upon which these charges were brought was a proper subject for a Bill of Particulars. *Id.* While it would have been preferable for the State to particularize both counts, rather than only the second count, defendant has failed to show prejudice as a result of the State's clarification of only the second count. It is

clear from the evidence at trial, including the jury instructions, that the first count was based upon defendant's forcible rape of the victim as the actual ravisher.

Defendant further contends that the counts charging rape were insufficient to charge an offense greater than second degree rape. He bases his argument on the State's failure to allege in the indictment the theory upon which the charge of first degree rape was brought. Defendant concedes that this issue has been resolved against him in *State v. Roberts*, 310 N.C. 428, 312 S.E. 2d 477; *see State v. Effler*, 309 N.C. 742, 309 S.E. 2d 203. We decline to reconsider our decisions in these two recent cases.

[2] By his final assignment of error defendant contends that the court abused its discretion in denying his motion to strike for cause two prospective jurors who, defendant alleges, were biased in favor of the State. One prospective juror was the father of an Assistant District Attorney in Cumberland County who did not participate in the trial. The second juror was an employee of the Fayetteville Police Department (the officers who handled the case and testified were sheriff's deputies). Both were questioned extensively. Each indicated that he or she would render a fair and impartial decision in the case. No answer given by either indicates otherwise. Due to the peculiar situation of each, it was obvious that both of these prospective jurors had, to some degree, more familiarity with the workings of the judicial system than an average individual might. This, alone, is insufficient to mandate automatic exclusion from a jury. *See State v. Hunt*, 37 N.C. App. 315, 246 S.E. 2d 159, *disc. rev. denied*, 295 N.C. 736, 248 S.E. 2d 865 (1978). Nor do we find it determinative that one of those prospective jurors, when asked if he might "lean" toward the prosecution, answered "there is always an element of doubt," while the other responded that she was not "absolutely" positive. These answers represent nothing more than total honesty and their import is characteristic of any prospective juror whose individual biases are not instantly shed upon being summoned for jury duty. Of significance is that these prospective jurors, when questioned, stated that they could listen to the evidence and render an impartial decision based solely upon the evidence presented from the witness stand. The trial judge did not abuse his discretion in denying defendant's motion to excuse for cause these two jurors. *See State v. Corbett*, 309 N.C. 382, 307 S.E. 2d 139 (1983).

Our review of the trial transcript indicates that this defendant received the benefit of able and aggressive representation by the public defender before an able and thorough trial judge. His representation on appeal was equally competent. Defendant received a fair trial free of error.

No error.

STATE OF NORTH CAROLINA v. ZOLTA ANTOINE HOWIE

No. 311PA83

(Filed 3 April 1984)

1. **Criminal Law § 99.2— questions and comments by court during trial—no expression of opinion**

In a prosecution for armed robbery of a service station attendant, the trial court did not express an opinion on the evidence during the trial in cautioning a witness to speak more slowly; clarifying the name of the oil company for which the witness worked; determining whether a witness could draw; clarifying the testimony of the witness with respect to the dimensions of the service station; and determining whether statements made by defendant were made in the presence of a codefendant for purposes of hearsay exceptions.

2. **Criminal Law § 86.9— bias of witness—cross-examination about indictment for another crime—exclusion as harmless error**

Even if cross-examination of a State's witness about his indictment on an unrelated armed robbery charge should have been permitted to show bias or prejudice by the witness, defendant was not prejudiced by the exclusion of such evidence where the jury had been apprised that the witness had been charged in the armed robbery case before the court, and where the possibility that the witness was to receive preferential treatment or concessions in return for his testimony was fully explored.

3. **Constitutional Law § 48— effective assistance of counsel during sentencing**

There is no merit to defendant's contention that he was denied the effective assistance of counsel during sentencing on the ground that counsel did not make an investigation of defendant's criminal record and other background information where the record shows that defense counsel's representation of defendant at sentencing was fully adequate, and there is nothing in the record to indicate that defense counsel did or did not make a background investigation or that a further search into defendant's background would have uncovered information tending to mitigate his sentence.

State v. Howie

APPEAL by defendant from *Davis, J.*, at the 16 March 1981 Criminal Session of Superior Court, CABARRUS County, following defendant's conviction of armed robbery and imposition of a life sentence. Defendant failed to perfect his appeal and this Court granted defendant's petition for certiorari on 7 July 1983. Heard in the Supreme Court 15 March 1984.

Defendant was tried, together with a codefendant, Eddie Wilkes, for the 8 November 1978 armed robbery of Raleigh Winfield Combs, a service station attendant. He contends that the trial judge's "continued comments during and intrusions into the trial" constituted "an improper expression of opinion showing favoritism and assistance to the state thereby depriving him of his right to a fair and impartial trial." He further argues that the trial court erred in limiting cross-examination of a State's witness. Finally he contends that he was denied effective assistance of counsel at sentencing. We find no error.

Rufus L. Edmisten, Attorney General, by Grayson G. Kelley, Assistant Attorney General, for the State.

Steven A. Grossman, Attorney for defendant-appellant.

MEYER, Justice.

At trial the State's evidence tended to show that on 8 November 1978, the victim, Raleigh Winfield Combs, was working as a service station attendant at what was then the Davis Oil Company in Kannapolis. At approximately 7:30 p.m. a black man wearing a ski mask entered the station and stated, "This is a robbery." He shot Mr. Combs five times, saying as he did so, "You die, you damn yellow son of a bitch." Mr. Combs suffered gunshot wounds to his throat, mouth, and abdomen. Mr. Combs was unable to identify his assailant. In addition to an undetermined amount of money taken from Mr. Combs, $492.00 was taken from the station.

Alfred Jerome Elliot testified that on the evening of 8 November 1978, the defendant came to his home, told Elliot he "had something he wanted to do," and asked to borrow Elliot's .22-caliber pistol. Elliot accompanied the defendant to his car and he, the defendant and codefendant Wilkes drove to within a block of the service station. Defendant parked the car, walked toward the service station, and returned approximately fifteen minutes

later holding Elliot's gun in one hand and money with blood on it in his other hand. The defendant gave Elliot $90.00 and returned the gun to him the next day.

Defendant offered no evidence. Following his conviction for armed robbery, he was sentenced to life imprisonment.

[1] Defendant first contends that the trial judge's comments during the trial constituted an impermissible expression of opinion. The court's questions and comments to which exception has been taken included *inter alia*: cautioning a witness to speak more slowly; clarifying the name of the oil company for which the witness worked; determining whether a witness could draw; clarifying the testimony of the witness with respect to the dimensions of the service station; and determining whether statements made by the defendant were made in the presence of codefendant Wilkes for purposes of hearsay exceptions. Our reading of the record discloses that in every instance the trial judge was acting well within his discretion. *State v. Jackson*, 306 N.C. 642, 295 S.E. 2d 383 (1982).

[2] Defendant next contends that he was denied his right to fully cross-examine and confront State's witness Elliot. In an effort to impeach Elliot on cross-examination, defense counsel attempted to elicit information concerning Elliot's having been charged in the very case before the court and his prior criminal activities. Elliot testified before the jury that he had been charged in the case before the court. Upon being questioned about prior convictions, defendant answered that he had been convicted of two armed robberies. A voir dire disclosed that defendant had not been convicted but had been indicted in one case (in North Carolina) and was under investigation for another robbery in South Carolina. The trial judge excluded evidence of Elliot's indictment for the unrelated robbery and the South Carolina investigation.

It is the State's position that evidence of the witness Elliot's possible involvement in unrelated robberies for which he had not been convicted was properly excluded under the authority of *State v. Williams*, 279 N.C. 663, 672, 185 S.E. 2d 174, 180 (1971). In *Williams* we stated that:

> *for purposes of impeachment*, a witness, including the defendant in a criminal case, may *not* be cross-examined as to

whether he has been *accused*, either informally or by affidavit on which a warrant is issued, of a criminal offense unrelated to the case on trial, nor cross-examined as to whether he has been *arrested for* such unrelated criminal offense.

It is defendant's position that the rule enunciated in *Williams* applies only to character impeachment and that, where the purpose of the cross-examination is impeachment by showing bias or prejudice, a different rule obtains.

Assuming arguendo that defendant's argument has merit, and the indictment on the unrelated robbery charge should have been admitted to show bias, he has failed to show prejudice by the exclusion of that evidence. The jury had been apprised that the witness had been charged in the present armed robbery case. The excluded evidence would have been merely cumulative. The thrust of the attempted cross-examination was to place before the jury the possibility that Elliot was to receive preferential treatment or concessions in the form of a plea on reduced charges in return for his testimony. This aspect of the witness's potential bias was fully explored. He stated unequivocally that he was testifying truthfully and no promises of preferential treatment, including any offer of a plea to a lesser charge, had been made in return for his testimony.

[3] Defendant's final assignment of error concerns an allegation of ineffective assistance of counsel during sentencing. Defense counsel, in his statement prior to sentencing, pointed out that defendant had never been convicted of a serious crime; that his preacher "thought of him as basically a good young man" and was "shocked" to hear of defendant's involvement in this robbery; and that because of defendant's youth, he might yet "develop into a productive member of society in the years to come." Defendant argues that his "trial counsel's statement on behalf of the defendant was the product of little if any preparation and, it is submitted, neglect." This argument is based partially on the fact that at sentencing defense counsel relied, in part, on the State to produce evidence of defendant's prior criminal record. Defendant further argues that a well-prepared trial attorney would certainly have had not only his record of convictions but "some evidence as to his environment, his childhood, his upbringing, his schooling, his

employment, sentencing alternatives, etc." The test for effective representation of counsel, as enunciated in *State v. Weaver*, 306 N.C. 629, 641, 295 S.E. 2d 375, 382 (1982), is "whether counsel's performance was 'within the range of competence demanded of attorneys in criminal cases.' "

We believe that defense counsel's representation of the defendant at sentencing was fully adequate. Defendant has not demonstrated, and there is absolutely nothing in the record to indicate, that defense counsel did or did not make a background investigation or that a further search into defendant's background would have uncovered information tending to mitigate his sentence.

No error.

RED HOUSE FURNITURE COMPANY v. ANNIE SMITH (APPEALED BY PAUL H. GIBSON)

No. 479PA83

(Filed 3 April 1984)

Sheriffs and Constables § 4.1 — penalty for failure to execute writ of possession — improperly entered

In an action in which the clerk of superior court of Guilford County issued a writ of possession commanding the Sheriff of Guilford County to take possession of furniture from defendant and deliver it to plaintiff, where a deputy sheriff attempted to execute the writ by going to the residence of defendant, and in return of the writ the deputy noted that defendant "stated she did not owe much and would work it out with plaintiff rather than let me pick it up and was not going to let know [sic] one have it," the trial court improperly entered judgment *nisi* in the sum of $100.00 against the Sheriff of Guilford County for failure to execute or make return upon the writ of possession since through his reliance on the law in this state prohibiting forcible entry to execute a writ of possession for personal property, the sheriff showed a valid and complete defense as to why the judgment of amercement should not have been made absolute. G.S. 1-313(4) and G.S. 1-480.

ON discretionary review, pursuant to G.S. 7A-31, of a decision of the Court of Appeals, 63 N.C. App. 769, 306 S.E. 2d 130 (1983), affirming judgment entered by *Cecil, Judge*, at the 2 August 1982

Civil Session of GUILFORD County District Court, High Point Division.

Plaintiff Red House Furniture Company obtained a judgment against defendant Annie Smith declaring Red House to be entitled to possession of certain furniture. Upon request of plaintiff and pursuant to G.S. 1-313(4), the Clerk of Superior Court of Guilford County on 12 January 1982 issued a writ of possession commanding the Sheriff of Guilford County to take possession of the furniture from defendant and to deliver it to plaintiff.

The return of the writ indicated that the writ was received by the Sheriff on 25 March 1982. Deputy Sheriff Coffer attempted to execute the writ by going to the residence of Ms. Smith on 1 April 1982. In his return of the writ, Deputy Coffer noted that defendant "stated she did not owe much and would work it out with plaintiff rather than let me pick it up and was not going to let know [sic] one have it." The Deputy declined to forcibly enter defendant's home to recover the furniture.

Upon verified motion of plaintiff, the trial court on 29 June 1982 entered judgment *nisi* in the sum of $100.00 against Paul H. Gibson, Sheriff of Guilford County, for failure to execute and make due return upon the writ of possession. Gibson was ordered to appear before the court and show cause why the judgment *nisi* should not become absolute.

On 3 August 1982, Gibson appeared and offered the defense that by law he had done all that was required of him in executing and returning the writ of possession for personal property. The trial court ruled that the actions of Deputy Coffer were imputable to Sheriff Gibson and that Gibson failed to take reasonable steps to execute the writ. The trial judge also found that the Sheriff had failed to show any defense as to why the judgment *nisi* entered on 29 June 1982 should not be made absolute. He therefore entered judgment for plaintiff in the sum of $100.00, together with costs of the amercement proceeding. Sheriff Gibson appealed.

The Court of Appeals affirmed the judgment of the district court in all respects and we granted Sheriff Gibson's petition for discretionary review on 6 December 1983.

Rossie G. Gardner for plaintiff-appellee.

Guilford County Attorney's Office, by J. Edwin Pons, for appellant, Sheriff Paul H. Gibson.

BRANCH, Chief Justice.

The issue presented by this appeal is whether the trial court correctly ruled that Sheriff Gibson failed to make a diligent attempt to execute the writ of possession and that he failed to show any defense as to why the judgment of amercement should not be made absolute.

At the time of this action, G.S. 162-14 provided,[1] in pertinent part, that a sheriff was subject to a penalty of forfeiting one hundred dollars ($100.00) for his failure to execute and make due return of all writs and other process to him legally issued and directed, unless he could show sufficient cause to the court at the next succeeding session after judgment *nisi* had been entered against him.

In the hearing before Judge Cecil on 3 August 1982, Sheriff Gibson offered the defense that the law in this State prohibits the use of force to execute writs of possession for personal property. He argued that when defendant denied him entrance to her home to recover the furniture, his only alternative was to return the writ without having recovered the property.

Relying upon a decision by the Superior Court of New Jersey, in *Vitale v. Hotel California, Inc.*, 184 N.J. Super. 512, 446 A. 2d 880, *aff'd*, 187 N.J. Super. 464, 455 A. 2d 508 (1982), the Court of Appeals rejected Gibson's argument and held that since the Sheriff had no reason to fear that he was in danger of imminent harm if he attempted forcible entry, his actions did not constitute a diligent attempt to execute the writ. The court further noted that G.S. 1-480 specifically allows a sheriff to break or enter a building where property subject to *claim and delivery* is concealed. Judge Johnson opined that "[i]f a sheriff can forcibly enter a building to recover concealed property before a responsive pleading can be filed, we see no reason why he should not be able to do so after judgment has been finally entered establishing the

1. This section was amended by the General Assembly, effective 1 July 1983. 1983 N.C. Sess. Laws, c. 670, § 8.

party's entitlement to the property." 63 N.C. App. at 771-72, 306 S.E. 2d at 131.

We reject this reasoning for it is in direct conflict with case law long established in this jurisdiction.

This Court's opinion in *State v. Whitaker*, 107 N.C. 802, 12 S.E. 456 (1890), is the most recent North Carolina decision relating to an officer's authority to make a forcible entry in an effort to execute civil process on personalty. We there held that:

> [i]n the absence of some statutory provision to the contrary, this case is governed by *S. v. Armfield*, 9 N.C. 246. It was there decided that an officer cannot break open an outer door or window of a dwelling against the consent of the owner for the purpose of making a levy on the goods of the owner. This decision is referred to with approval in *Sutton v. Allison*, 47 N.C. 339.
>
> While such authority is given an officer in case of "claim and delivery" where property is concealed, we can find nothing in The Code which warrants such conduct in cases of attachment and execution.

Id. at 804, 12 S.E. at 456. The rule of law enunciated in *Whitaker* and *Armfield* prohibiting forcible entry for the purpose of executing civil process on personal property is a restatement of the common law rule established in Semayne's Case, 77 Eng. Rep. 194 (K.B. 1604).

While it is true that by the enactment of G.S. 1-480 our legislature has provided an exception to this rule and permits forcible entry where property subject to claim and delivery is concealed, no similar exception has been promulgated with respect to the execution of writs of possession pursuant to G.S. 1-313(4).

We here reaffirm our decision in *Whitaker* that *"in the absence of some statutory provision to the contrary,"* the common law prohibition against the use of force to execute civil process on personal property applies. *See* G.S. 4-1 (common law is in force within this State except where it has been abrogated, repealed or has become obsolete).

We therefore hold that through his reliance on the law in this State prohibiting forcible entry to execute a writ of possession for personal property, Sheriff Gibson showed a valid and complete defense as to why the judgment of amercement should not have been made absolute.

The decision of the Court of Appeals is reversed, and this cause is remanded to the Court of Appeals for its further remand to the District Court of Guilford County, with direction to vacate the judgment absolute entered against appellant Sheriff Paul H. Gibson.

Reversed and remanded.

CHRISTINE O'NEAL, FORMERLY CHRISTINE O'NEAL WYNN v. JON B. WYNN

No. 505A83

(Filed 3 April 1984)

APPEAL of right by the plaintiff, pursuant to G.S. § 7A-30(2), from a decision of a divided panel of the Court of Appeals, 64 N.C. App. 149, 306 S.E. 2d 822 (1983), which affirmed the judgment entered by the *Honorable Hallett S. Ward, Judge Presiding,* at a Special Civil Session of District Court, HYDE County. Judgment was entered on 13 May 1982. Heard in the Supreme Court 15 February 1984.

Davis & Davis, by George Thomas Davis, Jr., for plaintiff-appellant.

Carter, Archie & Hassell, by Sid Hassell, Jr., for defendant-appellee.

PER CURIAM.

The facts of this case are adequately stated in the majority opinion of the Court of Appeals. After a careful review of the briefs and oral arguments presented in this case, and the majority decision of the Court of Appeals, we have concluded that the rationale and supporting authorities cited in the majority decision constitute a correct statement of the law and a correct application

of the law to the facts of this case. Therefore, we agree with the result reached by the majority in the Court of Appeals.

The decision of the Court of Appeals is

Affirmed.

STATE OF NORTH CAROLINA v. MICHAEL JAY HANKINS

No. 535A83

(Filed 3 April 1984)

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, 64 N.C. App. 324, 307 S.E. 2d 440 (1983), which reversed the judgment entered by the *Honorable Napoleon B. Barefoot, Judge Presiding,* at the 19 July 1982 Criminal Session of Superior Court, NEW HANOVER County. Judgment was entered on 22 July 1982. Heard in the Supreme Court 15 February 1984.

Rufus L. Edmisten, Attorney General, by John R. B. Matthis, Special Deputy Attorney General, and Philip A. Telfer, Assistant Attorney General, for the State-appellant.

William Norton Mason for defendant-appellee.

PER CURIAM.

The facts of this case are adequately stated in the majority opinion of the Court of Appeals. The first degree burglary charge was submitted to the jury on the theory that the defendant entered the house with the intent to commit *rape* or *larceny.* The jury returned a general verdict of guilty of first degree burglary. The Court of Appeals reversed defendant's conviction of first degree burglary and remanded the case for sentencing on the lesser-included offense of wrongful breaking or entry, a misdemeanor under G.S. § 14-54(b), holding that there was insufficient evidence to submit to the jury the question of whether the defendant intended to commit *rape* or *larceny* when he entered the house.

After carefully examining the record, briefs and oral arguments presented in this case, we have concluded that the result reached by the Court of Appeals is correct based upon the peculiar facts of this case. In reaching this conclusion we do not affect the validity of the holdings of this Court in *State v. Smith*, 211 N.C. 93, 189 S.E. 175 (1937) and *State v. Simpson*, 303 N.C. 439, 279 S.E. 2d 542 (1981).

The decision of the Court of Appeals is

Affirmed.

STATE OF NORTH CAROLINA v. ROY CECIL BALDWIN

No. 26A84

(Filed 3 April 1984)

JUDGMENT against the defendant was entered by *Mills, J.*, at the 21 September 1982 Criminal Session of Superior Court, WILKES County. Upon appeal to the Court of Appeals of North Carolina, the case was remanded to the Superior Court for a new sentencing hearing. The opinion of the Court of Appeals by *Judge Becton*, with *Judge Eagles* concurring and *Judge Hedrick* dissenting, is reported in 66 N.C. App. 156, 310 S.E. 2d 780 (1984). From this decision, the State of North Carolina appealed to this Court pursuant to N.C.G.S. 7A-30(2).

Rufus L. Edmisten, Attorney General, by Walter M. Smith and G. Criston Windham, Assistant Attorneys General, for the State.

William C. Gray, Jr., for defendant.

PER CURIAM.

Affirmed.

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

BYRD MOTOR LINES v. DUNLOP TIRE AND RUBBER

No. 403P83.

Case below: 63 N.C. App. 292

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 3 April 1984.

CARTER v. POOLE

No. 65P84.

Case below: 66 N.C. App. 143.

Petition by defendant for discretionary review under G.S. 7A-31 denied 3 April 1984.

CHASE v. BOWERS

No. 464P83.

Case below: 63 N.C. App. 565.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 3 April 1984.

CHEMICAL REALTY CORP. v. HOME FED'L SAVINGS & LOAN

No. 91P84.

Case below: 65 N.C. App. 242.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 3 April 1984.

FIREMAN'S FUND INSUR. CO. v. WASHINGTON

No. 622P83.

Case below: 65 N.C. App. 38.

Petition by several defendants for discretionary review under G.S. 7A-31 denied 3 April 1984. Motion by plaintiff to dismiss appeal for lack of substantial constitutional question allowed 3 April 1984.

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

GOBLE v. HELMS

No. 558P83.

Case below: 64 N.C. App. 439.

Petition by defendants for discretionary review under G.S. 7A-31 denied 3 April 1984.

HOGAN v. CONE MILLS CORP.

No. 480PA83.

Case below: 63 N.C. App. 439.

Petition by plaintiff writ of certiorari to North Carolina Court of Appeals allowed 19 March 1984.

KELLER v. CITY OF WILMINGTON

No. 47PA84.

Case below: 65 N.C. App. 675.

Petition by plaintiff for discretionary review under G.S. 7A-31 allowed 3 April 1984.

MAY v. SHUFORD MILLS

No. 546P83.

Case below: 64 N.C. App. 276.

Petition by defendants for discretionary review under G.S. 7A-31 denied 3 April 1984.

PLOTT v. PLOTT

No. 27PA84.

Case below: 65 N.C. App. 657.

Petition by plaintiff for discretionary review under G.S. 7A-31 allowed 3 April 1984.

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

ROBERSON v. ROBERSON

No. 57P84.

Case below: 65 N.C. App. 404.

Petition by defendant for discretionary review under G.S. 7A-31 denied 3 April 1984.

ROBINSON v. LEFEVER

No. 61P84.

Case below: 66 N.C. App. 202.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 3 April 1984. Motion by defendant to dismiss appeal for lack of substantial constitutional question allowed 3 April 1984.

SAMPLE v. MORGAN

No. 116A84.

Case below: 66 N.C. App. 338.

Petition by plaintiff for discretionary review under G.S. 7A-31 allowed 3 April 1984 as to additional issues.

STANLEY v. RETIREMENT AND HEALTH BENEFITS DIVISION

No. 86P84.

Case below: 66 N.C. App. 122.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 3 April 1984. Motion by defendant to dismiss appeal for lack of substantial constitutional question allowed 3 April 1984.

STATE v. BELL

No. 8PA84.

Case below: 65 N.C. App. 234.

Petition by defendant for writ of certiorari to North Carolina Court of Appeals allowed 21 March 1984.

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

STATE v. BOONE

No. 490P83.

Case below: 63 N.C. App. 566.

Petition for defendant for writ of certiorari to North Carolina Court of Appeals denied 3 April 1984.

STATE v. BOONE

No. 98P84.

Case below: 66 N.C. App. 377.

Petition by defendant for discretionary review under G.S. 7A-31 denied 3 April 1984. Motion by Attorney General to dismiss appeal for lack of substantial constitutional question allowed 3 April 1984.

STATE v. CLARK

No. 625P83.

Case below: 65 N.C. App. 286.

Petition by defendant for discretionary review under G.S. 7A-31 denied 3 April 1984.

STATE v. FLETCHER

No. 89P84.

Case below: 66 N.C. App. 36.

Petition by Attorney General for discretionary review under G.S. 7A-31 denied 3 April 1984.

STATE v. HOPE

No. 68P84.

Case below: 65 N.C. App. 825.

Petition by defendant for discretionary review under G.S. 7A-31 denied 3 April 1984.

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

STATE v. JONES

No. 4P84.

Case below: 65 N.C. App. 428.

Petition by defendant for writ of certiorari to North Carolina Court of Appeals allowed 3 April 1984 for the sole purpose of remanding to the North Carolina Court of Appeals for further remanding to the Superior Court, Gaston County, for resentencing without the application of the aggravating factor listed in G.S. 15A-1340.4(a)(1)g.

STATE v. MAYNARD

No. 629P83.

Case below: 65 N.C. App. 81.

Petition by defendant for discretionary review under G.S. 7A-31 denied 3 April 1984.

STATE v. MOORE

No. 569P83.

Case below: 64 N.C. App. 516.

Petition by Board of Education for discretionary review under G.S. 7A-31 denied 3 April 1984.

STATE v. MOORE

No. 597P83.

Case below: 64 N.C. App. 686.

Petition by defendant for discretionary review under G.S. 7A-31 denied 3 April 1984. Motion by Attorney General to dismiss appeal for lack of substantial constitutional question allowed 3 April 1984.

STATE v. OXENDINE

No. 570P83.

Case below: 64 N.C. App. 559.

Petition by defendant Tony Lee Oxendine for discretionary review under G.S. 7A-31 denied 3 April 1984.

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

STATE v. PARTRIDGE

No. 99P84.

Case below: 66 N.C. App. 427.

Petition by defendant for discretionary review under G.S. 7A-31 denied 3 April 1984.

STATE v. QUEEN

No. 64P84.

Case below: 65 N.C. App. 820.

Petition by defendant for discretionary review under G.S. 7A-31 denied 3 April 1984. Motion by Attorney General to dismiss appeal for lack of substantial constitutional question allowed 3 April 1984.

STATE v. RIDDLE

No. 84P84.

Case below: 66 N.C. App. 60.

Petition by defendant for discretionary review under G.S. 7A-31 allowed 3 April 1984 for the limited purpose of presenting the issue of the sentencing of the defendant as a "regular committed youthful offender," listed as Issue IV in defendant's petition. Motion by Attorney General to dismiss appeal for lack of significant public interest is allowed 3 April 1984.

STATE v. ROBERSON

No. 31P84.

Case below: 65 N.C. App. 624.

Petition by defendant for discretionary review under G.S. 7A-31 denied 3 April 1984.

STATE v. SIMMONS

No. 133A84.

Case below: 66 N.C. App. 402.

Petition by defendant for discretionary review as to issues in addition to those presented as the basis for the dissenting opinion of the Court of Appeals under G.S. 7A-30, 7A-31, and Appellate Rule 16(b) denied 3 April 1984. Motion by Attorney General to dismiss appeal as to additional issues for lack of substantial constitutional question allowed 3 April 1984.

STATE v. STOWE

No. 145P84.

Case below: 67 N.C. App. 197.

Petition by defendant for discretionary review under G.S. 7A-31 denied 3 April 1984.

STATE v. WELLS

No. 70P84.

Case below: 65 N.C. App. 825.

Petition by defendant for discretionary review under G.S. 7A-31 denied 3 April 1984. Motion by Attorney General to dismiss appeal allowed 3 April 1984.

TRASK v. CITY OF WILMINGTON

No. 551P83.

Case below: 64 N.C. App. 17.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 3 April 1984.

WILKES COUNTY v. GENTRY

No. 478PA83.

Case below: 63 N.C. App. 432.

Petition by defendant for writ of certiorari to North Carolina Court of Appeals allowed 19 March 1984.

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

WILLOUGHBY v. WILKINS

No. 35P84.

Case below: 65 N.C. App. 62.

Petitions by defendants for discretionary review under G.S. 7A-31 denied 3 April 1984.

STATE OF NORTH CAROLINA v. DAVID LAWSON

No. 142A81

(Filed 30 April 1984)

1. **Criminal Law § 73.2— admission of defendant—exception to hearsay rule**

A witness's testimony concerning defendant's statements to her about the offenses for which he was being tried were admissible under the party admission exception to the hearsay rule.

2. **Criminal Law § 89.2— prior statements of witness—offered as corroborating testimony**

It was proper for officers to testify regarding a witness's prior statements which were consistent with her in-court testimony and which corroborated that testimony.

3. **Criminal Law § 99.4— trial court's comments and explanations of voir dire—evidence jury left courtroom—comments not emphasizing importance of witness's testimony**

A trial judge's comments explaining a voir dire did not prejudicially emphasize a witness's testimony where (1) the record indicated that the jury had left the courtroom, (2) assuming *arguendo* the jury heard the complained of comments, there was nothing in the comments to suggest that the court was suggesting that the witness's testimony was extremely important since the witness was the only eyewitness to the shooting and the importance of his testimony was obvious to the jury, and it was not improper for the judge to tell the jury that he was going to rule on the competency of the proffered testimony, and (3) even if the comments could be deemed error, a different result would not have been reached at trial had the error not been committed since the evidence against defendant was overwhelming. G.S. 15A-1443(a).

4. **Constitutional Law § 80; Homicide § 31.3— constitutionality of death penalty statute—discretion of district attorney**

Where the United States Supreme Court has said the federal constitution does not prohibit the use of absolute prosecutorial discretion in determining which cases to prosecute for first degree murder so long as such discretionary decisions are not based on race, religion, or some other impermissible classification, the North Carolina Supreme Court is not inclined to interpret our state constitution to require more. Therefore, defendant's argument that our death penalty statute violates the equal protection of the laws clause of the Fourteenth Amendment because it afforded the district attorney "unbridled" discretion in deciding against whom he will seek verdicts of first degree murder and the death penalty must fail where defendant failed to show that the district attorney based his decision to seek the death penalty in defendant's case upon unjustifiable standards like "race, religion or other arbitrary classification."

5. Homicide § 31.3— constitutionality of sentencing statute for death penalty cases providing for review of judgment and sentence by Supreme Court

G.S. 15A-2000(d) does not require the Supreme Court to find facts, a function for which it has no jurisdiction; rather, the statute requires the Supreme Court to determine, as a matter of law, whether (1) the record supports the jury's finding of any aggravating circumstance upon which the trial court based its sentence of death, (2) the sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor, or (3) the sentence of death was excessive or disproportionate to the penalty imposed in similar cases. Nor are the terms "under the influence of passion, prejudice or any other arbitrary factor" unconstitutionally vague.

6. Criminal Law § 135.10— proportionality review of death sentence

In a prosecution for first degree murder, there was nothing in the record which suggested that the sentence of death was influenced by "passion, prejudice, or any other arbitrary factor." Further, the sentence of death was not excessive or disproportionate to the penalty imposed in similar cases where the evidence tended to show that the murder and the attempted murder were accomplished as the result of defendant's careful, cold and calculated determination that he would prefer murdering these persons to risking their being able to testify against him and possibly send him back to prison; where defendant at the sentencing hearing told the jury that if it believed he committed the murder, "Gas me" and "I'd like the death penalty"; where defendant offered little in mitigation of the murder; and where the jury, on supporting evidence, concluded that the murder was aggravated because it was committed to avoid arrest and was part of a course of conduct which involved a crime of violence against another person. There was no suggestion in this case that defendant's mental capacity was impaired or that he was under the influence of a mental or emotional disturbance. All the evidence showed that the murder and the attempted murder were coldly and calculatedly perpetrated because defendant did not want to leave any witnesses who might send him back to prison, and "the motive of witness elimination lacked even the excuse of emotion."

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

APPEAL by defendant from a judgment of *Judge James C. Davis*, entered at the 1 June 1981 Criminal Session of CABARRUS Superior Court, imposing a death sentence upon the jury's recommendation following defendant's conviction of first degree murder. N.C. Gen. Stat. § 7A-30 (1981). We allowed defendant's motion to bypass the Court of Appeals in two companion cases in which lesser sentences were imposed. These were judgments imposing, respectively, a twenty-year sentence of imprisonment upon defendant's conviction of assault with a deadly weapon with intent to kill inflicting serious injury, and a ten-year sentence of imprisonment for felonious breaking of a dwelling house.

Rufus L. Edmisten, Attorney General, by Elizabeth C. Bunting, Assistant Attorney General, for the state.

James C. Johnson, Jr., for defendant appellant.

EXUM, Justice.

In this appeal defendant contends the trial court erred by failing to exclude certain evidence and by improperly expressing its opinion to the jury. He also asks us to declare North Carolina's death penalty statute unconstitutional. We find no merit in any assignment and leave undisturbed the judgments entered by the trial court.

I.

In December 1980, Buren Shinn resided in a house on Old Salisbury Road approximately three miles from Concord. Buren's son Wayne lived in a house located about 100 yards away. Buren and Wayne worked together in a family electrical business.

After driving to his father's home on 4 December 1980, Wayne heard the burglar alarm at his own home. Wayne and Buren jumped into a truck and rushed over to Wayne's house, where they observed a dirty brown Ford parked in the driveway. Wayne got out of the truck and ran towards the patio at the side of his house. Buren then saw Wayne throw up his hands and heard a gun fire.

Buren ran to the truck, got in and began backing the truck in an effort to get away. Defendant ran toward him, waving a pistol. This sight diverted Buren's attention and he backed the truck into a ditch. Defendant approached the truck and ordered Buren to get out and move towards Wayne's house. Buren did so, pleading with defendant not to hurt him.

Before Buren reached the house, he heard another gunshot and felt a sharp blow to his head. He fell to the ground and lost consciousness. Sometime later he "came to," finding himself lying in a large pool of blood. Fearing that defendant might still be in the vicinity, he lay silently. Some twenty or thirty minutes later, he heard someone walk toward him and he felt a hand reach into his pocket and take his wallet.

Buren remained motionless for another twenty minutes. Hearing no more footsteps, he partly raised himself up. Seeing no one, he crawled away from the patio toward the road, hoping to stop a passing car. When no one stopped, he struggled to his feet and walked toward his home. As he entered his home, another son, Jerry, saw him and telephoned for help. After Jerry was told what had happened, he left to see about Wayne.

Law enforcement officers arrived at Wayne's house and found him lying in a pool of blood in the basement near the patio. Wayne and Buren were taken to a hospital where Wayne was pronounced dead as the result of a bullet wound to his head. Buren's injuries were not severe, as the bullet which struck him did not penetrate his skull. He recovered after a short stay in the hospital.

The police found Wayne's house ransacked. They found several jewelry items and a camera in a pillowcase, apparently dropped by the intruder. Marks on the kitchen door indicated the house had been forcibly entered.

Phyllis Soden, who had known defendant for several years, returned to her home from work at about 4 a.m. on 4 December 1980. Shortly after 9 a.m. defendant went to her home and stated that he needed her to take him some place immediately. Leaving his dirty brown Ford in her driveway, the two departed in her automobile. Defendant directed her to drive on the Old Salisbury Road. As they neared the Shinn home he told her to stop, let him out, drive a short distance farther, turn around, and return to pick him up. She followed defendant's directions. When she returned, he ran to the car carrying a crowbar.

After they returned to Ms. Soden's home, defendant explained that he had broken into a house and had left the crowbar there. He wanted to retrieve the bar because it might have his fingerprints on it. A little while later, defendant showed her a wallet and removed the money from it. Thereafter, he told her: He had broken into a house after hearing that the residents had gold and jewelry. He found some items and stuffed them into a pillowcase. As he was preparing to leave, a man entered the patio door. He pointed his gun at the man who put up his hands. He ordered the man to turn around and shot him in the back of his head. After the man fell, he ran out of the house. When he left

the house, he saw another man approaching the patio. The other man turned, ran and entered a truck. He ordered the man out of the truck; and, although the man begged defendant not to shoot, defendant forced him to walk toward the patio and shot him in the back of his head. He was confident both of the other men were dead because he shot them at close range. He killed them to eliminate witnesses because he did not want to go back to prison.

Defendant offered no evidence at the guilt-determination phase of the trial.

The jury convicted defendant of assault with a deadly weapon with intent to kill inflicting serious injury upon Buren Shinn and felonious breaking of the home of Wayne Shinn. It also convicted him of the first degree murder of Wayne Shinn.

The following transpired at the sentencing phase of the murder case. Outside the presence of the jury defendant was examined under oath by his counsel. During this examination defendant testified that his counsel had fully advised him regarding the nature of the sentencing phase of the proceeding. Defendant also acknowledged that on 6 June 1981 he signed an affidavit in which he acknowledged that he told his attorney, Mr. Johnson,

> on at least five separate occasions . . . that should I be found guilty, then in the second trial dealing with punishment, I wished to have my attorney seek and request the death penalty. I do not wish to spend the rest of my life in jail. I had rather have the death penalty than a life term. I understand my right to a second trial at which the jury will consider both mitigating and aggravating circumstances. I have, nevertheless, for some months before the trial told my attorney I do not want a life sentence, but a death sentence and I want him to take such legal steps as may be necessary to see that the sentence is carried out.

The trial judge then advised defendant that notwithstanding his desire to be sentenced to death, the jury must make that decision and that the court by law was required to submit whatever aggravating and mitigating circumstances were supported by the evidence. The trial judge said, "Even though you may ask the jury to recommend the death sentence in this case, the jury is not

bound by it and the jury may . . . still see fit to recommend life imprisonment."

The jury was then brought back into the courtroom. Defendant testified before the jury that his criminal record consisted of "two cases of breaking and entering some years ago in Stanly County." He had assisted the state "involving some criminal matters in Stanly County some years ago." The following colloquy then occurred:

> Q. At this time would you tell the jury what your request is regarding their decision?
>
> A. I'd like the death penalty.
>
> Q. Would you care to tell us why you want the death penalty?
>
> A. To be locked up in prison for something I did not do, is truly cruel and inhuman. I didn't do it. I don't care what anybody says. I'm innocent. That to be put in prison for life that's not right. You think I done it, gas me.
>
> Q. And you're—you know what you're asking?
>
> A. Yes, sir.
>
> Q. You know it's my responsibility to try to save your life?
>
> A. Yes, sir.
>
> Q. That's all.

There was a brief cross-examination by the state during which defendant admitted that he owned a .32 caliber pistol in September 1980; he had attempted to purchase a pistol shortly after 4 December 1980; and on 4 December 1980 he had gone to Salisbury with Phyllis Soden. At the guilt phase of his trial a ballistics expert had testified that the bullet which killed Wayne Shinn was a .32 caliber bullet.

The jury found as aggravating circumstances that the murder of Wayne Shinn was "committed for the purpose of avoiding a lawful arrest" and was "part of a course of conduct in which [defendant] engaged and [which] include[d] the commission by the

defendant of other crimes of violence against [another person]." *See* N.C. Gen. Stat. § 15A-2000(e)(4) & (11). The jury next found that the aggravating circumstances were sufficiently substantial to call for the imposition of the death penalty. Two specific mitigating circumstances were submitted, *i.e.*, defendant had "no significant history of prior criminal activity" and "defendant testified truthfully on behalf of the prosecution in another prosecution of a felony." *See* N.C. Gen. Stat. § 15A-2000(f)(1) & (8). The jury was also asked to consider whether any other circumstance existed which it deemed to have mitigating value. *See* N.C. Gen. Stat. § 15A-2000(f)(9). The jury did not specify which of the mitigating circumstances it found, but it did indicate that it found "one or more mitigating circumstances" to exist. The jury finally found that the aggravating circumstances outweighed the mitigating circumstances and recommended that defendant be sentenced to death.

II.

Guilt Phase

A.

[1] Defendant assigns error to the admission of Phyllis Soden's testimony regarding statements he had made to her after the shootings. Defendant says this testimony was inadmissible for the reason that it was hearsay not falling within any exception to the hearsay rule. We disagree.

Generally, out-of-court statements of a person offered through a witness other than declarant to prove the truth of the matter asserted in the statements is hearsay. *State v. Wood*, 306 N.C. 510, 294 S.E. 2d 310 (1982); 1 Brandis on North Carolina Evidence, § 138 at 551-53 (2d rev. ed. 1982). A well-recognized exception to the hearsay rule, however, permits out-of-court admissions of parties, including criminal defendants, to be related by a witness to whom the admissions were made. *State v. Edwards*, 286 N.C. 140, 209 S.E. 2d 789 (1974); *State v. Porth*, 269 N.C. 329, 153 S.E. 2d 10 (1967); 2 Brandis, *supra*, § 167, at 6-10. Ms. Soden's testimony concerning defendant's statements to her about the offenses for which he was being tried were admissible under the party admission exception to the hearsay rule.

B.

[2] Defendant contends it was error to admit testimony of police investigators relating Ms. Soden's prior statements to them made before and after defendant's arrest. At trial, Ms. Soden testified at length about defendant's admissions to her that he had shot both Wayne Shinn and Buren Shinn at close range when they had come upon him in Wayne Shinn's home after he had broken in and was attempting to steal various articles which he had collected in a pillowcase. She also testified to defendant's efforts to persuade her to be an alibi witness for him and to her consenting to permit defendant to hide his pistol used in the shootings at her home. She related further that she had made several statements to investigating officers and she gave, generally and in summary fashion, the content of those statements. The investigating officers were then permitted to testify to the statements made to them by Ms. Soden for the sole purpose of corroborating her in-court testimony. The statements did, in fact, corroborate her in-court testimony. The trial judge gave appropriate limiting instructions regarding the officers' testimony.

It was proper for the officers to testify regarding Ms. Soden's prior statements consistent with her in-court testimony to corroborate that testimony. *State v. Perry*, 298 N.C. 502, 259 S.E. 2d 496 (1979); *State v. Hopper*, 292 N.C. 580, 234 S.E. 2d 580 (1977).

C.

[3] Defendant assigns error to certain remarks made by the trial court, contending that the court impermissibly expressed an opinion to the jury.

The remarks of which defendant complains were made while Buren Shinn, one of the shooting victims, testified. The transcript indicates that he began testifying during the late afternoon. He had testified with respect to his being shot, carried to the hospital and treated for his injuries. He was then asked if he could identify the person who shot him. Defendant's objection necessitated a voir dire by the court. The following colloquy occurred:

> THE COURT: Sustained. Members of the jury, we have come to a point that requires you to not be in the courtroom

at this particular moment. Can I see you gentlemen here just one minute.

(Discussion at bench)

THE COURT: There is a matter at this particular point of the trial which requires that the Court do certain things in your absence prior to any testimony being heard by you at this particular stage of the trial. Now, I anticipate and the attorneys anticipate it to take longer than just a little while. So, I don't see any point in my leaving you in the jury room while we are doing this. I have no intentions of keeping you until after five and bringing you back in and start again. I'm going to let you go for the remainder of the day. However, I must admonish you at this time before I allow you to leave. We have plenty of work for us to do today. You must not discuss this case with anyone or allow anyone to discuss it with you. Do not discuss it even among yourselves. Keep an open mind about this case until you have heard the remainder of the evidence, the argument of counsel for the State and the Defendant, the charge of the Court and have gone to your jury room to deliberate. Then, and only then, are you allowed to talk about and discuss it. During the night recess, do not read anything in the newspapers about it, do not view anything on television or listen to anything on the radio regarding this matter. Keep an open mind about it and return in the morning to the jury room at nine-thirty. When you exit at this time, go on home for the night and I will see you folks in the morning at nine-thirty. Everybody else remain seated.

(Jury leaves courtroom)

THE COURT: A way of explanation and this is just an explanation. I'll tell you folks exactly what is going on. There comes times in the trial of cases where we must conduct as what is known as voir dire. That is we must determine whether or not an item is competent to be received into evidence before the jury. That's what we are just about to do. Mr. Shinn is going to be called upon to testify at this time regarding who he saw—

MR. BOWERS: May I approach the bench, sir?

THE COURT: Yes, sir.

(Discussion at bench)

THE COURT: I will not explain anything further to you at this time. Mr. District Attorney, you may continue.

Defendant argues that the trial court's comments (1) "emphasized to the jury that Mr. Shinn's testimony was extremely important"; (2) "implied that the judge personally was going to test the Shinn identification outside their presence to check its competence before he let them hear it"; and (3) "implied that Mr. Shinn obviously had seen the right man and that Mr. Shinn's identification was competent and thus believable because the judge brought [the jury] back in and allowed Mr. Shinn to testify. . . ." Defendant's argument relates only to those comments which follow immediately after the notation in the trial transcript "(Jury leaves courtroom)," yet defendant's argument seems to assume the jury heard the comments complained of. Defendant's argument must fail for several reasons.

First, this Court must assume that the jury had been excused and had left the courtroom when the remarks were made because this is what the trial transcript shows. Except as permitted by the evidentiary doctrine of judicial notice, *see* 6 Strong's North Carolina Index 3d *Evidence* §§ 1-3.7 (1977), this Court is bound on appeal by the record on appeal as certified and can judicially know only what appears in it. *State v. Gibbs*, 297 N.C. 410, 255 S.E. 2d 168 (1979); *State v. Williams*, 280 N.C. 132, 184 S.E. 2d 875 (1971). When, pursuant to App. R. 9(c)(1), the trial transcript, "as agreed to by the opposing party . . . or as settled by the trial tribunal," is filed by appellant in lieu of narrating the evidence in the record on appeal, as was done in this case, the trial transcript must be treated as part of the record on appeal for purposes of applying the rule that this Court is bound by what appears in the record on appeal. So far as this Court can know, therefore, the jury never heard the remarks of which defendant complains.

Second, assuming *arguendo* the jury heard the complained of comments, we find no error was committed. There is nothing in the comments to suggest, as defendant urges, that "Mr. Shinn's testimony was extremely important." Mr. Shinn was the only eyewitness to the shooting. The importance of his testimony was so

obvious that the jury must have known it without having to be told. Nevertheless, the trial court did not, as it should not have done, give undue emphasis to the importance of Mr. Shinn's testimony. It was not improper for the judge to tell the jury that he was going to rule on the competency of the proffered testimony. Trial judges frequently make rulings on competency of evidence in the presence of juries, and juries understand this to be one of the functions of the judge. Such rulings are not in themselves error. *See State v. Hooks*, 228 N.C. 689, 47 S.E. 2d 234 (1948). It cannot be error, therefore, for the trial judge to announce to the jury merely that he is going to determine in a proceeding out of their presence the competency of certain evidence. We see nothing in the comments to suggest that Mr. Shinn "had seen the right man" or that his testimony was "believable evidence." The trial judge said only Mr. Shinn would be called on to testify "regarding who he saw." This statement in no way suggests that the trial judge thought the person whom Mr. Shinn saw was the defendant or that Mr. Shinn's testimony on this point should be believed.

Finally, even if these comments could by some stretch of judicial imagination be deemed error, we are completely satisfied that had the error not been committed, a different result would not have been reached at trial. The evidence against defendant was overwhelming. It consisted not only of Mr. Shinn's eyewitness testimony but the testimony of a friend of defendant to whom defendant had admitted committing the crimes. The details of these admissions coincided precisely with facts uncovered by investigators and with Mr. Shinn's testimony. The trial judge in his final jury instruction carefully and at length told the jury that it was the "sole judge" of the credibility of each witness. He specifically instructed the jury, "The identification witness is a witness just like any other witness. That is, you should assess the credibility of the identification witness in the same way you would any other witness." Under the standard of N.C. Gen. Stat. § 15A-1443(a), no reversible error was committed.

We have dealt with all defendant's assigned errors. In addition, we have considered all of the trial proceedings which are in the record and transcript before us.[1] We find no error in the guilt phase of the trial.

1. The jury selection process was not contained in any document before us.

III.

Sentencing Phase

Defendant assigns as error the failure of the trial court to hold our death penalty statute unconstitutional. We find no merit in this assignment.

[4] Defendant argues, first, that our statute violates the Equal Protection of the Laws Clause of the Fourteenth Amendment because it affords the district attorney "unbridled" discretion in deciding against whom he will seek verdicts of first degree murder and the death penalty, and against whom he will seek verdicts of second degree murder and a lesser punishment. While defendant cites no authority, he contends that if unbridled discretion in juries to impose or not to impose the death penalty is unconstitutional, *see Woodson v. North Carolina*, 428 U.S. 280 (1976), then complete discretion on the part of district attorneys is unconstitutional.

In a hearing on his motion to have the statute declared unconstitutional, defendant called the district attorney as a witness. He testified, among other things, that he exercised broad discretion in deciding whether (1) he would seek a first degree murder verdict and a recommendation of the death penalty, or (2) he would seek a lesser verdict, or (3) he would accept a plea to a lesser degree of homicide. He had no statutory or any other kind of guidelines to follow in making these decisions. Often he declined to seek a first degree murder verdict and the death penalty because of a case's technical or evidentiary problems.

In *Oyler v. Boles*, 368 U.S. 448 (1962), the defendant challenged the constitutionality of West Virginia's habitual criminal statute on the ground that there was selective enforcement by the prosecution. In rejecting this challenge, the Court said:

> [T]he conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation. Even though the statistics in this case might imply a policy of selective enforcement, it was not stated that the selection was deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification. Therefore grounds supporting a finding of a denial of equal protection never were alleged.

Id. at 506 (citations omitted). In *State v. Cherry*, 298 N.C. 86, 103, 257 S.E. 2d 551, 562 (1979), *cert. denied*, 446 U.S. 941 (1980), the defendant claimed our death penalty procedure denied defendants constitutional due process because it placed no limits on the case calendaring prerogatives of the district attorney, who could, according to defendant, "calendar cases when he chooses, in front of whatever judge he chooses." In rejecting this argument, we said:

> Our courts have recognized that there may be selectivity in prosecutions and that the exercise of this prosecutorial prerogative does not reach constitutional proportion unless there be a showing that the selection was deliberately based upon 'an unjustifiable standard such as race, religion or other arbitrary classification.' [Citations, including *Oyler*, omitted.]

Id. Here, there is no allegation or even intimation that the district attorney had deliberately employed any "unjustifiable standard" in calendaring this or any other case involving the death penalty. The United States Supreme Court has rejected arguments identical to defendant's in the context of death penalty procedures. *Gregg v. Georgia*, 428 U.S. 153 (1976); *Proffitt v. Florida*, 428 U.S. 242 (1976).

Defendant fails to show that the district attorney based his decision to seek the death penalty in defendant's or any other death case upon unjustifiable standards like "race, religion or other arbitrary classification." The United States Supreme Court says the federal constitution does not prohibit the use of absolute prosecutorial discretion in determining which cases to prosecute for first degree murder so long as such discretionary decisions are not based on race, religion, or some other impermissible classification. We are not inclined to interpret our state constitution to require more.[2]

[5] Defendant attacks the constitutionality of our statute providing for review of judgment and sentence by this Court. *See* N.C. Gen. Stat. § 15A-2000(d). First, he contends that this Court must find facts, a function for which it has no jurisdiction. Second, he contends that the standards for review are unconstitutionally vague.

2. If prosecutors are to be "guided" in the exercise of this kind of discretion, we think it is the province of the legislature and not this Court to so provide.

Neither contention has merit. Section 15A-2000(d) provides, in pertinent part:

> Review of Judgment and Sentence.—
>
> (1) The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of North Carolina pursuant to procedures established by the Rules of Appellate Procedure. In its review, the Supreme Court shall consider the punishment imposed as well as any errors assigned on appeal.
>
> (2) The sentence of death shall be overturned and a sentence of life imprisonment imposed in lieu thereof by the Supreme Court *upon a finding* that the record does not support the jury's findings of any aggravating circumstance or circumstances upon which the sentencing court based its sentence of death, or *upon a finding* that the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor, or *upon a finding* that the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. The Supreme Court may suspend consideration of death penalty cases until such time as the court determines it is prepared to make the comparisons required under the provisions of this section. [Emphases supplied.]

Admittedly, this Court is not a fact-finding body. *See State v. Lamkins*, 286 N.C. 497, 212 S.E. 2d 106 (1975), *cert. denied*, 428 U.S. 909 (1976). "The Supreme Court shall have jurisdiction to review upon appeal any decision of the courts below, upon any matter of law or legal inference. . . ." N.C. Const. art. IV, § 12(1). While section 15A-2000(d)(2) uses the word "finding" in prescribing this Court's review of death sentences, a "finding of fact," as that term is generally understood, is not contemplated. Rather, "a finding," as used in the statute, means, rather, a "determination," or a "conclusion." The statute requires this Court to determine, as a matter of law, whether (1) the record supports the jury's finding of any aggravating circumstance upon which the trial court based its sentence of death, (2) the sentence of death was

imposed under the influence of passion, prejudice or any other arbitrary factor, or (3) the sentence of death is excessive or disproportionate to the penalty imposed in similar cases. The statute neither contemplates nor requires this Court to make factual findings.

Defendant argues that the terms "under the influence of passion, prejudice, or any other arbitrary factor" are unconstitutionally vague. Statutes containing identical or similar words have been upheld against vagueness challenges. *Gregg v. Georgia*, 428 U.S. at 166-67, 204-06. We agree with the Supreme Court's interpretation of the federal constitution on this point, and we are not inclined to interpret our state constitution any differently.

IV.

Proportionality

[6] Having found no error in the guilt or sentencing phase of the trial, we must now consider whether (1) "the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor" and (2) "the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." N.C. Gen. Stat. 15A-2000(d)(2).

We can find, and defendant has pointed to, nothing in the record which suggests that the sentence of death was influenced by "passion, prejudice, or any other arbitrary factor." The case was carefully and meticulously tried. The trial judge was assiduous at every stage to protect defendant's rights. The evidence of guilt was overwhelming. Defendant, against the advice of counsel, offered little, if anything, in mitigation of his sentence. Indeed defendant told the jury he preferred the death penalty to life imprisonment. The jury was carefully instructed at the sentencing phase regarding its duties under our capital sentencing statute. The instructions were in accordance with our case law on the subject. The jury was instructed that if it found the existence of aggravating and mitigating circumstances it

> must weigh the aggravating circumstances against the mitigating circumstances. In so doing, you are the sole judges of the weight to be given to any individual circumstance which

> you find, whether aggravating or mitigating. Your weighing should not consist of merely adding up the number of aggravating circumstances and mitigating circumstances. Rather, you must decide from all the evidence what value to give each circumstance and then weigh the aggravating circumstances against the mitigating circumstances so valued and finally determine whether the aggravating circumstances outweigh the mitigating circumstances.[3]

Nothing in the record before us suggests that the jury's ultimate determination of defendant's death sentence was based on anything other than its careful weighing of the aggravating against the mitigating circumstances in accordance with our capital sentencing statute.

Coming now to the question of whether the death sentence in this case "is excessive or disproportionate to the penalty imposed in similar cases, we note first our holding in *State v. D. Williams*, 308 N.C. 47, 301 S.E. 2d 335, *cert. denied*, 104 S.Ct. 202 (1983):

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

Id. at 79, 301 S.E. 2d at 355. The pool "includes only those cases which have been affirmed by this Court." *State v. Jackson*, 309 N.C. 26, 45, 305 S.E. 2d 703, 717 (1983). In conducting our proportionality review, we do not "necessarily feel bound . . . to give a citation to every case in the pool of 'similar cases' used for comparison." *State v. D. Williams*, 308 N.C. at 81, 301 S.E. 2d at 356.

3. Although the trial judge here correctly conveyed to the jury its duty to weigh the mitigating against the aggravating circumstances, see *State v. McDougall*, 308 N.C. 1, 301 S.E. 2d 308 (1983), for this Court's recommendation of a different ordering of the ultimate issues so as to better insure that the jury properly engages in the weighing process.

In *D. Williams*, we also described briefly the methods we employ in making our comparisons. *Id.* at 80-82, 301 S.E. 2d at 355-57.

In essence, our task on proportionality review is to compare the case at bar with other cases in the pool which are roughly similar with regard to the crime and the defendant, such as, for example, the manner in which the crime was committed and defendant's character, background, and physical and mental condition. If, after making such a comparison, we find that juries have consistently been returning death sentences in the similar cases, then we will have a strong basis for concluding that a death sentence in the case under review is not excessive or disproportionate. On the other hand if we find that juries have consistently been returning life sentences in the similar cases, we will have a strong basis for concluding that a death sentence in the case under review is excessive or disproportionate.

Essentially, this case involves the murder of the owner of a dwelling and the attempted murder of the owner's father, both of whom caught defendant burglarizing the dwelling. Both the murder and the attempted murder were accomplished as a result of defendant's careful, cold and calculated determination that he would prefer murdering these persons to risking their being able to testify against him and possibly send him back to prison. At the sentencing hearing defendant told the jury that if it believed he committed the murder, "gas me" and "I'd like the death penalty." Defendant offered little in mitigation of the murder. The jury, on supporting evidence, concluded that the murder was aggravated because it was committed to avoid arrest and was part of a course of conduct which involved a crime of violence against another person. Since the jury did not specify which mitigating circumstances it found and specified that it found "one or more," we must assume for purposes of proportionality review that the jury found both mitigating circumstances submitted, *i.e.*, that defendant had no significant criminal history and had testified for the prosecution in another felony case.

We note that of the fourteen cases in the pool in which a death sentence has been affirmed by this Court,[4] seven of them

4. *State v. Oliver*, 309 N.C. 326, 307 S.E. 2d 304 (1983); *State v. Craig and Anthony*, 308 N.C. 446, 302 S.E. 2d 740, *cert. denied*, 104 S.Ct. 263 (1983); *State v. D.*

were cases in which the jury found the aggravating factor that defendant engaged in a course of conduct involving violence against another person.[5] In *Williams II* the *only* aggravating circumstance submitted and found by the jury was that defendant engaged in such a course of conduct. Further, the jury found as a mitigating circumstance, among others, that defendant had no significant history of prior criminal activity. *Williams II* involved the shooting of an employee of a service station during an armed robbery of the station. At the sentencing phase the state offered evidence of another robbery murder committed by defendant on the same evening as part of a course of conduct involving both robbery murders. *D. Williams* is like the instant case in that it involved the murder of the occupant of a private dwelling when defendant, bent on burglarizing the dwelling he thought was unoccupied, was surprised by the occupant. It is true that in *D. Williams* defendant also sexually molested the victim and the jury found the crime to be especially heinous; but there were no crimes of violence committed against other persons. *Oliver* also is like the instant case in that it involved the murder of an armed robbery victim for the purpose of avoiding arrest, *i.e.*, to eliminate an eyewitness. There was also another murder committed in that case by Oliver's accomplice, Moore; although the "course of conduct" aggravating circumstance was not submitted to the jury.

Williams, 308 N.C. 47, 301 S.E. 2d 335, *cert. denied*, 104 S.Ct. 202 (1983); *State v. McDougall*, 308 N.C. 1, 301 S.E. 2d 308 (1983); *State v. Brown*, 306 N.C. 151, 293 S.E. 2d 569, *cert. denied*, 103 S.Ct. 503 (1982); *State v. Pinch*, 306 N.C. 1, 292 S.E. 2d 203, *cert. denied*, 103 S.Ct. 474 (1982); *State v. Smith*, 305 N.C. 691, 292 S.E. 2d 264, *cert. denied*, 103 S.Ct. 474 (1982); *State v. Williams II*, 305 N.C. 656, 292 S.E. 2d 243, *cert. denied*, 103 S.Ct. 474 (1982); *State v. Taylor*, 304 N.C. 249, 283 S.E. 2d 761 (1981), *cert. denied*, 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); *State v. Hutchins*, 303 N.C. 321, 279 S.E. 2d 788 (1981); *State v. Martin*, 303 N.C. 246, 278 S.E. 2d 214, *cert. denied*, 454 U.S. 933 (1981); *State v. McDowell*, 301 N.C. 279, 271 S.E. 2d 286 (1980), *cert. denied*, 450 U.S. 1025 (1981); *State v. Barfield*, 298 N.C. 306, 259 S.E. 2d 510 (1979), *cert. denied*, 448 U.S. 907 (1980).

5. *Craig and Anthony*, 308 N.C. at 450, 302 S.E. 2d at 743; *McDougall*, 308 N.C. at 16, 301 S.E. 2d at 318; *Brown*, 306 N.C. at 161, 293 S.E. 2d at 577; *Pinch*, 306 N.C. at 7, 292 S.E. 2d at 212; *Williams II*, 305 N.C. at 680, 292 S.E. 2d at 249; *Hutchins*, 303 N.C. at 347, 279 S.E. 2d at 804; *McDowell*, 301 N.C. at 283, 271 S.E. 2d at 290.

We recognize, on the other hand, that in a number of robbery murder cases, juries have imposed sentences of life imprisonment rather than death.[6] Of these cases, only in *Barnette* did the jury find that the capital offense was committed during a course of conduct in which defendant committed crimes of violence against others. In *Barnette*, however, the jury found one or more of various mitigating circumstances which included that defendant's capacity "to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired." N.C. Gen. Stat. § 15A-2000(f)(6). Likewise in *Booker* the jury found one or more of a number of mitigating circumstances which included the impaired capacity of defendant and the circumstance that defendant when the crime was committed "was under the influence of mental or emotional disturbance." *Id.* § 2000(f)(2). In *Hill* the jury did find that defendant knowingly created a risk of death to more than one person by means of a weapon which would normally be hazardous to the lives of more than one person as an aggravating circumstance; but the jury found as a mitigating circumstance that defendant was under the influence of a mental or emotional disturbance at the time of his crime. In *Crews* two defendants, Crews and Turpin, were convicted of two murders committed at the same time, the cases being joined for trial and sentencing. The jury did find in mitigation that Crews "up to the time of his departure, AWOL, from the U.S. Army, . . . enjoyed a good reputation in his home community and his promotion in the U.S. Army substantiated this reputation." It found that Turpin acted under duress or domination of another and was under the influence of a mental or emotional disturbance. It found both defendants had no significant history of criminal activity. Crews committed one murder and Turpin the other. Crews put up a relatively strong case in mitigation at the sentencing hearing. It included the testimony of seven family members who told of his

6. *State v. Abdullah*, 309 N.C. 63, 306 S.E. 2d 100 (1983); *State v. Hill*, 308 N.C. 382, 302 S.E. 2d 202 (1983); *State v. Barnette*, 307 N.C. 608, 300 S.E. 2d 340 (1983); *State v. Alston*, 307 N.C. 321, 298 S.E. 2d 631 (1983); *State v. Booker*, 306 N.C. 302, 293 S.E. 2d 78 (1982); *State v. Hunt*, 305 N.C. 238, 287 S.E. 2d 818 (1982); *State v. Elkerson*, 304 N.C. 658, 285 S.E. 2d 784 (1982); *State v. Murvin*, 304 N.C. 523, 284 S.E. 2d 289 (1981); *State v. Rinck*, 303 N.C. 551, 280 S.E. 2d 912 (1981); *State v. Miller*, 302 N.C. 572, 276 S.E. 2d 417 (1981); *State v. Moore*, 301 N.C. 262, 271 S.E. 2d 242 (1980); *State v. Smith*, 301 N.C. 695, 272 S.E. 2d 852 (1980); *State v. Crews*, 296 N.C. 607, 252 S.E. 2d 745 (1979).

good reputation in the community where he lived. He also denied participating in the murders, but admitted being with his accomplices. In *Elkerson*, *Murvin*, *Rinck*, and *Alston*, no sentencing hearings were conducted because there was no evidence of any aggravating circumstances. In *Abdullah*, at this writing, we have no information regarding the aggravating or mitigating circumstances submitted to or found by the jury.

The aggravating circumstance that the capital crime was committed during a course of conduct which included crimes of violence against another person is common to half the cases in which this Court has affirmed death sentences. Even in the presence of this factor, however, or other similar factors, juries in *Barnette* and *Hill* did not impose the death penalty where they also found defendant's capacity to appreciate the criminality of his act or to conform his conduct to law was impaired or that defendant was under a mental or emotional disturbance, or both. Here defendant did commit a capital murder in the course of which he also committed a crime of violence against another person. Indeed that crime of violence was an attempted murder itself. There is no suggestion in the case that defendant's mental capacity was impaired or that he was under the influence of a mental or emotional disturbance. All the evidence shows that the murder and the attempted murder were coldly and calculatedly perpetrated because defendant did not want to leave any witnesses who might send him back to prison. In *Oliver*, in sustaining on proportionality review a death sentence, this Court said:

> 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, jealously, hate, revenge, or passion. The motive of witness elimination lacks even the excuse of emotion.

309 N.C. at 375, 307 S.E. 2d at 335. So it is here.

Because juries have returned death sentences in a number of cases similar to this one and the cases in which juries have returned life imprisonment are for the most part distinguishable on the basis of the absence of an aggravating factor present in this case or the presence of mitigating factors absent in this case, we

conclude that the sentence of death in this case is not excessive or disproportionate to penalties imposed in similar cases, considering both the circumstances under which the crime was committed and the character, background and mental state of defendant.

Consequently, in defendant's trial and sentencing hearing, we find

No error.

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

CLAUDE TOLSON MURDOCK v. ERNEST E. RATLIFF, ADMINISTRATOR OF THE ESTATE OF PATRICK ENYI UZOH, DECEASED, MICHAEL LANE MOSS AND ERNEST RAY CARDWELL

CONNER HOMES CORPORATION v. ERNEST E. RATLIFF, ADMINISTRATOR OF THE ESTATE OF PATRICK ENYI UZOH, DECEASED, MICHAEL LANE MOSS AND ERNEST RAY CARDWELL

ERNEST E. RATLIFF, ADMINISTRATOR OF THE ESTATE OF PATRICK ENYI UZOH, DECEASED, AND CECILIA UZOH, WIDOW OF DECEASED, PATRICK ENYI UZOH v. MICHAEL LANE MOSS AND ERNEST RAY CARDWELL

No. 401A83

(Filed 30 April 1984)

1. **Rules of Civil Procedure § 50.2— directed verdict for party with burden of proof**

A directed verdict may be granted in favor of the party with the burden of proof when the credibility of the movant's evidence is manifest as a matter of law.

2. **Automobiles and Other Vehicles § 56.2— negligence in stopping on highway or driving too slowly—error in directing verdict against defendant**

In an action to recover for personal injuries and property damages received when plaintiffs' truck and a mobile home being towed by the truck were struck by an automobile operated by defendant's intestate after it had been struck in the rear by a Mack truck, plaintiffs' evidence did not establish as a matter of law that defendant's intestate was negligent in violating G.S.

20-141(h), which prohibits the operation of a motor vehicle on the highway at such a slow speed as to impede normal movement of traffic "except when reduced speed is necessary for safe operation or in compliance with law," where it tended to show that the intestate either stopped or slowed down in the highway before being struck from the rear; each lane of the highway was 12 feet wide, and the towed mobile home was 14 feet wide; and various safety and warning devices had been placed on the truck and mobile home, including flashing lights, extension side-view mirrors, a "Wide Load" sign, and red flags.

3. Rules of Civil Procedure § 50.2— directed verdict for party with burden of proof—evidence not manifestly credible

In an action to recover for personal injuries and property damages received when plaintiffs' truck and a mobile home being towed by the truck were struck by an automobile operated by defendant's intestate after it had been struck in the rear by a Mack truck, plaintiffs' evidence was not manifestly credible so as to permit the entry of directed verdicts against defendant where there were significant contradictions in the evidence at trial, and where the evidence supported possible inferences (1) that the negligence of defendant's intestate was the sole proximate cause of the accident, (2) that the negligence of the driver of the Mack truck was the sole proximate cause of the accident, and (3) that the negligence of both defendant's intestate and the driver of the Mack truck were proximate causes of the accident.

4. Evidence § 23.1; Pleadings § 37.1— defendant's introduction of plaintiff's pleadings—defendant not bound by allegations of negligence

Defendant was not bound by allegations in plaintiff's complaint which defendant introduced into evidence that the negligence of defendant's intestate was a proximate cause of the accident in question where the complaint was admitted only for impeachment purposes to show that plaintiff had alleged that negligence by a second defendant was a proximate cause of the accident, and where the allegations in the complaint were contradicted by other evidence at trial.

5. Automobiles and Other Vehicles § 56.1— negligence in striking slowing or stopping vehicle from rear

In an action to recover for the wrongful death of plaintiff's intestate when the car he was driving was struck from the rear by defendants' truck after the intestate had stopped or slowed down while meeting a truck towing a mobile home, plaintiff's evidence was sufficient for the jury to find that defendant truck driver was negligent in driving at an excessive speed and in failing to keep a proper lookout and maintain proper control over his vehicle where it tended to show that defendant driver was traveling at a speed of approximately 55 miles per hour when he rounded a moderate curve located approximately 1,500 feet from the scene of the accident; his view was totally unobstructed and he saw the truck towing the mobile home as he rounded the curve; defendant driver also saw the warning signs on the truck pulling the mobile home; defendant driver did not reduce his speed from 55 miles per hour until he was close enough to the intestate's car to observe that it was not moving and until he applied his brakes immediately preceding the accident; defendants' truck left 199 feet of skid marks on the pavement prior to impact with the

intestate's vehicle; defendants' truck struck the intestate's car with such force that the front end was lifted off the pavement and the car was propelled into the path of the oncoming truck; and after impact, defendants' truck still had enough speed and momentum to travel an additional 66 feet before coming to a complete stop.

APPEAL of right by Ernest E. Ratliff, Administrator of the Estate of Patrick Enyi Uzoh, Deceased, pursuant to G.S. 7A-30(2), from a decision of a divided panel of the Court of Appeals, 63 N.C. App. 306, 305 S.E. 2d 48 (1983), which affirmed the trial court's order granting the appellees' motions for a directed verdict. Judgment was entered on 3 September 1981 by the *Honorable Edwin S. Preston, Jr., Judge Presiding*, at the 24 August 1981 Civil Session of Superior Court, WAKE County. Heard in the Supreme Court 9 November 1983.

Patterson, Dilthey, Clay, Cranfill, Sumner & Hartzog, by Paul L. Cranfill; Young, Moore, Henderson & Alvis, P.A., by Edward B. Clark; Jones & Wooten, by Lamar Jones, for plaintiff-appellees, Claude Tolson Murdock and Conner Homes Corporation.

Haywood, Denny & Miller, by J. A. Webster, III, and George W. Miller, Jr., for defendant-appellees, Michael Lane Moss and Ernest Ray Cardwell.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, by James G. Billings, for appellants, Ernest E. Ratliff, Administrator of the Estate of Patrick Enyi Uzoh, Deceased, and Cecilia Uzoh, Widow of Deceased, Patrick Enyi Uzoh.

FRYE, Justice.

This case involves three separate lawsuits which were consolidated for purposes of trial and which arose out of a traffic accident involving three vehicles. The primary issue presented for review by this Court is whether the trial court erred in granting directed verdicts in favor of the plaintiff-appellees Claude Tolson Murdock and Conner Homes Corporation, and defendant-appellees Michael Lane Moss and Ernest Ray Cardwell. The majority of the panel of the Court of Appeals held that the trial court properly granted directed verdicts in favor of the appellees. For the

reasons stated herein, we reverse the decision of the Court of Appeals and remand for a new trial.

I.

All of the claims in this lawsuit arose out of an automobile accident, involving three vehicles, which occurred on 17 August 1979. The automobile accident occurred on Highway 64 in Nash County. At the point where the accident occurred, Highway 64 was a two-lane highway with each lane being approximately twelve feet wide.

On 17 August 1979, Claude Tolson Murdock was driving in an easterly direction on Highway 64. Murdock was driving a 1977 two-ton Ford truck towing a fourteen-foot wide mobile home. The truck and the mobile home were owned by Conner Homes Corporation.

Patrick Enyi Uzoh, the decedent, was traveling in a westerly direction on Highway 64, approaching Murdock, in a 1979 Plymouth automobile which was owned by the North Carolina Department of Administration. Uzoh was traveling alone. Michael Lane Moss was also traveling in a westerly direction on Highway 64, some distance to the rear of the Plymouth driven by Uzoh. Moss was driving a 1974 Mack eighteen-wheeler truck which was owned by Ernest Ray Cardwell.

The evidence at trial tended to show that as the Plymouth driven by Uzoh approached the Conner Homes' truck, Uzoh stopped or reduced his speed. Whether the Uzoh vehicle stopped or reduced its speed is a much disputed fact in this case. The evidence further shows that the Mack truck, driven by Moss, struck the Uzoh vehicle in the right rear portion of the car. As a result of the collision, the front end of the Uzoh vehicle was lifted off the ground. Then the Uzoh vehicle crossed the center line of the highway and entered the eastbound lane where it was struck by the Conner Homes' truck.

As a result of the collision, Murdock suffered various personal injuries. The Conner Homes' truck and mobile home were damaged extensively. Uzoh was killed. The Plymouth driven by Uzoh was severely damaged, as was the Mack truck driven by Moss and owned by Cardwell.

The following lawsuits were initiated as a result of the accident:

On 23 February 1980, Murdock instituted a civil suit in the Superior Court, Carteret County, against Ernest E. Ratliff, Administrator of the Estate of Patrick Enyi Uzoh, Deceased [hereinafter referred to as Ratliff], Moss and Cardwell, alleging that their joint and concurring negligence caused the personal injuries which he [Murdock] sustained in the accident. Ratliff denied any negligence on the part of Uzoh, the decedent, and asserted cross-claims against defendants Moss and Cardwell for contribution. Moss and Cardwell also denied any negligence on their part and asserted cross-claims against Ratliff for contribution. Additionally, Cardwell asserted a cross-claim against Ratliff for the damage done to his Mack truck. This case was subsequently transferred to the Superior Court, Wake County.

On 25 February 1980, Conner Homes Corporation instituted a civil suit in Superior Court, Carteret County, against defendants, Ernest E. Ratliff, Administrator of the Estate of Patrick Enyi Uzoh, Deceased [hereinafter referred to as Ratliff], Moss and Cardwell, alleging that their negligent acts proximately caused the accident. Ratliff answered the complaint and denied any negligence. Ratliff also filed a cross-claim against Moss and Cardwell for contribution in the event that Conner Homes Corporation recovered a verdict against him. Also, in answer to the complaint filed by Conner Homes Corporation, Moss and Cardwell denied any negligence on their part, and Cardwell asserted a cross-claim against Ratliff for property damage to his Mack truck. This case was also transferred to the Superior Court, Wake County.

On 31 July 1980, Ernest E. Ratliff, Administrator of the Estate of Patrick Enyi Uzoh, Deceased [hereinafter referred to as Ratliff], and Cecilia Uzoh, the widow of Patrick Uzoh, instituted a civil suit in the Superior Court, Wake County, against Moss and Cardwell, seeking to recover for the wrongful death of Uzoh and for loss of consortium. Moss and Cardwell denied any negligence on their part and asserted a counterclaim for property damage to the Mack truck. Ratliff and Cecilia Uzoh filed a reply asserting the defense of last clear chance.

Pursuant to the motions of counsel, all three cases were consolidated for trial. Also, the issues of damages in the wrongful

death case and the claim for loss of consortium were severed for trial. Therefore, five claims were to be determined at trial. These claims were: (1) Murdock's claim for personal injuries; (2) Conner Homes Corporation's claim for property damage; (3) Ratliff's claim for wrongful death; (4) Cecilia Uzoh's claim for loss of consortium; and, (5) Cardwell's claim for property damage.

At the close of the evidence presented by Conner Homes Corporation and Murdock, motions for directed verdict by Ratliff, Moss and Cardwell were denied. Subsequently, while Ratliff was presenting his evidence, he attempted and was allowed to introduce into evidence the complaint filed by Murdock. The Murdock complaint was initially allowed into evidence only against Murdock. Counsel for Moss and Cardwell first objected to the introduction of the Murdock complaint but subsequently objected only to those portions of the complaint relating to his clients. The objections were sustained. The Murdock complaint contained numerous allegations that Uzoh's negligence in stopping the car in the highway was a proximate cause of the accident. The complaint also alleged that the negligence of Moss was a proximate cause of the accident. At the close of Ratliff's evidence, Moss and Cardwell moved for a directed verdict. Their motion was denied.

Then, Cardwell took a voluntary dismissal on his claim for property damage to his Mack truck. Thereafter, at the close of all the evidence, Ratliff, Moss and Cardwell renewed their respective motions for directed verdicts. These motions were denied.

Pursuant to a stipulation entered into between counsel for the respective parties and in order to simplify the cases for the jury, the issues submitted to the jury were limited to the following:

1. Were the plaintiffs, Connor [sic] Homes Corporation and Claude Tolson Murdock, damaged or injured as a result of the negligence of Patrick Enyi Uzoh, as alleged in their complaints?

2. Were the plaintiffs, Connor [sic] Homes Corporation and Claude Tolson Murdock, damaged or injured by the negligence of the defendant, Michael Lane Moss, as alleged in their complaint[s]?

3. What amount of damages, if any, is the plaintiff, Claude Tolson Murdock, entitled to recover?

The parties also stipulated that the jury's verdict concerning Issues 1 and 2 would resolve the wrongful death suit brought by Ratliff.

The jury received its charge and began deliberating in the late afternoon hours of 27 August 1981. A motion for a directed verdict against Ratliff was made by Murdock and Conner Homes Corporation while the jury was deliberating. The transcript does not show that the trial judge made a ruling on the motion at that time, if at all.

The jury continued its deliberations on 28 and 29 August 1981. On 29 August 1981, the foreman of the jury reported to the trial judge that the jury was not making progress towards reaching a verdict and that they had not answered any of the questions. Later that day, the foreman reported that the jury had not reached a unanimous decision on any issue. The foreman indicated that the jury was divided 7 to 5 on the first issue and 9 to 3 on the second issue. After reconvening jury deliberations, the foreman subsequently reported to the trial judge that the jury was divided 8 to 4 on the first issue and 5 to 7 on the second issue.

Subsequently, Moss and Cardwell moved for a directed verdict against Ratliff, as did Murdock and Conner Homes Corporation. After another report from the jury indicated that they had not been able to reach a verdict, the judge stated that he would rule on the motions after the jury returned to the courtroom. Upon the jury's return to the courtroom, the foreman announced that the jury did not believe that it could reach a decision in the case.

After hearing the jury's decision, the trial judge allowed the motion for directed verdict by Moss and Cardwell "as against Uzoh." The trial judge also allowed the motion for directed verdict by Murdock and Conner Homes Corporation "against Uzoh." The trial judge then withdrew one of the jurors and declared a mistrial on Issues 2 and 3. Thereafter, judgment was entered in favor of Conner Homes Corporation in the amount of $24,231.00, the stipulated amount of property damage. The amount of dam-

ages to be recovered by Murdock, from Ratliff, for his personal injuries was left to be determined at a subsequent trial. Lastly, the wrongful death claim asserted by Ratliff was dismissed.[1]

II.

Defendant-Ratliff assigns as error the Court of Appeals' affirmance of the trial court's granting of motions for directed verdict, pursuant to N.C. Gen. Stat. § 1A-1, Rule 50(a), in favor of plaintiffs Claude Tolson Murdock and Conner Homes Corporation, at the close of all the evidence. We find this assignment of error to be meritorious and therefore we reverse the decision of the Court of Appeals.

[1] At the outset, we note that Murdock and Conner Homes Corporation, as plaintiffs, had the burden of proof in each of their lawsuits for the recovery of damages for personal injuries and property damage respectively. This Court has previously stated that a directed verdict may be granted in favor of the party with the burden of proof when the credibility of the movant's evidence is manifest as a matter of law. *Bank v. Burnette*, 297 N.C. 524, 256 S.E. 2d 388 (1979). However, in order to justify granting a motion for a directed verdict in favor of the party with the burden of proof, the evidence must so clearly establish the fact in issue that no reasonable inferences to the contrary can be drawn. *Id.* at 536, 256 S.E. 2d at 395. In *Burnette*, this Court listed the following as being situations where the credibility of a movant's evidence is manifest as a matter of law:

(1) Where non-movant establishes proponent's case by admitting the truth of the basic facts upon which the claim of proponent rests. [Citations omitted.]

(2) Where the controlling evidence is documentary and non-movant does not deny the authenticity or correctness of the documents. [Citations omitted.]

1. We note that no judgment was entered as to the disposition of the loss of consortium claim of Cecilia Uzoh. Additionally, no judgment was entered as to the cross-claims for contribution that had been asserted by Ratliff against Moss and Cardwell, and by Moss and Cardwell against Ratliff. However, in light of the decision which we have reached in this case, we find it unnecessary to address appellant-Ratliff's and Cecilia Uzoh's arguments concerning the failure of the trial court to rule on the aforementioned claims.

(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 contradiction." [Citations omitted.]

Id. at 537-38, 256 S.E. 2d at 396.

This Court continued as follows:

[W]hile credibility is generally for the jury, courts set the outer limits of it by preliminarily determining whether the jury is at liberty to disbelieve the evidence presented by movant. [Citations omitted.] *Needless to say, the instances where credibility is manifest will be rare, and courts should exercise restraint in removing the issue of credibility from the jury.* [Citation omitted.] [Emphasis added.]

Id. at 538, 256 S.E. 2d at 396.

The Court of Appeals held that the credibility of the evidence presented by Murdock and Conner Homes Corporation was manifest as a matter of law based on category numbers one and three in *Burnette*. In first holding that the movant's evidence was manifest as a matter of law under the third category, the Court of Appeals stated that viewing the evidence in the light most favorable to appellant, the evidence "unequivocally shows that Uzoh either suddenly stopped or almost stopped on the highway." *Murdock v. Ratliff*, 63 N.C. App. 306, 311, 305 S.E. 2d 48, 52 (1983). The court continued as follows:

Regardless of whether Uzoh came to a full stop or almost stopped, it is clear that his conduct constituted negligence as a matter of law. Uzoh violated G.S. 20-141(h) which provides, in part: "No person shall operate a motor vehicle on the highway at such a slow speed as to impede the normal and reasonable movement of traffic except when reduced speed is necessary for safe operation or in compliance with law; . . ." Violation of the standard of care required by G.S. 20-141(h) is negligence *per se*. [Citation omitted.]

Id. at 311, 305 S.E. 2d at 52. The Court of Appeals also stated that there was no evidence to refute the allegations that Uzoh was negligent and aside from latent doubts, there were no doubts

as to the credibility of the witnesses, therefore, no reasonable jury could have drawn any contrary inferences.

We disagree with the conclusion reached by the majority of the panel of the Court of Appeals. First, we note that G.S. 20-141(h) provides that, "[n]o person shall operate a motor vehicle on the highway at such a slow speed as to impede the normal and reasonable movement of traffic *except when reduced speed is necessary for safe operation or in compliance with law. . . .*" [Emphasis added.] Under the facts of this case, it does not appear that Uzoh violated G.S. 20-141(h) as a matter of law.

The evidence presented through the testimony of Murdock and Moss tended to show that Uzoh either stopped or slowed down in the highway. Both witnesses testified, at one time or another, that the Uzoh vehicle had stopped in the highway. However, both witnesses also admitted that they were not sure whether the Uzoh vehicle ever came to a complete stop. Moss admitted that even up to the point of impact he was not sure whether the Uzoh vehicle was moving or had stopped. Murdock testified that, immediately preceding the accident, the front end of the Uzoh vehicle went down and smoke was coming from the tires of the car. However, the Highway Patrolman who investigated the accident testified that he did not find any skid marks on the highway which should have been apparent had the Uzoh vehicle skidded.

Other evidence at trial tended to show that, at the point where the accident occurred, Highway 64 was twenty-four feet in width, with each lane being approximately twelve feet wide. The mobile home, which Murdock was towing, was fourteen feet in width, and in order to keep the mobile home from crossing the center line, Murdock had to drive very close to the right side of the road. The truck which was towing the mobile home had a flashing amber light on top of the cab, and a "Wide Load" sign had been placed on the front bumper of the truck. The truck also had side-view mirrors which extended three feet beyond the cab of the truck, thus enabling Murdock to see behind him and along the side of the mobile home. A red flag had been placed on each corner of the mobile home and in the middle of the mobile home. Murdock testified that these safety devices were placed on the truck and mobile home in order to warn other traveling motorists

of the over-sized load and in order to put motorists on notice to proceed with caution and care.

[2] Viewing the above evidence in the light most favorable to Ratliff, the non-movant, and resolving all discrepancies in the evidence in his favor, *Summey v. Cauthen*, 283 N.C. 640, 197 S.E. 2d 549 (1973), we hold that the evidence presented by Murdock and Conner Homes Corporation was not manifestly credible and did not establish as a matter of law that Uzoh was negligent or that his actions violated G.S. 20-141(h). Taking into consideration the width of each lane of Highway 64, which was twelve feet, the width of the mobile home which Murdock was towing, which was fourteen feet, and all of the safety and warning devices which had been placed on the truck and the mobile home, i.e., flashing lights, red flags, extension side-view mirrors, it appears very likely that Uzoh's reduction in speed was necessary for the safe operation of his vehicle. In fact, Uzoh may well have been guilty of engaging in negligent conduct had he not reduced his speed as he approached the mobile home. We believe that most careful and prudent drivers would have reduced their speed under the aforementioned circumstances. Therefore, the Court of Appeals erred in holding that Uzoh was negligent as a matter of law based on a violation of G.S. 20-141(h).

[3] We also find that the contradictions in the evidence were significant in this case, contrary to the Court of Appeals' conclusion that they were "trivial." The contradictions in the evidence, based on the testimony of the witnesses at trial, related to whether Uzoh came to a complete stop or almost stopped; whether smoke was coming from the tires of Uzoh's vehicle; whether Moss saw Uzoh when he was 235, 750 or 1,500 feet in front of him; whether Moss was traveling approximately sixteen miles per hour or substantially faster when his truck hit the Uzoh automobile; and, whether Uzoh was 100 feet or 100 yards away before Murdock first saw Uzoh's automobile approaching. We are convinced that all of these contradictions in the evidence are at the crux of a determination of culpable negligence in the instant case.

In order for Murdock or Conner Homes Corporation to be entitled to directed verdicts in their favor, they must prove, as a matter of law, that Uzoh's negligence was a proximate cause of

the accident. Our review of all the evidence, taking into consideration the contradictions mentioned above, convinces us that the evidence in the instant case supports at least three possible inferences, one inference being that Uzoh's negligence was the sole proximate cause of the accident, another inference being that Moss' negligence was the sole proximate cause of the accident, and a third inference being that the negligence of both Uzoh and Moss were proximate causes of the accident. Therefore, the credibility of the evidence presented by Murdock and Conner Homes Corporation was not manifest as a matter of law because more than one inference can be drawn from the evidence. *See Burnette*, 297 N.C. at 536, 256 S.E. 2d at 395. We also note that, as stated above, Ratliff has pointed out specific areas of impeachment and contradictions in the evidence presented by both parties. Hence, the Court of Appeals erred in affirming the trial court's granting of the motion for directed verdict in favor of Murdock and Conner Homes Corporation, the parties with the burden of proof, based upon the ground that Ratliff had not pointed out specific areas of impeachment and contradictions in the evidence. *See Kidd v. Early*, 289 N.C. 343, 222 S.E. 2d 392 (1976).

[4] The second reason stated by the Court of Appeals for holding that the credibility of the evidence presented by Murdock and Conner Homes Corporation was manifest as a matter of law was that under the first category in *Burnette*, "appellant established Murdock's and Conner Homes' case by admitting that Uzoh was negligent when he introduced Murdock's complaint into evidence." *Murdock*, 63 N.C. App. at 312, 305 S.E. 2d at 52. The Court of Appeals held that the allegations of negligence against Uzoh contained in the Murdock complaint were binding upon Ratliff because the pleadings were offered into evidence without limitation and because the pleadings were uncontradicted at trial. Therefore, the issue for determination by this Court is whether Ratliff is bound by the allegations of negligence against Uzoh, which were contained in the Murdock complaint, on the theory that the complaint was admitted without limitation and without being contradicted at trial. After a careful review of the trial transcript, we have concluded that Ratliff was not bound by the allegations relating to the negligence of Uzoh contained in the Murdock complaint.

Ratliff, Murdock and Conner Homes Corporation strenuously argue their respective contentions on this issue. Ratliff argues that the Murdock complaint was offered for the limited purpose of impeachment and that the essential allegations contained in the complaint were contradicted at trial. Therefore, Ratliff contends that he is not bound by the allegations in the Murdock complaint that the negligence of Uzoh proximately caused the accident. Murdock and Conner Homes Corporation contend that the Murdock complaint was introduced without limitation and without contradiction of the essential claims and therefore Ratliff is bound by the allegations of negligence against Uzoh contained therein.

The case law of North Carolina clearly provides that a party offering into evidence, without limitation, portions of his opponent's pleading is bound thereby. *Smith v. Metal Co.*, 257 N.C. 143, 125 S.E. 2d 377 (1962); *Meece v. Dickson*, 252 N.C. 300, 113 S.E. 2d 578 (1960), *rev'd on other grounds, Melton v. Crotts*, 257 N.C. 121, 125 S.E. 2d 396 (1962); *Smith v. Burleson*, 9 N.C. App. 611, 177 S.E. 2d 451 (1970). We note that in each of the above cases the allegations in the pleadings, which were introduced into evidence, by the opposing party, were uncontradicted at trial. *Id.* We find that fact to be very important in determining the issue in the instant case.

In applying the above-stated rule to the facts of the instant case, we note that Murdock testified that in his opinion the accident was caused by the Uzoh automobile coming to a sudden stop in the traffic lane in front of the truck driven by Moss. Thereafter, counsel for Ratliff asked Murdock the following question on recross-examination: "Well, if that is your opinion of the cause of the wreck, why did you sue Mr. Moss?" An objection to the question was sustained by the trial court. Subsequently, when Ratliff was presenting evidence, he attempted to impeach the testimony of Murdock by using the Murdock complaint. The following exchange occurred at trial outside the presence of the jury:

> MR. BILLINGS [counsel for Ratliff]: Let me ask that I be allowed to have marked—I don't know whether I should mark it or not, but I would like to introduce in evidence on behalf of Uzoh the Murdock complaint. I don't know the procedure for doing that.

MR. MILLER [counsel for Moss and Cardwell]: The defendant Moss and Cardwell will object.

COURT: Let me see it. I have the tender. I have the objection.

MR. MILLER: That is the only part that we are concerned with.

COURT: I understand, unverified. Any objection?

MR. CRANFILL: No, sir.

COURT: No objection. The Murdock complaint will be received into evidence with respect to Claude Tolson Murdock. The objection—

MR. MILLER: Let me think a minute. Just a moment, Your Honor. I still object.

COURT: Still object to it?

MR. MILLER: Yes, sir.

COURT: Objection is sustained with respect to Moss and Cardwell. The complaint comes in then in terms of Murdock only.

MR. BILLINGS: Your Honor, my witness has just walked in.

COURT: Fine.

MR. MILLER: If Your Honor please, may I on the last offer of evidence, my objection to that, if I may qualify that objection.

COURT: All right, you may.

MR. MILLER: Is to that portion of the complaint as it relates to the two defendants that I represent. That is the purpose of my objection. Other than that, I have no objection.

COURT: All right. Then the ruling is that it is sustained with respect to that portion of the complaint.

MR. MILLER: Yes, sir. I will not itemize each paragraph but the record will indicate those portions directed to these two defendants.

COURT: All right, Mr. Billings, examine the witness.

MR. BILLINGS: In response to that, may I simply identify those portions of that complaint had I been allowed to do so that I would have read to the jury so we will have a clear record?

COURT: Indeed.

MR. BILLINGS: Your Honor, those portions of the Uzoh Exhibit 36 that had I been permitted to do so, I would have read to the jury are contained on page 3 beginning at line 8, or paragraph 8, including paragraph nine and ten.

COURT: All right, sir.

MR. BILLINGS: Thank you. Of course, the purpose that I wanted to read them was in response to Mr. Murdock's statement brought out by Mr. Miller that he didn't consider—that he considered the cause of the accident to be the Uzoh vehicle stopping in the roadway in front of him and I had intended to ask him about these allegations of Mr. Moss.

MR. MILLER: The three that you are tendering would be as to Mr. Moss and Cardwell, are eight, nine and ten, is that right?

COURT: That is correct.

MR. MILLER: All right, sir.

Based on the above exchange, we are convinced that the Murdock complaint was offered into evidence for impeachment purposes and not for substantive purposes. After counsel for Moss and Cardwell, Mr. Miller, had qualified his objection to the admissibility of the Murdock complaint as it related to his clients, counsel for Ratliff, Mr. Billings, then qualified his tender of the Murdock complaint, after receiving the trial judge's approval. Mr. Billings explicitly identified those portions of the Murdock complaint that he would have read to the jury as being paragraphs 8, 9 and 10, which alleged that the accident occurred as the direct and proximate result of the negligence of Moss while operating the Mack truck owned by Cardwell. He also stated that he wanted to read the paragraphs in response to Murdock's statement that "he considered the cause of the accident to be the Uzoh

vehicle stopping in the roadway in front of him." We find this evidence to be affirmative proof that the Murdock complaint was not offered by Ratliff without limitation, but instead was offered for the limited purpose of impeachment. Accordingly, the allegations contained therein were not binding against Ratliff.

Ratliff is not bound by the allegations of negligence contained in the Murdock complaint for another reason. Assuming *arguendo* that the Murdock complaint was offered without limitation, Ratliff would still not be bound by the allegations of Uzoh's negligence contained therein since those allegations were contradicted at trial. *See Meece v. Dickson*, 252 N.C. 300, 113 S.E. 2d 578 (1960), *rev'd on other grounds, Melton v. Crotts*, 257 N.C. 121, 125 S.E. 2d 396 (1962); *Sowers v. Marley*, 235 N.C. 607, 70 S.E. 2d 670 (1952); *Smith v. Burleson*, 9 N.C. App. 611, 177 S.E. 2d 451. We find it unnecessary to repeat the aforementioned contradictions in the evidence relating to the alleged negligence of Uzoh. Suffice it to say that the contradictions were not "trivial," and they all related to the numerous issues of negligence involved in this case.

In view of our holding that the Murdock complaint was offered into evidence for impeachment purposes only and since the allegations in the complaint were contradicted by other evidence, Ratliff was not bound by the allegations of Uzoh's negligence contained in the Murdock complaint. Thus, the Court of Appeals erred in holding that the credibility of the evidence, presented by Murdock and Conner Homes, was manifest as a matter of law because Ratliff established the case for Murdock and Conner Homes Corporation through his introduction of the Murdock complaint.

III.

Plaintiff-Ratliff assigns as error the Court of Appeals' affirmance of the trial court's granting of defendants' (Moss and Cardwell) motion for directed verdict, pursuant to N.C. Gen. Stat. § 1A-1, Rule 50(a). Defendants' motion for a directed verdict under Rule 50(a) raises the question of whether the evidence is sufficient to go to the jury. *Summey v. Cauthen*, 283 N.C. 640, 197 S.E. 2d 549 (1973). In reviewing such a motion, all the evidence in favor of the non-movant must be deemed true, all conflicts in the evidence must be resolved in favor of the non-movant, and the non-movant is entitled to every inference reasonably to be drawn

in his favor. *Summey*, 283 N.C. at 647, 197 S.E. 2d at 554. A defendant's motion for a directed verdict may be granted only if, as a matter of law, the evidence, when viewed in the light most favorable to plaintiff, is insufficient to justify a verdict for plaintiff. *See Rappaport v. Days Inn*, 296 N.C. 382, 250 S.E. 2d 245 (1979).

Moss and Cardwell contend that Ratliff was bound by the allegations of Uzoh's negligence contained in the Murdock complaint as a basis for upholding the trial court's and the Court of Appeals' rulings in their favor. For the same reasons stated in our discussion of the Murdock complaint in relation to Murdock and Conner Homes Corporation, we hold that, as to Moss and Cardwell, Ratliff was not bound by the allegations of Uzoh's negligence contained in the Murdock complaint.

[5] Additionally, a careful review of the evidence shows that the evidence was not insufficient, as a matter of law, to justify a verdict in favor of Ratliff. The testimony shows that on 17 August 1979 the sun was shining and it was a pretty, clear day. The evidence tends to show that Moss was traveling at a speed of approximately 55 miles per hour when he rounded a moderate curve located approximately 1,500 feet from the scene of the accident. His view was totally unobstructed and Moss admitted that he saw the Conner Homes' truck and the Uzoh vehicle as he rounded the curve.[2] Moss also admitted that he saw the warning signs on the Conner Homes' truck which to him meant to slow down and proceed with caution. Nevertheless, by his own testimony, Moss did not reduce his speed until he was close enough to the Uzoh automobile to observe that it was not moving. Viewed in the light most favorable to Ratliff, the evidence tends to show that Moss did not decrease his speed from 55 miles per hour until he applied his brakes immediately preceding the accident. The physical evidence shows that the truck driven by Moss left 199 feet of skid marks on the pavement prior to impact with the Uzoh vehicle. Even so, the truck driven by Moss still struck the Uzoh automo-

2. Moss initially gave this statement concerning when he first observed the Uzoh vehicle to the Highway Patrolman who investigated the accident. However, he subsequently gave a recorded statement in which he indicated that he was 750 feet away from the Uzoh vehicle when he first observed it. Even later, Moss stated during sworn deposition testimony that he was only 235 feet away from the Uzoh vehicle when he first observed it.

bile with such force that the front end was lifted off the pavement and the car was propelled into the path of the oncoming truck driven by Murdock. After impact, the truck driven by Moss still had enough speed and momentum to travel an additional 66 feet before coming to a complete stop.

Viewing the foregoing evidence in the light most favorable to Ratliff, the evidence was clearly sufficient to justify a verdict in favor of Ratliff based upon the negligence of Moss. Without attempting to decide the ultimate issues in the case, we note that the evidence supports an inference of excessive speed by Moss and his failure to keep a proper lookout and maintain proper control over the truck which he was operating. The evidence also does not indicate that Uzoh was contributorily negligent as a matter of law. Therefore, we hold that Moss' and Cardwell's motion for directed verdict was erroneously granted by the trial court and affirmed by the Court of Appeals.

In summary, we hold that the Court of Appeals erred in affirming the trial court's granting of the motions for directed verdicts in favor of plaintiffs, Claude Tolson Murdock and Conner Homes Corporation, and defendants, Michael Lane Moss and Ernest Ray Cardwell. Therefore, we reverse the decision of the Court of Appeals and remand the case to that court for further remand to the Superior Court, Wake County, for a new trial on all issues.

Reversed and remanded.

J. R. CARVER, ADMINISTRATOR OF THE ESTATE OF BENJAMIN SCOTT CARVER v. PHYLLIS CARVER

No. 658PA82

(Filed 30 April 1984)

1. Appeal and Error §§ 21, 68— Supreme Court's denial of further review of Court of Appeals decision—no law of the case

The Supreme Court's denial of defendant's petition for further review of a Court of Appeals decision that parental immunity did not bar an action for the wrongful death of a child did not make that decision the law of the case in the

Supreme Court and did not mean that the Supreme Court had determined that the decision of the Court of Appeals was correct.

2. **Death § 3.3; Parent and Child § 2.1— automobile accident—wrongful death action against child's mother—parental immunity inapplicable**

The doctrine of parental immunity did not bar an action by the estate of a child against the child's mother for the wrongful death of the child in an automobile accident since G.S. 1-539.21 and G.S. 28A-18-2 together abrogate parental immunity in wrongful death actions arising out of the operation of motor vehicles.

3. **Actions § 5; Automobiles and Other Vehicles § 108; Death § 11— family purpose automobile—mother's negligence in death of child not imputed to father—father's right to share in recovery against mother**

Where a minor child was killed in an accident caused solely by his mother's negligence in the operation of a family purpose automobile owned by the father, the active negligence of the mother will not be imputed to the father under the family purpose doctrine so as to bar the father from sharing in any recovery by the child's estate against the mother under the principle that no one should profit by his own wrong. However, the mother cannot share in any recovery by her child's estate based on her own negligence.

4. **Actions § 5; Death §§ 7.3, 8, 11— wrongful death of child—negligence by mother—damages recoverable**

In a wrongful death action by the estate of a child against the child's mother in which the parents are the beneficiaries of the estate and the mother is precluded from sharing in the recovery based on her own negligence, only the father's losses as a result of the death of the child may be considered in assessing damages under G.S. 28A-18-2(b)(4), and whatever damages are awarded under this section need not be reduced but are fully recoverable by the estate to be ultimately enjoyed by the father. Since the reasonable funeral expenses of the decedent are primarily the responsibility of the father, this item of damages need not be reduced because the mother is precluded from sharing in the recovery. However, any damages awarded for decedent's pain and suffering should be reduced by half, the mother's pro rata share of these damages.

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

Justice MEYER dissenting.

ON writ of certiorari to review a summary judgment for defendant entered by *Judge Allen*, presiding in GASTON Superior Court, on 6 October 1982.

Ronald Williams for plaintiff appellant.

Golding, Crews, Meekins, Gordon & Gray by James P. Crews for defendant appellee.

EXUM, Justice.

This is a wrongful death action by the estate of a two-month-old child against the child's mother. The allegations are that the child was killed in an automobile accident caused by the mother's negligence. The child is survived by his mother, the defendant; his father, who was not present at the time of the accident; and three siblings. Two questions arise: (1) Does the doctrine of parental immunity bar this action? (2) Should the active negligence of one parent, if any, be imputed to the other parent under the family purpose doctrine so as to bar all recovery by the child's estate under the principle that no one should profit by his wrong? We answer both questions negatively, vacate the summary judgment for defendant, and remand for further proceedings.

I.

Luther Carver, who is not a party to this action, and defendant, Phyllis Carver, are husband and wife and parents of the deceased, Benjamin Scott Carver. On 8 April 1980 Mrs. Carver was operating the family automobile in which the deceased child was a passenger. While they traveled along Ike Lynch Road in Gaston County the automobile overturned, and the child was killed. His parents and three older siblings survive him. Mr. Carver owned the automobile which was used for family purposes, and Mrs. Carver was using it for those purposes at the time of the accident.

Initially, defendant successfully moved in the trial court to dismiss this action on the basis of the doctrine of parental immunity. The Court of Appeals reversed, holding that because N.C. Gen. Stat. § 1-539.21, effective 1 October 1975,[1] abolished the doctrine of parental immunity in actions for personal injury and property damage arising out of the operation of motor vehicles, wrongful death actions arising out of the operation of motor vehicles would not be barred by the doctrine. *Carver v. Carver*, 55 N.C. App. 716, 286 S.E. 2d 799, *disc. rev. denied*, 305 N.C. 584, 292 S.E. 2d 569 (1982). Defendant then answered, engaged in discovery, and moved for summary judgment.

1. 1975 Session Laws, ch. 685, § 2.

The motion was grounded on two propositions: First, that defendant's negligence, if any, was imputed to the child's father under the family purpose doctrine and second, since only the parents would be entitled to share in any recovery, there could in fact be no recovery under the principle that no person should profit by his wrong. Judge Allen allowed this motion and dismissed the action. Plaintiff failed to give timely notice of appeal, and the Court of Appeals denied his petition for writ of certiorari. Plaintiff then applied to this Court for a writ of certiorari, and we granted our writ on 2 February 1983 to review the correctness of Judge Allen's ruling. Defendant cross-assigns as error the Court of Appeals' earlier decision that parental immunity did not bar this wrongful death action.

II.

[1] At the outset we note our agreement with defendant's position that we are not bound to follow the decision of the Court of Appeals on the first appeal of this matter that the action was not barred by the doctrine of parental immunity. Our denial of defendant's petition for further review of the Court of Appeals' decision on this point does not make that decision the law of the case *in this Court* nor does it mean "that this Court has determined that the decision of the Court of Appeals is correct." *Peaseley v. Virginia Iron, Coal & Coke Co.*, 282 N.C. 585, 592, 194 S.E. 2d 133, 139 (1973). *See also Spartan Leasing, Inc. v. Brown*, 285 N.C. 689, 208 S.E. 2d 649 (1974).

[2] Although we could now decide the question differently, we conclude that the Court of Appeals' decision on the parental immunity issue was well reasoned and altogether correct. The Court of Appeals, in an opinion by Judge Wells, concurred in by Judges Arnold and (now Justice) H. C. Martin, reasoned as follows: N.C. Gen. Stat. § 28A-18-2 (successor to 28-173 and 28-174) authorizes wrongful death actions when death "is caused by the wrongful act, neglect or default of another, such as would, if the injured person had lived, have entitled him to an action for damages therefor." Had the deceased child in this case lived, he would have had a cause of action against his mother for any injuries caused by his mother's negligent operation of the automobile by virtue of N.C. Gen. Stat. § 1-539.21 which provides:

> **Abolition of parent-child immunity in motor vehicle cases.** The relationship of parent and child shall not bar the right of action by a minor child against a parent for personal injury or property damage arising out of the operation of a motor vehicle owned or operated by such parent.

Since parental immunity would not have barred a personal injury action brought by the child had he lived, it likewise does not bar this wrongful death action brought by his estate.

The Court of Appeals correctly recognized that, in determining whether any wrongful death action is maintainable, this Court has consistently analyzed the question in terms of whether the deceased had he lived would have had a claim against defendant for injuries inflicted. If so, then the estate of the deceased may maintain an action for wrongful death; if not, then the action for wrongful death will not lie. *Raftery v. Vick Construction Co.*, 291 N.C. 180, 230 S.E. 2d 405 (1976) (wrongful death action maintainable because personal injury action would have been had deceased lived); *Skinner v. Whitley*, 281 N.C. 476, 189 S.E. 2d 230 (1972). Indeed, in *Skinner*, decided before the enactment of N.C. Gen. Stat. § 1-539.21, this Court held that the estates of two deceased minor children could not maintain wrongful death actions against the estate of their deceased father when all were killed in an automobile operated by the father. The decision's rationale was that since the children's actions for personal injuries, had they lived, would have been barred by the parental immunity doctrine, their wrongful death actions were likewise barred. The Court said, "This conclusion follows as a matter of law unless the reciprocal immunity rule between parent and unemancipated minor child is repudiated or modified in this jurisdiction." 281 N.C. at 479, 189 S.E. 2d at 232. The Court went on to suggest that if the parental immunity doctrine were to be changed, it ought to be by legislation rather than adjudication. The legislature apparently responded to this suggestion in 1975 by enacting N.C. Gen. Stat. § 1-539.21.

Since, therefore, as the Court of Appeals reasoned, N.C. Gen. Stat. § 1-539.21 has abolished the doctrine of parental immunity in personal injury and property damage cases arising out of a parent's operation of a motor vehicle, the doctrine is no longer a bar to wrongful death actions by the deceased child's estate

which likewise arises out of a parent's operation of a motor vehicle.

Defendant misses the point when she argues that because N.C. Gen. Stat. § 1-539.21 does not expressly mention wrongful death actions and expressly refers only to "personal injury or property damage" actions, the legislature intended to abolish parental immunity only in personal injury or property damage claims. It is not N.C. Gen. Stat. § 1-539.21 standing alone which abrogates parental immunity in wrongful death actions arising out of operation of motor vehicles; it is this statute and N.C. Gen. Stat. § 28A-18-2 read *in pari materia*, which bring about this result. It is, of course, a fundamental canon of statutory construction that statutes which are *in pari materia*, *i.e.*, which relate or are applicable to the same matter or subject, although enacted at different times must be construed together in order to ascertain legislative intent. *Great Southern Media, Inc. v. McDowell County*, 304 N.C. 427, 284 S.E. 2d 457 (1981); *In re Arthur*, 291 N.C. 640, 231 S.E. 2d 614 (1977); *State Highway Commission v. Hemphill*, 269 N.C. 535, 153 S.E. 2d 22 (1967); Black's Law Dictionary 711 (rev. 5th ed. 1979); Ballentine's Law Dictionary 657 (1948).

III.

[3] We turn now to the second issue before us: Whether defendant's negligence, if any, in causing the death of the child is imputed to the child's father, who is also defendant's husband and owner of the car, under the family purpose doctrine so as to bar recovery in this wrongful death action. The parties agree that the automobile being operated by defendant was a family purpose automobile owned by the father-husband and was being operated by defendant-mother as a family purpose car. Defendant's argument in support of allowing her motion for summary judgment is this: Proceeds recovered in a wrongful death action do not constitute part of the estate of the deceased generally except for certain limited purposes. "The amount recovered in such action is not liable to be applied as assets, in the payment of debts or legacies, except as to burial expenses of the deceased, and reasonable hospital and medical expenses not exceeding Five Hundred Dollars ($500.00) incident to the injury resulting in death; . . . but shall be disposed of as provided in the Intestate Succession Act." N.C. Gen. Stat. § 28A-18-2. The Intestate Succession

Act provides that if the intestate "is survived by both parents, they shall take in equal shares, or if either parent is dead, the surviving parent shall take the entire share." N.C. Gen. Stat. § 29-15(3). The child here is survived by both parents. Only the parents, therefore, will be entitled to share in any recovery made in this action. Since both parents are responsible for the child's death, the mother through her active negligence and the father through imputed negligence under the family purpose doctrine, there can be no recovery because of the principle that no person should be permitted to profit by his or her own wrong.

All propositions in the foregoing argument, except for the proposition that the mother's negligence is imputed to the father, are supported by our cases:

In *In re Estate of Ives*, 248 N.C. 176, 102 S.E. 2d 807 (1958), the mother was killed in an automobile collision while riding as a passenger in one of the automobiles being operated by her son, Sam Ives. The decedent was survived by four sons, in addition to Sam. Her estate settled with Sam's liability carrier and a sum of money was paid into the estate pursuant to this settlement. In a petition before the clerk for advice on how to distribute the proceeds of this settlement, the clerk ruled that the sums should be divided equally between all of the deceased's sons except Sam. On Sam's appeal the superior court, and subsequently this Court, affirmed the clerk's judgment. This Court said:

> In an action to recover damages for wrongful death the real party in interest is the beneficiary under the statute for whom recovery is sought, and not the administrator. *Davenport v. Patrick*, 227 N.C. 686, 44 S.E. 2d 203.
>
> 'It is a maxim of law, recognized and established, that no man shall take advantage of his own wrong; and this maxim, which is based on elementary principles, is fully recognized in courts of law and equity, and, indeed, admits of illustration from every branch of legal procedure.' Broom's Legal Maxims, Tenth Ed., 191.
>
> This maxim embodied in the common law, and constituting an essential part thereof, is stated in the text books and reported cases. It has its foundation in universal law administered in all civilized lands, for without its recognition

> and enforcement by the courts their judgments would rightly excite public indignation. This maxim has been adopted as public policy in this state and we have decided in many cases instituted to recover damages for wrongful death that no beneficiary under the statute for whom recovery is sought will be permitted to enrich himself by his own wrong. *Davenport v. Patrick, supra; Pearson v. Stores Corp.*, 219 N.C. 717, 14 S.E. 2d 811; *Goldsmith v. Samet*, 201 N.C. 574, 160 S.E. 835; *Harton v. Telephone Co.*, 141 N.C. 455, 54 S.E. 299; *Davis v. R.R.*, 136 N.C. 115, 48 S.E. 591. The right of a person otherwise entitled to receive the money paid for wrongful death, or to share in the distribution of such a sum paid, will be denied where the death of the decedent was caused by such person's negligence. *Davenport v. Patrick, supra; Goldsmith v. Samet, supra.*

Id. at 181-82, 102 S.E. 2d at 811.

In *Cox v. Shaw*, 263 N.C. 361, 139 S.E. 2d 676 (1965), a husband and wife and their son were riding together in the husband's family purpose automobile. The son, an unemancipated minor living in the home of his parents, was driving. This automobile collided with another automobile, and in the collision the mother and son were killed. The mother's estate brought a wrongful death action against the driver of the other car, the son's estate and the husband-father. The trial court entered judgment on the pleadings in favor of the husband-father and the son's estate. This Court affirmed the ruling dismissing the action against the son's estate on the ground of family immunity, holding that a parent or the parent's estate could not maintain an action for negligence against an unemancipated child or the child's estate. The Court reversed the decision dismissing the action against the husband-father.

In reaching this decision the Court recognized that the theory of liability against the husband-father was *respondeat superior*. The agency relationship arose in two ways: First, the husband-father as a passenger in his own automobile "had the right to control and direct its operation by the driver, his son." *Id.* at 363, 139 S.E. 2d at 678. Second, "under the family purpose doctrine . . . negligence would have been equally imputable to

the father had he not been present." *Id.* at 363-64, 139 S.E. 2d at 678.

The husband-father argued that as principal being sued only on a theory of imputed liability he should be "entitled to avail himself of his son's immunity." *Id.* at 364, 139 S.E. 2d at 678. The Court, in a thoughtful and well-researched opinion by Justice (later Chief Justice) Sharp, rejected this argument. It relied on the principle established in cases from other jurisdictions and embodied in Restatement (Second) of Agency § 217 (1958), that a principal otherwise liable for the negligence of his agent may not take advantage of an immunity which is personal to the agent. The Court held, further, that although a principal ordinarily has a right of action over against his agent for indemnity, this would not be true where the principal was the father and the agent the son because of the immunity of the son from suit by the father. The Court expressly noted that its decision permitting the action of the wife's estate against the husband-father "does not lift the immunity of the son's estate from suit by the father so as to authorize an action by him for indemnity should plaintiff recover in this action." 263 N.C. at 368, 139 S.E. 2d at 681.

Finally, the Court in *Cox* held that it would not permit "defendant husband-father, as a distributee of the estate of his wife, to profit from his own wrong." *Id.* The Court said:

> Where the beneficiary of an estate is culpably responsible for the decedent's death, he may not share in the administrator's recovery for wrongful death. The identity of beneficiaries entitled to share in the recovery is determined as of the time of decedent's death. *Davenport v. Patrick*, 227 N.C. 686, 44 S.E. 2d 203. Here, had plaintiff's intestate died a natural death, her beneficiaries would have been her husband, her son, and her daughter. G.S. 29-14(2). Under the circumstances, however, only the daughter will be entitled to benefit from any recovery which the administrator may obtain in this action. Therefore, should the jury return a verdict in plaintiff's favor, the court will enter judgment for only one-third of the amount.

Id.

Cox and other cases firmly established the principle that in wrongful death actions where recovery depends on establishing the liability of a party who is also a beneficiary of the decedent's estate, any recovery obtained shall be reduced by that party-beneficiary's pro rata share and that party-beneficiary is precluded from participating in the recovery; but the action may be maintained on behalf of other beneficiaries, if any. *Davenport v. Patrick*, 227 N.C. 686, 44 S.E. 2d 203 (1947); *Pearson v. National Manufacture & Stores Corp.*, 219 N.C. 717, 14 S.E. 2d 811 (1941). Further, if recovery in a wrongful death action depends upon establishing the liability of a party who is the sole beneficiary of the decedent's estate, the action may not be maintained at all. *Davenport*, 227 N.C. 686, 44 S.E. 2d 203; *Goldsmith v. Samet*, 201 N.C. 574, 160 S.E. 835 (1931). In *Goldsmith*, the son's estate brought wrongful death action against the mother, alleging the negligent operation of an automobile by the father who was acting as the mother's agent. A demurrer to the complaint was sustained on appeal on the ground, first, that the action was barred by the doctrine of parental immunity and, second, that "if recovery were allowed, the amount would be divided between the two wrongdoers." *Id.* at 575, 160 S.E. at 835.

It is important to note that in all of the above cases the Court was concerned with not permitting a beneficiary of an estate to share in a wrongful death recovery when the recovery itself depended on establishing the liability of the beneficiary as a party-defendant or when the beneficiary was himself negligent as in *Goldsmith*.

In the instant case recovery does not depend upon establishing the liability of anyone but defendant-wife-mother. Recovery here is not grounded on establishing the liability of the father who is neither a party defendant nor one through whom the liability of the defendant is sought to be established.

This case, therefore, is controlled by *Foster v. Foster*, 264 N.C. 695, 142 S.E. 2d 638 (1965). *Foster* was a civil action by husband against his wife to recover medical expenses he had expended on their infant child after the child was injured while riding as a passenger in an automobile being operated by the wife-mother. The parties stipulated the mother's negligence caused the collision resulting in the child's injuries and that the

plaintiff-father was not present at the collision. The parties further stipulated that the father owned the automobile being operated by the mother and maintained it as a family purpose automobile. This Court, in a thoroughly considered opinion by Justice (later Chief Justice) Parker, affirmed a judgment for plaintiff against the contention, among others, that the husband's action should be barred because, under the family purpose doctrine, his wife's negligence under the circumstances presented would be imputed to him. In rejecting this argument, the Court said:

> The agreed facts are sufficient to invoke the family car purpose doctrine. In *Smith v. Simpson*, 260 N.C. 601, 133 S.E. 2d 474, it is said: 'The very genesis of the family purpose doctrine is agency. The question of liability for negligent injury must be determined in that aspect.' It seems clear from the agreed statement of facts that at the time of the injuries to Pamela Sue Foster defendant was the agent of plaintiff, and was acting within the scope of her authority as his agent. It has been held (or assumed) in many cases that, in the absence of waiver or estoppel on his part, a principal or master has a right of action against the agent or servant for loss or damage resulting to the principal or master which has proximately resulted from the agent's or servant's negligence. 3 C.J.S., Agency, § 286, (a); Annot. 110 A.L.R. 832, where many cases are cited, including one from North Carolina. What was said by Ervin, J., writing the majority opinion in *Rollison v. Hicks*, 233 N.C. 99, 63 S.E. 2d 190, in respect to actions brought by the master against the servant to recover for injuries suffered by the former as a result of the latter's actional negligence is also applicable to similar actions brought by a principal against his agent. Justice Ervin said:
>
> > 'The doctrine of imputed negligence has no application, however, to actions brought by the master against the servant to recover for injuries suffered by the former as a result of the latter's actionable negligence. * * *
> >
> > '* * * But it would offend justice and right to impute the negligence of a servant to his master and thus exempt him from the consequences of his own wrong-doing where the negligence proximately causes injury to a master who is without personal fault.'

> According to the agreed facts 'plaintiff was not present at the time of the said collision.' There is no waiver or estoppel on his part in the instant case. He was not in the automobile at the time of the collision, and that is another reason why his wife's negligence cannot be imputed to him. 65 C.J.S., Negligence, § 168, (f).

Id. at 699-700, 142 S.E. 2d at 642-43.

The result here must be the same as in *Foster.* The husband-father is not barred from sharing in any recovery by his son's estate because defendant-wife-mother's negligence cannot be imputed to him for this purpose under the family purpose doctrine. The doctrine is essentially a means for establishing liability of responsible parties on a theory of *respondeat superior* whereby the responsible party is the principal and the party actively negligent is agent. *Foster* establishes that the doctrine may not be used to bar an action brought by the husband-father against the wife-mother for medical expenses expended on their son. It follows that the doctrine may not be used to deny distribution to the husband-father as beneficiary of his son's estate when the estate's recovery is grounded, if at all, solely on the negligence of the wife-mother.

We are not inadvertent to *Dixon v. Briley,* 253 N.C. 807, 117 S.E. 2d 747 (1961). In *Dixon* two brothers, James B. and Otha Lee, were riding in an automobile when it collided at a railroad crossing with Southern Railway Company's freight train. Apparently Otha Lee was driving and James B. was a passenger. Both were killed in the collision. Their father, Albert, as administrator of James B.'s estate, brought wrongful death action against Otha Lee's estate and Southern Railway Company, alleging that the negligence of Southern Railway and Otha Lee caused the collision. Southern Railway moved to amend its answer. The proposed amendment sought to allege that the automobile was a family purpose car, owned by the father and being operated at the time as a family purpose vehicle; therefore any negligence of the operator of the car would be imputed to the father and would be a bar to any recovery or a bar *pro tanto* to that portion of any recovery which would be distributable to the father. The trial court refused to allow the amendment, concluding that it would not constitute a defense. This Court, in a brief per curiam opinion,

concluded that it was error for the trial court to deny the amendment as a matter of law and remanded the matter to permit the trial court to exercise its discretion in determining whether the amendment ought to be allowed. Suffice it to say that the *Dixon* case did not come to grips with the question of whether the pleading ultimately would constitute a defense. It held simply that the trial court should not have denied the motion to amend on the ground that the pleading would not constitute a defense. We note further that only appellant Southern Railway appeared when the case was argued in this Court; there was no counsel *contra*. Finally, *Dixon* was not referred to in the later *Foster* case which thoroughly considered, and should be considered authoritative on, this question.

The result is this: This action may be maintained on behalf of the child's estate, but only the father-husband will be entitled to share in any recovery. Since any recovery obtained will be grounded on the negligence of defendant-mother-wife, she shall not share in the recovery, if there is any.

IV.

[4] The only remaining problem is how best to accomplish this result in the trial of this proceeding. The cases heretofore discussed resolved the problem by simply letting the wrongful death action proceed to verdict. The verdict was then reduced by the pro rata share of the beneficiary or beneficiaries upon whose liability or negligence the recovery depended and judgment entered accordingly. The recovery was distributed ultimately only to the other beneficiaries of the estate. This procedure worked well under our former wrongful death statutes in effect when these cases were decided.

In 1969 the legislature rewrote a portion of these statutes so as to change significantly the measure of damages recoverable in a wrongful death action. "An Act to Rewrite G.S. 28-174, Relating to Damages Recoverable for Death by Wrongful Act," Chapter 215, 1969 Sess. Laws. The differences in wrongful death damages recoverable before and after the 1969 changes are fully chronicled in *Bowen v. Constructors Equipment Rental Co.*, 283 N.C. 395, 196 S.E. 2d 789 (1973). Essentially, as the *Bowen* opinion demonstrates, damages for death itself under former G.S. 28-174 were limited to the "*present value* of the *net pecuniary worth* of

the deceased based on his life expectancy." *Id.* at 415, 196 S.E. 2d at 803. The damages under this formula were arrived at without consideration of who might share in the recovery or their relationship to the deceased. The focus was solely on the probable worth of the deceased had he lived out his normal life expectancy. "Prior to the 1969 act, whether the relationship between such persons [entitled to the recovery] and the decedent was one of closeness, estrangement or indifference had no bearing upon the amount of the recovery." *Id.*

The 1969 Act, now codified as N.C. Gen. Stat. § 28A-18-2, provides for wrongful death damages as follows:

> (b) Damages recoverable for death by wrongful act include:
>
> (1) Expenses for care, treatment and hospitalization incident to the injury resulting in death;
>
> (2) Compensation for pain and suffering of the decedent;
>
> (3) The reasonable funeral expenses of the decedent;
>
> (4) The present monetary value of the decedent *to the persons entitled to receive the damages recovered*, including but not limited to compensation for the loss of the reasonably expected:
>
> a. Net income of the decedent,
>
> b. Services, protection, care and assistance of the decedent, whether voluntary or obligatory, *to the persons entitled to the damages recovered.*
>
> c. Society, companionship, comfort, guidance, kindly offices and advice of the decedent *to the persons entitled to the damages recovered*;
>
> (5) Such punitive damages as the decedent could have recovered had he survived, and punitive damages for wrongfully causing the death of the decedent through maliciousness, wilful or wanton injury, or gross negligence;
>
> (6) Nominal damages when the jury so finds. [Emphasis supplied.]

In this action the damages which plaintiff seeks to recover are: (1) the reasonable funeral expenses of the decedent; (2) compensation for the pain and suffering of the decedent; and (3) the items of damages recoverable under section (b)(4) of the statute. "The first step to determine the damages recoverable under [section (b)(4)] is to identify the particular persons who are entitled to receive the damages recovered." *Bowen*, 283 N.C. at 418, 196 S.E. 2d at 805. In ascertaining the amount of damages recoverable under section (b)(4), the trier of fact must be apprised of those who are going to share in the recovery; for under this section it is only the losses suffered by these persons as a result of the decedent's death which may be taken into account in assessing these damages.

In the present case since only the father-husband will be entitled to share in the recovery, the trier of fact must be so apprised and must take this fact into account in assessing the damages recoverable under section (b)(4). Only the father-husband's losses as a result of the death of the child may be considered and losses to the mother-wife may not be considered in assessing damages under this section. It follows that whatever damages are awarded under this section need not be reduced but are fully recoverable by the estate to be ultimately enjoyed by the father-husband.

Since the reasonable funeral expenses of the decedent are primarily the responsibility of the father-husband, neither should this item of damages be reduced because the mother-wife is precluded from sharing in the recovery.

Damages awarded, if any, for decedent's pain and suffering should, however, be reduced by half, which represents the mother-wife's pro rata share of these damages, under the principles established in our cases.

Instead of a general verdict on damages, these various damages issues arising on each subsection of section (b)(4) should be submitted separately to the jury as special verdicts.

The result is that summary judgment entered for defendant below is reversed and this case is remanded for further proceedings not inconsistent with this opinion.

Reversed and remanded.

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

Justice MEYER dissenting.

The well-settled common law of North Carolina does not permit recovery for an unintentional tort between unemancipated minors and their parents. *Gillikin v. Burbage*, 263 N.C. 317, 139 S.E. 2d 753 (1965); *Redding v. Redding*, 235 N.C. 638, 70 S.E. 2d 676 (1952); *Small v. Morrison*, 185 N.C. 577, 118 S.E. 12 (1923). Nor is the personal representative of a deceased unemancipated minor permitted to bring a wrongful death action against a parent of the child. *Skinner v. Whitley*, 281 N.C. 476, 189 S.E. 2d 230 (1972); *Lewis v. Insurance Co.*, 243 N.C. 55, 89 S.E. 2d 788 (1955). Of course there is a very limited exception to the prevailing common law rule in North Carolina created by G.S. § 1-539.21. This statutory exception applies only to personal injury and property damage actions arising solely out of the operation of automobiles owned or operated by the parent. This statute provides as follows:

> The relationship of parent and child shall not bar the *right of action* by a minor child against a parent *for personal injury or property damage* arising out of the operation of a motor vehicle owned or operated by such parent.

(Emphasis added.)

This statute by its own terms creates a limited exception to the prevailing common law rule in North Carolina. It allows a child to sue a parent but not a parent to sue a child. It applies only in motor vehicle cases and then applies only to personal injury and property damage claims. The statute does not mention wrongful death actions. It was extended to cover that classification by the holding in this very case when it was initially before the COA on the dismissal of the administrator's action for failure to state a cause of action. *Carver v. Carver*, 55 N.C. App. 716, 286 S.E. 2d 799, *cert. denied*, 305 N.C. 584 (1982). As is clearly demonstrated in the majority opinion, this Court's denial of defendant's petition for further review did not make that decision of

the Court of Appeals the law of the case in this Court nor does it mean that this Court determined that the decision of the Court of Appeals is correct. I believe that this Court should now hold that G.S. § 1-539.21 does not extend to wrongful death actions, thus the common law continues to apply and this action is barred by the doctrine of parental immunity.

There was, when it was enacted, and there continues to be, good reason for the legislature's omission of wrongful death actions from the provisions of G.S. § 1-539.21. This Court should not extend the statute in the face of strong public policy considerations which augur against it. It is the parents here who are the real parties in interest. The majority has properly barred the wife/mother from recovery as an actual distributee of the proceeds of the action under the maxim that one should not be allowed to profit from his own wrong.

Justice (later Chief Justice) Parker stated the principle in *In re Estate of Ives*, 248 N.C. 176, 181-82, 102 S.E. 2d 807, 811 (1958), as follows:

> In an action to recover damages for wrongful death the real party in interest is the beneficiary under the statute for whom recovery is sought, and not the administrator. *Davenport v. Patrick*, 227 N.C. 686, 44 S.E. 2d 203.
>
> 'It is a maxim of law, recognized and established, that no man shall take advantage of his own wrong; and this maxim, which is based on elementary principles, is fully recognized in courts of law and equity, and, indeed, admits of illustration from every branch of legal procedure.' Broom's Legal Maxims, Tenth Ed., 191.
>
> This maxim embodied in the common law, and constituting an essential part thereof, is stated in the text books and reported cases. It has its foundation in universal law administered in all civilized lands, for without its recognition and enforcement by the courts their judgments would rightly excite public indignation. This maxim has been adopted as public policy in this state and we have decided in many cases instituted to recover damages for wrongful death that no beneficiary under the statute for whom recovery is sought will be permitted to enrich himself by his own wrong. *Daven-*

port v. Patrick, supra; Pearson v. Stores Corp., 219 N.C. 717, 14 S.E. 2d 811; *Goldsmith v. Samet*, 201 N.C. 574, 160 S.E. 835; *Harton v. Telephone Co.*, 141 N.C. 455, 54 S.E. 299; *Davis v. R.R.*, 136 N.C. 115, 48 S.E. 591. The right of a person otherwise entitled to receive the money paid for wrongful death, or to share in the distribution of such a sum paid, will be denied where the death of the decedent was caused by such person's negligence. *Davenport v. Patrick, supra; Goldsmith v. Samet, supra.*

While the wife/mother is barred from taking as an actual distributee of the proceeds from this action, I believe it is inescapable that she will indeed benefit from the recovery which resulted from her own wrong. Should the husband/father choose to do so could he not give her some of, or indeed all of, the recovery? Should he die intestate would she not receive benefits under our laws governing intestate succession? Should he die testate could he not will her the funds recovered? Should the marriage terminate without a separation agreement would she not benefit from the recovery through equitable distribution? Should the recovery simply go into the family treasury, which is more likely, would she not benefit?

I believe that the overriding public policy of not allowing one to benefit from his own wrong dictates that the statute not be extended by judicial fiat to wrongful death actions. If the legislature chooses to do so, it may express its intent and will to so extend the statute by appropriate legislation.

IN THE MATTER OF: PAUL S. GORSKI, ET AL. v. NORTH CAROLINA SYMPHONY SOCIETY, INC. AND EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA

No. 594A83

(Filed 30 April 1984)

1. Administrative Law § 8; Master and Servant § 111— review of administrative decision by superior court—scope of review

Civil cases are distinguishable from administrative proceedings in that there are no pleadings required in administrative proceedings, and the function of the superior court upon review is to insure that the Commission, in an

unemployment compensation case, properly construed and applied the applicable law in reaching its decision, as well as determining whether the evidence supported the findings of fact and deciding whether the facts found supported the conclusions of law and the Commission's decision. G.S. 96-15(f). Therefore, in a case involving unemployment compensation claims of sixty-two professional musicians who were members of the N.C. Symphony Orchestra in 1981, the superior court properly considered the issue of "group temporary layoff" where the issue was before the deputy commissioner, but he failed to recognize it, and where by their appeal to the superior court, claimants directly raised the issue.

2. Master and Servant § 108.2— unemployment compensation for symphony musicians—group temporary layoff conclusion supported by evidence

In an action involving the unemployment compensation claim of professional musicians who were members of N.C. Symphony Orchestra in 1981, the superior court judge properly concluded that claimants were on a "group temporary layoff" pursuant to various regulations promulgated by the Commission pursuant to G.S. 96-4(a) for a five-week period and were entitled to compensation for that period.

APPEAL by claimants pursuant to N.C.G.S. 7A-30(2) from the decision of the Court of Appeals (*Judges Phillips* and *Arnold* concurring, *Judge Becton* dissenting) reported in 64 N.C. App. 649, 308 S.E. 2d 460 (1983), which vacated the order entered by *Farmer, J.*, at the 27 January 1982 Civil Session of Superior Court, WAKE County, and remanded the cause to the Employment Security Commission for reinstatement of its order of 17 July 1981 denying benefits to the claimants. Heard in the Supreme Court 12 March 1984.

This case involves unemployment compensation claims of sixty-two professional musicians who were members of the North Carolina Symphony Orchestra in 1981. The claimants' employment with the Symphony was controlled by a contract between the Society and Local 500 of the American Federation of Musicians. The contract extended through the 1981-82 season, with provision for a forty-week season in 1980-81 to conclude 1 June 1981. Each musician also had a yearly binder contract with the Symphony.

On 12 April 1981, the Symphony notified each musician that the master contract and scheduled season were to be cancelled effective 26 April 1981 because the Symphony did not have the necessary funds to continue operations.

All the musicians properly filed claims for benefits with the Employment Security Commission, registered for work, and reported as required. Contrary to established procedure pursuant to N.C.G.S. 96-15, the acting Chief Deputy Commissioner removed the claims from the claims adjudicator and transferred them to a deputy commissioner for hearing and decision. The notices of hearing stated that the hearing would be on two issues: the claimants' separation from employment, N.C.G.S. 96-14(1), (2), and claimants' availability for work while unemployed, N.C.G.S. 96-13(a)(3).

At the hearing, the Symphony produced evidence that it intended to reinstate all the musicians; that it did not intend to cancel the master contract indefinitely; that concerts were scheduled for the 1981-82 season, tickets were being sold, and fund-raising efforts were being pursued; that all of the musicians were "tenured" under the contract and would continue to receive benefits under the contract, including disability, life and medical insurance, insurance for their musical instruments, retirement benefits, and workers' compensation insurance coverage. Most of the claimants played benefit concerts during the period, with the proceeds going to the Symphony for disbursement to the musicians.

The musicians produced evidence of their efforts to obtain employment. Three of the musicians were employed by other orchestras and asked for and received leaves of absence from the Symphony. Many also sought positions as teachers as well as with other musical organizations, and several accepted part-time nonprofessional work while searching for permanent employment.

The deputy commissioner made the following conclusions, inter alia:

> Based on the foregoing facts, it must be concluded that the claimants herein were, in effect, laid off their jobs for the final five weeks of the 1980-81 Symphony Season due to a lack of work available resulting from insufficient funding.
>
> . . . .
>
> Based on the foregoing facts and legal authorities, it is concluded that the claimants herein have not met their burden of showing by the greater weight of the evidence that

they have been available for permanent fulltime employment while filing claims for unemployment benefits.

First of all, they have not been genuinely attached to the labor force and available for permanent fulltime employment because of their continuing job attachment with the employer herein, The North Carolina Symphony.

. . . .

Most of the claimants have executed their individual binders for the 1981-82 Symphony Season and, apparently, the claimants have not attempted to cancel their binders. The employer has not attempted to cancel the individual binders either and has, in fact, indicated its intention of honoring the binders.

. . . .

Secondly, it is concluded that the claimants are not genuinely attached to the labor force and are, therefore, not available for permanent fulltime suitable employment because there is a virtually nonexistent market in the area of their residence and an extremely limited market nationwide for the claimants' job skills and experience. The claimants are not situated so that they have much of a chance to find work that is appropriate for them to perform. This is not necessarily due to any faults or deficiencies insofar as the individual claimants are concerned.

On these findings, the Commission denied claimants' applications for benefits.

Upon appeal to the superior court, that court entered an order making findings in pertinent part as follows:

1. The Employment Security Commission of North Carolina adopted the Regulations of the Employment Security Commission of North Carolina (January 1, 1981) pursuant to its authority under N.C.G.S. Sec. 96-4; and

2. Appellants herein were involved in a group temporary layoff as defined in Regulations 1.15 and 1.24 of the aforementioned Regulations; and

3. The filing of the appellants' claims herein constituted a constructive registration for work for at least the first four consecutive weeks of total unemployment under Regulation 10.16 of the aforementioned Regulations; and

4. Appellants were eligible for unemployment benefits during the first four weeks of total unemployment (minus any waiting period required under N.C.G.S. Sec. 96-13(c)); and

5. The Employment Security Commission failed to make a determination under the aforementioned Regulation 10.16 as to whether actual registration for work was required of appellants as of the first day of the fifth consecutive week of total unemployment; . . .

Upon these findings, the court ordered that claimants be paid benefits for the first four weeks of their unemployment, less any waiting period required by statute, and remanded the proceeding to the Commission for determination of whether it was necessary for claimants to register for work on the fifth week of their unemployment pursuant to Employment Security Commission Regulation 10.16.

From this order, the Symphony and the Commission appealed to the Court of Appeals. That court reversed the superior court's decision.

Smith, Patterson, Follin, Curtis, James & Harkavy, by Michael G. Okun, for claimant appellants.

Poyner, Geraghty, Hartsfield & Townsend, by Cecil W. Harrison, Jr., for appellee North Carolina Symphony Society, Inc.

Deputy Chief Counsel V. Henry Gransee, Jr. and Staff Attorney Donald R. Teeter for appellee Employment Security Commission of North Carolina.

MARTIN, Justice.

We hold that the trial judge properly found claimants were entitled to unemployment benefits, and we therefore reverse the decision of the Court of Appeals.

[1] The appellees argue that in reviewing unemployment benefit claims the superior court acts as an appellate court and cannot consider a basis for relief not presented in the administrative

process. For this reason, they contend the superior court could not base its decision upon the theory of a "group temporary layoff" because that issue was not presented to the Commission. In adopting this argument, the Court of Appeals relied upon *Grissom v. Dept. of Revenue*, 34 N.C. App. 381, 238 S.E. 2d 311 (1977), *disc. rev. denied*, 294 N.C. 183 (1978). *Grissom* involved a petition for review in the superior court of the dismissal of claimant as an employee of the Department of Revenue. Upon appeal to the Court of Appeals, Grissom contended that his petition was actually a complaint and could be construed to contain a claim that he was fired because of his exercise of free speech. The Court of Appeals held that because this issue was not before the superior court, he could not do so upon appeal, relying upon *Lawson v. Benton*, 272 N.C. 627, 158 S.E. 2d 805 (1968). *Lawson* was not an administrative review case but involved an automobile collision. The defendant sought to argue in the Supreme Court that an issue of contributory negligence should have been submitted to the jury. This Court pointed out that defendant had not pleaded contributory negligence and did not tender an issue on it to the court, did not except to the issues submitted nor request an instruction on that theory, and held that defendant could not raise that issue on appeal.

Civil cases such as *Lawson* are distinguishable from the proceeding here at bar. Parties, unless allowed to amend, must prove their case according to their allegations. *Oil Co. v. Miller and Batten v. Miller*, 264 N.C. 101, 141 S.E. 2d 41 (1965). In this administrative proceeding there are no pleadings required. The function of the superior court upon review is to ensure that the Commission properly construed and applied the applicable law in reaching its decision, as well as determining whether the evidence supports the findings of fact and deciding whether the facts found support the conclusions of law and the Commission's decision. *Intercraft Industries Corp. v. Morrison*, 305 N.C. 373, 289 S.E. 2d 357 (1982). In contrast to the requirements of normal civil litigation, the statute governing unemployment proceedings reads in part: "[T]he conduct of hearings and appeals shall be in accordance with regulations prescribed by the Commission for determining the rights of the parties, whether or not such regulations conform to common-law or statutory rules of evidence and other technical rules of procedure." N.C. Gen. Stat. § 96-15(f)(Cum.

Supp. 1983). Contrary to *Grissom, supra*, there was abundant evidence before the deputy commissioner to require a determination of whether the "group temporary layoff" regulations should be applied in this proceeding. The issue was before the deputy commissioner, but he failed to recognize it and thereby erred.

We note that in this proceeding claimants did not receive a hearing before the claims adjudicator prior to the hearing before the deputy commissioner. Although this procedure was lawful, it may have prevented all of the theories for relief from being fully developed during the administrative hearing. Nevertheless, Symphony by its evidence, summarized above, demonstrated that claimants had not been discharged from employment but, rather, were still employees of Symphony during the five-week period and thereafter pending the commencement of the 1981-82 season. Symphony only intended to reduce the 1980-81 season by five weeks because of the lack of operating funds. In so doing, they effectively placed the claimants in the status of a "group temporary layoff."

By their appeal to the superior court, claimants directly raised the issue of whether they were a part of the labor force, considering their continuing job attachment with the Symphony. The resolution of this issue affects the determination of whether the court properly applied the "group temporary layoff" regulations to this case. We hold that the issue of "group temporary layoff" was properly considered by the superior court.

[2] We now turn to the issue of whether the superior court correctly held that the claimants were entitled to benefits under the "group temporary layoff" regulations. Pursuant to N.C.G.S. 96-4(a), the Commission has promulgated the following pertinent regulations:

> 1.24—"Temporary Layoff" is a period of unemployment occurring when one or more workers, because of lack of work during a payroll week as established by the employer, are partially or totally unemployed but are retained on the payroll and are considered by the employer to be continuing employees.
>
> 1.15—"Group Temporary Layoff" is a temporary layoff involving twenty (20) or more workers.

9.10—Whenever a group of twenty (20) or more workers is either partially or totally separated or temporarily laid off from employment at the same time, the employer shall notify the local Employment Security Office prior to the date of separation or layoff. . . .

10.16—Unless the employer is allowed by the Commission to file claims on machine readable media, any worker who is involved in a group temporary layoff of one or more payroll weeks shall report to the local Employment Security Office or a designated point of service on a date and time specified by the Commission in a notice posted on the business premises of the worker's employer. The worker shall file an initial or continued claim for benefits on a form provided or approved by the Commission. The filing of a claim shall constitute a constructive registration for work. If a temporary layoff of total unemployment exceeds four consecutive payroll weeks, the individual shall be considered to have been separated from employment and an actual registration must be taken as of the first day of the fifth consecutive week. . . .

The Commission found as facts that: (1) The claimants are all tenured musicians with the Symphony. (2) The Symphony cancelled the master contract, reducing the 1980-81 season by five weeks, because of lack of operating funds. (3) The claimants were not paid for the last five weeks of the season. (4) The Symphony and claimants intended that claimants would be employed by Symphony for the 1981-82 season. (5) Symphony assured all of the musicians that the required funding would be available for the 1981-82 season as previously scheduled under the 1980-83 master contract. (6) Claimants have continued to receive full benefits under the master contract (except salary) during the five-week period, including sick leave, disability program, long term disability program, maternity leave, health insurance, life insurance, retirement plan, instrument insurance, and workers' compensation. (7) A substantial majority of the claimants have participated in concerts during the five-week period and the proceeds from these concerts have been paid to the Symphony for distribution to the participating musicians. (8) Eight claimants have been employed by Symphony for two to five seasons, forty claimants for five to ten seasons, and ten for more than ten seasons. (9) In

the past, claimants have continued to be employed by the Symphony even when the master contracts had expired and prior to the execution of new contracts. It was stipulated that all of the claimants had signed binder contracts with the Symphony for the 1981-82 season.

Based on these findings, the Commission properly concluded that claimants had been laid off their jobs for the final five weeks of the 1980-81 season due to lack of work available as a result of insufficient funding.

The above findings and conclusion support the superior court's conclusion that claimants were in a "group temporary layoff" during the five-week period. The Commission's conclusion that claimants were not a part of the labor force because of their continued job attachment to the Symphony buttresses this holding. This is true even though the Symphony failed to notify the Employment Security Office as required by regulation 9.10. An employer cannot defeat the rights of employees to benefits under the statute by failing to comply with the statute or the rules and regulations duly promulgated by the Commission. If the facts support the application of the regulations, they will be applied regardless of the intent of the employer.

The purpose of the "group temporary layoff" regulation is to allow an employee to receive unemployment benefits for a period of no more than four weeks without proving that he is available for work in the sense of permanent full-time employment elsewhere. This is based upon the theory that the employee is still employed and therefore is not a part of the labor force. The employee is automatically entitled to benefits for up to four weeks (less any waiting period mandated by the statute) provided he files his claim in accordance with the regulations, which is conceded in this proceeding. N.C. Empl. Sec. Comm. Reg. 10.16 (1981).

Symphony also argues that the Commission regulations concerning "group temporary layoff" are unconstitutional. The record discloses that this issue was not raised before the superior court. It was first raised in the Court of Appeals; however, that court did not pass upon it. Constitutional issues may not be raised for the first time in the appellate division. *Wilcox v. Highway Comm.*, 279 N.C. 185, 181 S.E. 2d 435 (1971). This is in accord with the

decisions of the United States Supreme Court. *Edelman v. California*, 344 U.S. 357, 97 L.Ed. 387 (1953).

We hold that the superior court judge did not err in concluding that claimants were on a "group temporary layoff" pursuant to the above regulations for the five-week period in question.

The decision of the Court of Appeals is reversed, and this cause is remanded to that court for reinstatement of the judgment of the superior court and for further remand to the superior court for compliance with its judgment.

Reversed and remanded.

TEXACO, INC. v. GEORGE E. CREEL, GRAHAM R. CREEL AND LORENE G. BRAME

No. 381PA82

(Filed 30 April 1984)

1. Vendor and Purchaser § 1.3— options to purchase—fixed price and right of first refusal—construction

Where a lease contained a $50,000 fixed price option to purchase the property "at any time during the term of this lease or any extension or renewal thereof" and a "right of first refusal" option giving the lessee the right to purchase "on the same terms and at the same price as any bona fide offer" for the premises which the lessors desire to accept, and where the lease also provided that "any option herein granted shall be continuing and pre-emptive, binding on the lessor's heirs, devisees, administrators, executors or assigns, and the failure of lessee to exercise same in any one case shall not affect lessee's right to exercise such option in other cases thereafter arising during the term of this lease or any extension or renewal thereof," the fixed price option continued to bind the lessors or their successors in interest even though the lessee failed to meet a bona fide third-party offer.

2. Appeal and Error § 24— cross-assignments of error by appellees

Appellees' failure to except to and cross-assign as error the portion of the trial court's summary judgment order relating to the sufficiency of appellant's tender of the purchase price under an option precludes appellate review of the sufficiency of the tender. App. Rule 10(d).

3. Vendor and Purchaser § 5— contract to convey pursuant to option—specific performance—effect of value of property and negotiation for resale

Plaintiff was entitled to specific performance of a contract to convey pursuant to a fixed price option even though the property may have been worth significantly more than the price fixed by the contract and plaintiff may have negotiated for a resale of the property.

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

ON petition for discretionary review of a decision of the Court of Appeals, 57 N.C. App. 611, 292 S.E. 2d 130 (1982), reversing the denial of plaintiff's motion for summary judgment by *Judge John Martin*, presiding at the 23 February 1981 Session of ORANGE Superior Court.

Newitt, Bruny & Koch by John G. Newitt, Jr. and Roger H. Bruny, attorneys for defendant appellants.

Newsom, Graham, Hedrick, Murray, Bryson, Kennon & Faison by Josiah S. Murray, III and Joel M. Craig, attorneys for plaintiff appellee.

EXUM, Justice.

This is an action for specific performance of a fixed price option provision in a lease. The determinative issue is whether plaintiff, as defendants' lessee, is entitled to specific performance. We conclude plaintiff is so entitled and affirm the Court of Appeals.

On 9 September 1949, the Texaco Company, plaintiff's predecessor in interest, leased from Thomas and Inez Pendergraft, defendants' predecessors in interest, a lot located next to Fowler's Food Store in Chapel Hill. The lease was to begin on 1 February 1950 and run for ten years with the lessee given the option to extend the term for four additional five-year terms. The rent for the duration of the lease, including any extensions, was set at $100 per month.

Plaintiff apparently elected to extend the lease for all four extensions so the lease was due to expire on 31 January 1980. The lease contained the following language which gives rise to the instant suit:

(11)—Option to Purchase. Lessor hereby grants to lessee the exclusive right, at lessee's option, to purchase the demised premises, free and clear of all liens and encumbrances, including leases, (which were not on the premises at the date of this lease) at any time during the term of this lease or any extension or renewal thereof,

(a) for the sum of *Fifty Thousand* dollars; it being understood that if any part of said premises be condemned, the amount of damages awarded to or accepted by lessor as a result thereof shall be deducted from such price,

(b) On the same terms and at the same price as any bona fide offer for said premises received by lessor and which offer lessor desires to accept. Upon receipt of a bona fide offer, and each time any such offer is received, lessor (or his assigns) shall immediately notify lessee, in writing, of the full details of such offer, including the name and address of any offeror, whereupon lessee shall have thirty (30) days after receipt of such notice in which to elect to exercise lessee's prior right to purchase. No sale of or transfer of title to said premises shall be binding on lessee unless and until these requirements are fully complied with.

Any option herein granted shall be continuing and preemptive, binding on the lessor's heirs, devisees, administrators, executors, or assigns, and the failure of lessee to exercise same in any one case shall not affect lessee's right to exercise such option in other cases thereafter arising during the term of this lease or any extension or renewal thereof.

Upon receipt of lessee's notice of election to exercise any option granted herein, which notice shall be given in accordance with the Notice Clause of this lease, lessee shall have a reasonable time in which to examine title and, upon completion of such examination if title is found satisfactory, shall tender the purchase price to lessor, and lessor shall thereupon deliver to lessee a good and sufficient Warranty Deed conveying the premises to the lessee free and clear of all encumbrances (including without limiting the foregoing

the rights of dower and/or curtesy). All rentals and taxes shall be prorated between grantor and grantee to the date of delivery of the aforesaid deed.

Lessee's notice of election to purchase pursuant to either of the options granted in this clause shall be sufficient if deposited in the mail addressed to lessor at or before midnight of the day on which option period expires.

There is evidence in the record that defendants Creel received several offers from third parties to purchase the property for more than $50,000 in January 1980. There is also evidence that plaintiff gave written notice of its intention to exercise the fixed price option to defendants on 17 January 1980 and to counsel for defendants Creel on 31 January 1980. We will assume for purposes of analysis that all the offers received by defendants were bona fide, and were promptly communicated to plaintiff in the manner required under the lease. We will also assume that defendants would have accepted the highest offer of $217,000 (made by two children of defendants Creel) had it not been for plaintiff's intention to exercise its fixed price option and to seek specific performance of the contract to convey created by such exercise. Plaintiff actually attempted to tender the fifty-thousand-dollar purchase price, set forth in the fixed price option, by check to defendants on 1 February 1980. Because defendants, believing the contract required plaintiff to meet its highest offer, refused to convey title to the property, plaintiff filed suit on 4 February 1980 for specific performance and also filed a notice of lis pendens on the property. Defendants counterclaimed, asserting they had been damaged in the amount of $217,000 when the younger Creels withdrew their offer because of reluctance to "buy a lawsuit." Defendants also asserted they were entitled to treble damages because the filing of lis pendens was an unfair and deceptive trade practice.

Both parties moved for summary judgment. The trial court denied plaintiff's motion, concluding plaintiff was not entitled to specific performance. A jury trial was held on defendants' counterclaims, and the trial court directed a verdict in favor of plaintiff on its motion at the close of defendants' evidence. Both sides appealed.

The Court of Appeals, in a well-reasoned opinion by Judge Becton, correctly recognized the case involves only a question of law—the interpretation of the option clauses in the lease. The Court of Appeals summarized the split of authority in other jurisdictions involving leases substantially similar to the instant one, adopted that view which it thought was most faithful to the language of the lease, and concluded plaintiff properly conformed to the option requirements. It reversed the trial court and remanded the case for entry of summary judgment for plaintiff and for an order directing specific performance of the fixed option agreement. 57 N.C. App. at 619, 292 S.E. 2d at 135.

[1] This appeal raises a question of first impression in North Carolina—the interpretation of a fixed price option accompanied by a "right of first refusal" option. Because no genuine issue of material fact has been presented, summary judgment is an appropriate vehicle for determining the contentions of the parties. As summarized in *Kidd v. Early*, 289 N.C. 343, 352, 222 S.E. 2d 392, 399 (1976), by former Chief Justice Sharp writing for the Court:

> Upon motion a summary judgment must be entered 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law.' G.S. 1A-1, Rule 56(c). The party moving for summary judgment has the burden of establishing the lack of any triable issue of fact. His papers are carefully scrutinized and all inferences are resolved against him. *Caldwell v. Deese*, 288 N.C. 375, 218 S.E. 2d 379 (1975); *Railway Co. v. Werner Industries*, 286 N.C. 89, 209 S.E. 2d 734 (1974); *Page v. Sloan*, 281 N.C. 697, 190 S.E. 2d 189 (1972). The court should never resolve an issue of fact. 'However, summary judgments should be looked upon with favor where no genuine issue of material fact is presented.' *Kessing v. Mortgage Corp.*, 278 N.C. 523, 180 S.E. 2d 823, 830 (1971).

In order to discern the effect the parties intended the option clauses to have, we must, as in any contract, examine "the language of the contract, the purposes of the contract, the subject matter and the situation of the parties at the time the contract is

executed." *Adder v. Holman & Moody, Inc.*, 288 N.C. 484, 492, 219 S.E. 2d 190, 196 (1975).

The plain language of the lease gives plaintiff the right to purchase the property for fifty thousand dollars "at any time during the term of this lease or any extension or renewal thereof." It also gives plaintiff the right to purchase the property "[o]n the same terms and at the same price as any bona fide offer" for the premises which the lessor desires to accept. If the lessor receives a bona fide offer he must immediately notify the lessee in writing of the "full details of such offer." The lessee then has thirty days after receiving the notice to exercise his right to purchase. Significantly, the lease further provides:

> Any option herein granted shall be *continuing and pre-emptive*, binding on the lessor's heirs, devisees, administrators, executors, or assigns, and *the failure of lessee to exercise same in any one case shall not affect lessee's right to exercise such option in other cases thereafter arising* during the term of this lease or any extension or renewal thereof. [Emphasis added.]

Defendants argue we should construe this language to mean that failure to exercise the right of first refusal in one case terminates forever the right to exercise the fixed price option. They further argue that to construe the fixed price option as continuing would mean that it would be

> enforceable against lessor and against all third parties who purchased the property from lessor regardless of the fact that the lessee had refused to exercise its right of first refusal. As a practical matter this would place a ceiling of $50,000.00 on the price which the lessor could obtain for the property during the entire thirty years that the lease and its renewals were in effect thus depriving lessor of all appreciation in value.

Plaintiff, on the other hand, argues the two

> provisions are separate alternatives, and the pre-emptive rights granted in Paragraph 11(6) in nowise limit Plaintiff's rights under the fixed-price option of Paragraph 11(a) of the Lease. Under this analysis, Plaintiff was entitled to exercise

its fixed-price option notwithstanding the presence of alleged third-party offers at a higher price.

Defendants rely on *Texaco, Inc. v. Rogow*, 150 Conn. 401, 190 A. 2d 48 (1963), which involves the same plaintiff and substantially similar language in a lease. In *Rogow* the lease contained a fixed price option of $16,000 which could only be exercised *after* the ninth year of the lease. Just before the end of the ninth year the lessor received a bona fide offer to purchase the premises for $44,000. The lessee was notified of this offer, but chose to give notice of its exercise of the fixed price option after the end of the ninth year. When the lessor refused to convey the property for the $16,000 price, the lessee filed suit.

The Connecticut Supreme Court concluded:

> The plaintiff's [lessee's] fixed price option could be effectively exercised only after the first nine years of the term, and then, practically speaking, only prior to the plaintiff's receipt of a notice from the defendant of a valid and bona fide offer from a third party. On April 30, 1959, still during the first nine years of the lease, the plaintiff did receive notice from the defendant of the [third party's] offer and of the defendant's desire to accept it. Thereupon, the fixed price option was rendered ineffective and could not be exercised even after the close of the ninth year, and the plaintiff had to accept the first refusal offer, as provided in the lease, or risk losing the right to purchase the property thereafter.

150 Conn. at 409, 190 A. 2d at 52.

In reaching this conclusion the Court discussed its concern that if the lessee were allowed to exercise the fixed price option after it had declined to meet a third party offer the lessee could effectively control the price at which a third party would offer to purchase the property during the entire term of the lease. No third party would want to pay more than the amount in the fixed price option if it knew the lessee could force a sale later at the fixed price. The Court rejected the lessee's argument that the following language in the lease mandated precisely the result that permitted the lessee in effect to control the ceiling price of offers to purchase:

> Any option herein granted shall be continuing and preemptive, binding on the lessor's heirs, devisees, administrators, executors, or assigns, and the failure of lessee to exercise same in any one case shall not affect lessee's right to exercise such option in other cases thereafter arising during the term of this lease.

Id. at 406, 190 A. 2d at 51. It is because the *Rogow* Court's interpretation gives no effect to this language that we believe the authority cited by plaintiff is more persuasive.

Plaintiff also relies on a case interpreting a lease in which Texaco, Inc. was the lessee and containing language almost identical to that in the lease at issue here. In *Crowley v. Texaco, Inc.*, 306 N.W. 2d 871 (S.D. 1981), the lease contained two option clauses in Paragraph 11. The first was a $22,000 fixed price option. The second clause was a right of first refusal which became an option when the lessor gave the lessee notice of a third-party offer.

The South Dakota Supreme Court summarized the split of authority on the proper interpretation of dual option provisions.

> One line of cases hold, as did the trial court in this case, that if the lessee does not purchase after due notice of a bona fide offer, then the optioner, by selling the premises, terminates the fixed price option. *Shell Oil Co. v. Blumberg*, 154 F. 2d 251 (5th Cir. 1946); *Manasse v. Ford*, 58 Cal. App. 312, 208 P. 354 (1922); *Harding v. Gibbs*, 125 Ill. 85, 17 N.E. 60 (1888); *Northwest Racing Association v. Hunt*, 20 Ill. App. 2d 393, 156 N.E. 2d 285 (1959); *Adams v. Helburn*, 198 Ky. 546, 249 S.W. 543 (1923).
>
> The construction accepted by other authorities is that unless otherwise provided in the lease, the two provisions are separate and distinct. *Sinclair Refining Co. v. Clay*, 102 F. Supp. 732 (N.D. Ohio 1951), aff'd, 194 F. 2d 532 (6th Cir. 1952); *Cities Service Oil Co. v. Estes*, 208 Va. 44, 155 S.E. 2d 59 (1967). The lessee may exercise his option to purchase for a fixed price without regard to the provision for first right of purchase. *Gulf Oil Corp. v. Montanaro*, 94 N.J. Super. 348, 228 A. 2d 352 (1967). The lessee's rights under an (11)(a) type option have thus been held to be continuing and are not ex-

tinguished by the failure of the lessee to earlier exercise a first right to purchase after notice of an offer from a third person. *See*: 51(C) C.J.S. Landlord & Tenant § 88(11).

One of the leading cases adhering to the latter view is *Butler v. Richardson*, 74 R.I. 344, 60 A. 2d 718 (1948). The Rhode Island Supreme Court concluded that a fixed price option similar to (11)(a) was clear, explicit, and not coupled with or conditioned upon any other agreement. Regarding the first refusal provision, the Court said:

> But the question here is what effect this provision for a first refusal has, if any, upon the provision for an option. As we indicated above it has no effect whatever. The right of option remains unimpaired. Until the time prescribed for its exercise expires, the respondents cannot sell for any amount without complainants' consent. However, the provision for a first refusal may nevertheless serve a useful purpose. It provides a means whereby respondents, if they desired, could induce an acceleration of complainants' decision to purchase by affording them an opportunity to purchase at a price more advantageous to them than the price fixed in the option. Of course the provision could not serve this purpose if the offer was at a higher price, and consequently it is inconceivable that the parties in agreeing to the provision could have contemplated any offer except one that was lower than $15,000. We are of the opinion, therefore, that the provision for a first refusal should be construed in that light, not so much as an alternative to the provision for an option but rather as a supplement thereto.

74 R.I. at 349-50, 60 A. 2d at 722.

306 N.W. 2d at 873-74.

The South Dakota Supreme Court relied on several principles of construction, as well as the precedents in other jurisdictions, in analyzing the language of the contested lease. One of those principles was that the purchase option was for the benefit of the lessee and was to be construed "with that in mind." *Id.* at 874. The Court also emphasized that a proper interpretation should give effect to each provision of the lease. *Id.* The Court concluded

the "continuing and preemptive" language referring to "[a]ny option" would be nullified if the failure of the lessee to meet a bona fide offer resulted in a termination of the right to exercise the fixed price option. Thus, it concluded the lessee's failure to meet an earlier "attractive" offer by a third party did not terminate its right to exercise the $22,000 fixed price option in the contract.

We believe, as did the South Dakota Court, that the interpretation which is most faithful to the language of the contract is that the fixed price option continues to bind the lessors or their successors in interest even if the lessee fails to meet a bona fide third-party offer. According to defendants, the only language called into question under this interpretation is the last sentence of paragraph 11(b), providing: "No sale of or transfer of title to said premises shall be binding on lessee unless and until [the notice requirements of the first refusal provision] are fully complied with." Defendants argue that if this statement is true, then the converse must be true; that is, if the notice requirements are met and lessee fails to meet the third party offer, then all its options must be extinguished or the sale would not be binding. When read in context, however, we believe the sentence was clearly intended to protect the lessee from a sale at less than the fixed price, of which it had no notice. To permit such a sale to be binding would negate the lessee's right of first refusal because there would be no penalty on the lessors if they sold the property without communicating the favorable offer to the lessee.

We believe that not only the language of the lease, but the situation of the parties in 1949 when the lease was made indicates they intended both options to continue even if a third party offer is not met by the lessee. We recognize the result of this interpretation of the lease is harsh if it deprives defendants of the appreciated value of their property which exceeds the fixed price. But, as stated earlier, in construing a contract we look not only at its language, but also at the situation of the parties *at the time the contract was made.* In 1949 it was unlikely that either party anticipated the dramatic increases in property values on Franklin Street in Chapel Hill which have occurred in the intervening years.

It is also apparent from the lease that Texaco was concerned about a third party buying the property after it had improved the

property and established a business. The lessors were most likely concerned about being in a position to induce lessee to buy the property at a price more advantageous than the fixed price option, should they no longer wish to have their asset tied up in a long-term lease. The first refusal provision thus served the purposes of both parties. In addition, the actual price set in the fixed price option was obviously a bargained-for sum. It is apparent from the Connecticut and South Dakota cases that Texaco did not have a uniform price it insisted upon in the fixed price option. Given that the rent on the property was only $100 per month for the entire term of the lease, it is probable that the lessors viewed the $50,000 price as being reasonable even at the end of the lease term.

[2] In conclusion, we believe the Court of Appeals correctly construed the lease and plaintiff is entitled to summary judgment in its favor, if its fixed price option was properly exercised. Defendants have asserted on appeal that plaintiff's tender of the $50,000 purchase price was defective in that it was never delivered to George E. Creel and that it was in the form of the check. Defendants failed, however, to except to, or cross-assign as error, the trial court's conclusion in its summary judgment order in favor of defendants that there was no genuine issue as to the fact that "on 1 February 1980 plaintiff tendered to the defendants the sum of $50,000 for the purchase of the . . . property." Rule 10(d) of the North Carolina Rules of Appellate Procedure provides a means by which a party may except to and cross-assign as error a portion of an order from which his opposing party appeals.

> **Exceptions and Cross Assignments of Error by Appellee.** Without taking an appeal an appellee may set out exceptions to and cross-assign as error any action or omission of the trial court to which an exception was duly taken or to which an exception was deemed by rule or law to have been taken, and which deprived the appellee of an alternative basis in law for supporting the judgment, order, or other determination from which appeal has been taken.

The failure to except to and cross-assign as error this portion of the trial court's order on summary judgment precludes review of the sufficiency of tender on appeal. N.C. R. App. P. 10(a).

[3] Finally, defendants assert that even if plaintiff properly exercised the option provision, it is not entitled to specific performance of the contract to convey which was thereby created. *See Kidd*, 289 N.C. at 352, 222 S.E. 2d at 399 (1976); *Byrd v. Freeman*, 252 N.C. 724, 114 S.E. 2d 715 (1960). Defendants argue it would be inequitable for plaintiff to receive specific performance when the property is worth significantly more than $50,000 and that plaintiff has an adequate remedy at law for damages.

These arguments are without merit. As stated in *Watts v. Keller*, 56 F. 1, 4 (8th Cir. 1893):

> An option to buy or sell land, more than any other form of contract, contemplates a specific performance of its terms; and it is the right to have them specifically enforced that imparts to them their usefulness and value. An option to buy or sell a town lot may be valuable when the party can have the contract specifically enforced, but, if he cannot do this, and must resort to an action at law for damages, his option in most cases will be of little or no value. No man of any experience in the law would esteem an option on a lawsuit for an uncertain measure of damages as of any value. The modern, and we think the sound, doctrine is that when such contracts are free from fraud, and are made upon a sufficient consideration, they impose upon the makers an obligation to perform them specifically, which equity will enforce.

Quoted in Ward v. Albertson, 165 N.C. 218, 222, 81 S.E. 168, 169-70 (1914).

There is no question that the options in the lease were supported by consideration. *See First-Citizens Bank & Trust Co. v. Frazelle*, 226 N.C. 724, 40 S.E. 2d 367 (1946) (lease sufficient consideration for a lessee's option to purchase the property). That plaintiff may have negotiated for resale of the property does not prevent it from obtaining specific performance. Even if plaintiff had actually reached an agreement to resell, failure to obtain specific performance would render it unable to convey the property and would open it to suit for breach of the subsequent contract. In light of the principle that ordinarily one may obtain specific performance of a contract to convey land, such performance should be enforced regardless of the lessee's intent to resell. *Loveless v. Diehl*, 235 Ark. 805, 364 S.W. 2d 317 (1963);

Waller v. Lieberman, 214 Mich. 428, 183 N.W. 235 (1921); *McCullough v. Newton*, 348 S.W. 2d 138 (Mo. 1961); D. Dobbs, Remedies § 12.10 (1973). Plaintiff is entitled, on remand, to an order of specific performance of the fixed price option it has exercised. The decision of the Court of Appeals is

Affirmed.

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

ROGER SWINDELL AND WIFE, BETTY L. SWINDELL v. LARRY OVERTON, SUBSTITUTE TRUSTEE, THOMAS EDISON CAHOON AND WIFE, JULIA JONES CAHOON, WALTER G. CREDLE AND WIFE, DONNA S. CREDLE

No. 323PA83

(Filed 30 April 1984)

Mortgages and Deeds of Trust § 27 — foreclosure sale — failure to receive separate bids for two tracts of land error

In an action by plaintiffs seeking to have a foreclosure sale set aside, the Court of Appeals erred in finding that the foreclosure sale should not be set aside and in finding plaintiffs' action for conversion of crops should not lie since plaintiffs were obligors on three separate notes for $2,000, $30,000, and $2,589, secured by two deeds of trust on two different tracts of land; the worth of the land was alleged to be in excess of $70,000, excluding the value of a growing soybean crop on one of the tracts, to which an additional $50,000 in value was alleged; and despite plaintiffs' request that bids be received for the two tracts of land separately as well as together in order to maximize the potential sale price, defendant trustee advertised and sold the land together, in one offering, with the Credles purchasing at the third and final sale for $47,980. The *en masse* sale of these two tracts of land constituted a material and prejudicial irregularity since, had the two tracts of land been sold separately, the plaintiffs might have recouped an amount on one tract sufficient to repay the debt on the second, thus saving at least one of the two pieces of property, and common law principles of equity, unaffected by G.S. 45-21.34, .35, are applicable to *set aside* the foreclosure sale.

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

ON discretionary review of the decision of the Court of Appeals, 62 N.C. App. 160, 302 S.E. 2d 841 (1983), affirming in part

and reversing in part summary judgment entered in favor of defendants on 15 December 1981 by *Peel, J.*, in Superior Court, HYDE County. Heard in the Supreme Court 13 March 1984.

This is an action by plaintiffs to have a foreclosure sale set aside and for monetary damages. The parties do not dispute the following chronology of facts.

On 15 May 1969, plaintiffs executed a deed of trust to George D. Davis, Trustee, on a thirty-acre tract of land in Hyde County to secure a promissory note for $2,000 payable to B. M. Weston. On 7 April 1978, plaintiffs executed a deed of trust on a separate 42.6 acre tract of land in Hyde County to Hugh Q. Alexander, Jr., Trustee, securing a note payable to Wachovia Bank & Trust Company in the sum of $30,000.

About a year later, on 19 April 1979, plaintiffs executed a document entitled "Personal Note and Agreement" to defendants Thomas E. and Julia J. Cahoon for $2,589. In this note, plaintiffs acknowledged that the notes to B. M. Weston and Wachovia Bank & Trust Company had been assigned to the Cahoons and that all monies owed to the Cahoons were secured by those lands described in the two deeds of trust. Plaintiffs defaulted under the terms of their note to the Cahoons. On or about 17 April 1980, defendant Larry S. Overton was substituted as trustee to foreclose the deeds of trust securing the $2,000 note and the $30,000 note.

On 23 April 1980, defendant Overton, as substitute trustee, commenced foreclosure proceedings on both deeds of trust. The order of foreclosure was entered by the Clerk of Superior Court of Hyde County, Walter A. Credle (no close relation to defendants Credle), on 9 May 1980.

On 7 August 1980, a sale of both tracts of land was held by defendant Overton, with Lennie Perry of Bertie County the highest bidder at $40,000. A resale of both tracts was held on 11 September 1980 upon an upset bid of $45,600 by Ira B. Hall of Norfolk, Virginia. A second resale of both tracts took place on 17 October 1980. Defendant Walter G. Credle was the highest bidder for the sum of $47,980. Roger Swindell attended each of the three sales.

On 28 October 1980, plaintiffs' attorney telephoned the Clerk of Hyde County Superior Court to inform him of the Swindells' objection to a confirmation of the resale to defendants Credle on the grounds that the $47,980 selling price was below the fair market value of both tracts of land. When told that plaintiffs were preparing a restraining order to prevent confirmation of the sale, the clerk responded that "if the confirmation of resale was presented before the restraining order, there would be no alternative but to sign the confirmation of resale."

There ensued the following sequence of events: On 29 October 1980 at 9:00 a.m., plaintiffs appeared before the Honorable Frank R. Brown, superior court judge assigned to hold court in the Second Judicial District, who was presiding over a session of criminal superior court in Martin County at the courthouse in Williamston, N.C., seeking a temporary restraining order pursuant to N.C.G.S. 45-21.34.

That same day, at 9:45 a.m., an assistant clerk of Hyde County Superior Court signed an order confirming the resale of the land to the Credles. At 10:30 that morning, Judge Brown signed the temporary restraining order which—along with the motion, supporting affidavits, and a summons and complaint for defendants—was then transported by plaintiffs' attorney to the office of the Clerk of Superior Court for Hyde County in Swan Quarter, N.C., where they were filed at 1:45 p.m. that day.

In their original complaint filed on 29 October 1980, plaintiffs alleged that the fair market value of the land foreclosed was at least $70,000 and the bid of the defendants Credle was substantially inadequate and inequitable. They sought to have the clerk restrained from confirming the sale; they further demanded a resale of the two tracts of land pursuant to N.C.G.S. 45-21.35.

On 3 November 1980 Judge Brown entered an order dissolving the temporary restraining order and denying plaintiffs' motion. He had concluded, inter alia, that "this Court is without jurisdiction to grant the relief prayed for in the plaintiffs' Complaint in that the Confirmation entered by the Hyde County Clerk of Superior Court in the foreclosure was signed and filed prior to the granting of the Temporary Restraining Order by the undersigned." Plaintiffs excepted to, but did not appeal from, that order.

That same day, defendant Overton conveyed the foreclosed tracts of land to defendants Credle. After payment of the $2,000 note, the $30,000 note, the $2,589 note, and the expenses of the foreclosure sale, there remained a surplus in the amount of $4,739.62, which was paid into the clerk of superior court's office.

On 25 January 1981, plaintiffs moved to amend their complaint. On 20 February 1981, Judge David E. Reid, Jr. entered an order dismissing plaintiffs' original complaint and allowing their motion to amend.

In the amended complaint, filed 23 March 1981, plaintiffs alleged, in addition to the inadequacy of the sale price, that defendant Overton had improperly conducted the foreclosure sale in that he had sold both tracts of land together at each sale and resale although he had been requested by plaintiffs to sell the tracts of land separately and to obtain both separate bids and combination bids in an effort to bring more money. Plaintiffs alleged they had been damaged in the sum of $60,000 by defendant Overton's failure to fulfill his duties as fiduciary for all parties to these proceedings. Plaintiffs further alleged, in a second claim for relief, that prior to 14 April 1980 they had expended more than $15,000 in planting and cultivating a soybean crop on one of the tracts and had requested defendants' permission to harvest the crop in the fall of 1980 or, in the alternative, that the harvest proceeds be held in escrow pending resolution of this action. Plaintiffs alleged that defendants Credle refused this request, harvested the crop, and were unjustly enriched thereby in the amount of more than $50,000. In third and fourth claims for relief, plaintiffs alleged that attorneys' fees for defendants Cahoon had been wrongly charged by defendant Overton to the foreclosure expenses and, finally, that the interest rate on the personal note to the Cahoons was excessive.

In this amended complaint plaintiffs prayed for, inter alia, the following relief: (1) damages of $50,000 against defendants Credle for conversion of the soybean crop; (2) damages of $2,165.60 against defendants Cahoon and Overton for the improper payment of attorneys' fees; (3) damages of $7,189.11 against defendants Cahoon for excessive interest charged; (4) that the clerk be permanently enjoined from confirming the sale pursuant to N.C.G.S. 45-21.34, or, in the alternative, that the sale be

set aside; (5) that a proper resale of the lands be ordered or, in the alternative, damages in the amount of $100,000 from defendants Overton and Cahoon pursuant to the alleged irregularities in the foreclosure proceedings.

All defendants moved for summary judgment on all claims. On 15 December 1981, Judge Elbert S. Peel, Jr. made the following rulings: He allowed motions for summary judgment for defendants Cahoon and Overton as to all claims except for improper payment of attorneys' fees and excessive interest. He allowed the motion for summary judgment of defendants Credle as to all claims.

The Court of Appeals reversed Judge Peel's dismissal of the plaintiffs' claim for damages for breach of fiduciary duty against Overton and remanded the case for trial on this claim. It affirmed all other rulings of the trial judge.

J. Michael Weeks, P.A., by J. Michael Weeks, for plaintiffs.

Cherry, Cherry, Flythe and Overton, by Thomas L. Cherry and Joseph J. Flythe, for defendant Overton.

Geo. Thomas Davis, Jr. for defendants Credle.

MARTIN, Justice.

In its opinion, the Court of Appeals held that pursuant to N.C.G.S. 45-21.34, .35, Judge Peel had correctly entered summary judgment for defendants Overton, Cahoon, and Credle as to plaintiffs' right to injunctive relief in this matter. "Once the Clerk's Order of Confirmation is entered, an action for injunctive relief will not lie. . . ." 62 N.C. App. at 166, 302 S.E. 2d at 845. The opinion further concluded, at least by implication, that the plaintiffs Swindell are also barred from the remedy of setting aside the foreclosure sale on the same grounds that their action was not brought until after the sale was confirmed. Upon this conclusion rests the holding that summary judgment in favor of the Credles was therefore proper on the issue of plaintiffs' claim for damages against the Credles for conversion of the soybean crop, given the well-settled North Carolina rule that the purchaser at a foreclosure sale is entitled to crops unsevered at the time of the trustee's delivery of the deed. *Collins v. Bass,* 198 N.C. 99, 150

S.E. 706 (1929). We granted discretionary review to consider the correctness of these conclusions, and we reverse. As a matter of law plaintiffs should be allowed to challenge the clerk's confirmation of a foreclosure sale by an independent action under circumstances hereinafter set forth. We further find that the forecast of evidence as established by the exhibits and affidavits before the trial court was clearly sufficient to survive the summary judgment motion of the defendant-purchasers Credle.

The trustee is bound by his office to present the sale under every possible advantage to the debtor as well as to the creditor. He is bound to use not only good faith but also every requisite degree of diligence in conducting the sale and to attend equally to the interest of the debtor and creditor alike. *Mills v. Building & Loan Assn.*, 216 N.C. 664, 6 S.E. 2d 549 (1940).

Our analysis is twofold: (1) Plaintiffs are correct in applying this Court's decision in *Foust v. Loan Asso.*, 233 N.C. 35, 62 S.E. 2d 521 (1950), to this case. (2) Because the facts of this case do not support a finding that the defendants Credle were innocent purchasers for value, they are not protected thereby from having the foreclosure sale set aside.

In *Foust*, property having a market value of approximately $6,000 was sold at foreclosure for $825. The trustee erroneously reported that it was sold for $6,400. The sale was confirmed. This Court responded as follows: "These facts raise the single question of law: Was the irregularity in the report of such substantial nature as to require the Court to vacate the order of confirmation and the deed executed pursuant thereto? We must answer in the affirmative." 233 N.C. at 36, 62 S.E. 2d at 523.

The Court spoke to the nature and potential effects of the irregularity:

> There is no contention that the error in the report was deliberate, or was prompted by an evil purpose, or was other than the result of an honest mistake. It appears to have been one of those slips which may occur in business transactions. Nonetheless, it was highly deceptive and its natural and probable effect was to chill any desire on the part of interested parties to engage in further competitive bidding. Thus it tended to prevent any upset bid.

> Actuality of injury is not a prerequisite of relief. The potentialities of the error, considered in connection with the grossly inadequate price, compel the conclusion that *the irregularity in the sale was material and prejudicial—sufficient in nature to justify the interposition of a court of equity.*

233 N.C. at 37-38, 62 S.E. 2d at 523 (emphasis added).

Allegations of inadequacy of the purchase price realized at a foreclosure sale which has in all other respects been duly and properly conducted in strict conformity with the power of sale will not be sufficient to upset a sale. *Hill v. Fertilizer Co.*, 210 N.C. 417, 187 S.E. 577 (1936); *Roberson v. Matthews; Matthews v. Roberson*, 200 N.C. 241, 156 S.E. 496 (1931); *Weir v. Weir*, 196 N.C. 268, 145 S.E. 281 (1928). *Foust* stands for the proposition that it is the materiality of the irregularity in such a sale, not mere inadequacy of the purchase price, which is determinative of a decision in equity to set the sale aside. Where an irregularity is first alleged, gross inadequacy of purchase price may then be considered on the question of the materiality of the irregularity. *Foust, supra*, 233 N.C. 35, 62 S.E. 2d 521; *Hill v. Fertilizer Co., supra* (and cases cited therein). Where inadequacy of purchase price is necessary to establish the materiality of the irregularity, it must also appear that the irregularity or unusual circumstance caused the inadequacy of price. 2 Wiltsie, *Mortgage Foreclosure* § 899 (5th ed. 1939).

Plaintiffs Swindell were obligors and defendants Cahoon were obligees on three separate notes for $2,000, $30,000, and $2,589, secured by two deeds of trust on two different tracts of land. The worth of the land was alleged to be in excess of $70,000, excluding the value of a growing soybean crop on one of the tracts, to which an additional $50,000 in value was alleged. Despite plaintiffs' requests that bids be received for the two tracts of land separately as well as together in order to maximize the potential sale price, defendant Overton advertised and sold the land together, in one offering, with the Credles purchasing at the third and final sale for $47,980.

We hold that the *en masse* sale of these two tracts of land constituted a material and prejudicial irregularity commensurate in severity to that found by the Court in *Foust*. Had the two

tracts of land been sold separately, the Swindells might have recouped an amount on one tract sufficient to repay the debt on the second, thus saving at least one of the two pieces of property. The property had the alleged potential of yielding over $120,000, including the alleged $50,000 soybean crop.

It must be remembered that this case involves two distinct deeds of trust. Arguments having to do with the discretion of the trustee to sell land as a whole or in parcels have no place here, but are properly considered where the land in question is conveyed in a single mortgage instrument. We are in agreement with the following conclusion of the Court of Appeals in its opinion:

> [S]ales of *separately indentured* properties must be separately conducted, in order to (1) maximize the potential value of each tract; (2) to facilitate the debtor's opportunity to satisfy each separate debt before sale is completed; (3) to properly allow upset bids on each separate property; and (4) to properly apply the proceeds from each sale, including the surplus, if any.

62 N.C. App. at 169, 302 S.E. 2d at 847 (emphasis added).

We note that the preferred procedure, where possible, is for the party selling to obtain the mortgagor's agreement in advance as to the method of sale. *See* Osborne, Nelson, Whitman, *Real Estate Finance Law* § 7.20 (1979).

Our holding today is not affected by N.C.G.S. 45-21.34, .35. These statutes limit injunctive relief in foreclosure proceedings. Here, we are applying common law equitable principles to *set aside* a foreclosure sale. These principles are unaffected by these statutes. The Court of Appeals erroneously concluded otherwise.

It is true that where the defect in a foreclosure sale renders the sale voidable, as in the case at bar, the mortgagor's right of redemption can be cut off if the land is bought by a bona fide purchaser for value without notice. In such instances, a plaintiff is left with an action for damages against the trustee as his only remedy. *Davis v. Doggett,* 212 N.C. 589, 194 S.E. 288 (1937).

> If the sale purchaser has paid value and is unrelated to the mortgagee, it would seem that he should take free of voidable defects if: (a) he has no actual knowledge of the defects;

(b) he is not on reasonable notice from recorded instruments; and (c) the defects are not such that a person attending the sale exercising reasonable care would have been aware of the defect.

Osborne, Nelson, Whitman, *supra*. *See also* 2 Wiltsie, *supra*, § 780.

The Credles claim the status of "bona fide purchasers for value without any notice of irregularity." The advertisement of sale itself disclosed separate debts secured by two separate deeds of trust on two separate tracts of land. We hold that the purchasers had notice of the significant defect in the proceeding.

Applying these holdings to the opinion of the Court of Appeals, the results are:

(1) The Court of Appeals erred in affirming the summary judgment against plaintiffs on the action to set aside the sale. We therefore reverse.

(2) The Court of Appeals erred in affirming the summary judgment against plaintiffs on the action for conversion of crops. We therefore reverse.

(3) The Court of Appeals correctly reversed the summary judgment against plaintiffs' claim for breach of fiduciary duty. We therefore affirm.

(4) The Court of Appeals correctly affirmed plaintiffs' amending their complaint. We therefore affirm.

The case is remanded to the Court of Appeals for further remand to the superior court for proceedings not inconsistent with this opinion.

Reversed in part; affirmed in part.

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

STATE OF NORTH CAROLINA v. EDDIE CHARLES JONES, SR.

No. 425A83

(Filed 30 April 1984)

1. **Criminal Law § 91— statutory speedy trial period—exclusion of delays for continuances granted to State**

In a prosecution for the rape of defendant's six-year-old child, the trial court did not err in excluding from the statutory speedy trial period delays resulting from continuances granted to the State on the following grounds: (1) the illness of one of the two investigating officers and the unavailability of the victim's mother because she had recently given birth to a son; and (2) the unavailability of the victim's mother until a material witness order was issued for her because she was being uncooperative. G.S. 15A-701(b)(7).

2. **Constitutional Law § 50— constitutional right to speedy trial—delay between indictment and trial**

Defendant was not denied his constitutional right to a speedy trial by a delay of seven months between the date of defendant's indictment for rape and the commencement of his trial since the length of the delay did not in and of itself constitute an unreasonable or prejudicial delay, defendant failed to assert his constitutional right to a speedy trial at any time prior to or during trial, defendant had been released on bond the day of his arrest, and defendant failed to show any evidence of resulting prejudice from the delay.

3. **Rape and Allied Offenses § 4; Witnesses § 1.2— competency of seven-year-old victim to testify**

The trial court did not abuse its discretion in admitting the testimony of a seven-year-old rape victim where the record shows that the victim demonstrated a sufficient level of intelligence to give evidence and a sufficient understanding of the importance to tell the truth.

4. **Rape and Allied Offenses § 5— first degree rape of child—sufficiency of evidence**

The State's evidence was sufficient to support defendant's conviction of the first degree rape of his six-year-old daughter.

ON appeal by defendant as a matter of right from the judgment of *Long, J.*, entered at the 21 March 1983 Criminal Session of the Superior Court, ROWAN County. Defendant was convicted of first degree rape of a child six years and eleven months of age. The trial judge imposed a sentence of life imprisonment.

In relevant part, the evidence for the State tended to show that the thirty-four-year-old defendant was the father of the vic-

tim. The alleged offense occurred while the child was in defendant's custody for a weekend visitation.

Defendant's daughter testified that when she and her four-year-old brother Eddie visited their father, the three of them would sleep in the same bed. The defendant-father required the victim to sleep between him and her brother. The child testified that defendant had intercourse with her during these visits, usually twice on each night. She was afraid to tell her mother of these occurrences because of her father's threats. Eventually, she informed her mother who reported the incidents to the police. The victim, without any aid or prompting from her mother, consistently related her story to the police, the examining physician, the attending nurse and a rape crisis counselor.

The doctor's examination of the victim revealed that the opening of her vagina was larger than that expected for a girl her age. Her hymen was somewhat stretched, had an irregular margin and was perforated. The doctor was of the opinion that the child had had sexual intercourse, but he found no evidence of forcible penetration.

The defendant testified in his own behalf and denied ever having sexual relations with his daughter. He explained that he lived with his parents in their home. His three sisters and their children lived there also. Access to the only bathroom in the house was through the bedroom in which the defendant slept. Defendant acknowledged that his daughter always slept next to him.

Defendant presented several witnesses who testified as to his good reputation. Other witnesses, including his parents, offered evidence which corroborated the defendant's testimony.

The jury deliberated and found the defendant guilty of first degree rape. A sentence of life imprisonment was imposed by the trial court. The defendant was permitted to post a $25,000.00 bond for his appearance pending appeal.

Attorney General Rufus L. Edmisten by Assistant Attorney General Wilson Hayman, for the State.

William V. Bost, for the defendant.

COPELAND, Justice.

[1] In the defendant's first assignment of error he contends that his statutory right to a speedy trial, under N.C. Gen. Stat. § 15A-701, has been violated. Specifically defendant argues that Superior Court judges holding court in Rowan County committed reversible error in granting five successive motions by the State for continuance, pursuant to N.C. Gen. Stat. § 15A-701(b)(7), and in excluding the time covered by the continuances from the Speedy Trial Act's mandatory 120 day period. Defendant contends the judges who granted the continuances erroneously failed to make findings of fact to justify granting the motions.

Under North Carolina's Speedy Trial Act, N.C. Gen. Stat. § 15A-701(a1), a criminal defendant must be brought to trial within 120 days of his arrest, service with criminal process, waiver of indictment, or his indictment, whichever occurs last. *See*: *State v. Marlow*, 310 N.C. 507, 313 S.E. 2d 532 (1984).

In this case, the return of an indictment for first degree rape against defendant on 23 August 1982 triggered the running of the Speedy Trial Statute. Subsequent to defendant's indictment, the following motions were allowed by the trial court with the respective times excluded:

1. The defendant moved for a continuance from 30 August 1982 until 20 September 1982. By stipulation the parties have agreed to exclude this 21 day period from the computation.

2. The State moved to continue the trial from 20 September 1982 until 17 October 1982 for a period of 27 days on the grounds that the trial of other cases prevented the trial of this case during this session.

3. The State moved to continue the trial from 18 October 1982 until 14 November 1982 for a period of 27 days on the grounds that an essential witness for the State was absent or unavailable within the meaning of N.C. Gen. Stat. § 15A-701 (b)(3).

4. The State moved to continue the trial from 15 November 1982 until 2 January 1983 for a period of 49 days on the grounds that "Officer R. J. Harrison was unavailable due to

illness" and "State's witness, Patricia Jones, recently conceived a child and was not available." [The record reveals that Patricia Jones had recently given birth to a child.]

5. The State moved to continue the trial from 3 January 1983 until 30 January 1983 for a period of 27 days on the grounds that the trial of other cases prevented the trial of this case during this session.

6. The State moved to continue the trial from 7 February 1983 until 6 March 1983 for a period of 27 days on the grounds that a material witness, *i.e.*, Patricia Jones, was unavailable.

An examination of the record reveals that a total of 211 days elapsed between defendant's indictment on 23 August 1982 and the commencement of his trial on 21 March 1983. Defendant concedes that this 211 day period should exclude the 21 days resulting from his 30 August 1982 request for a continuance. This reduction leaves 190 days.

Pursuant to N.C. Gen. Stat. § 15A-701(b)(7), any period of delay resulting from a continuance granted by a judge may be excluded in computing the time within which a criminal defendant's trial must begin provided, however, the judge who grants the continuance finds "that the ends of justice served by granting the continuance outweigh the best interests of the public and the defendant in a speedy trial and sets forth in writing in the record of the case the reasons for so finding. A superior court judge must not grant a motion for continuance unless the motion is in writing and he has made written findings as provided in this subdivision."

In order to determine compliance with the Speedy Trial Act, we must examine the continuances granted to the State. We begin with the State's 15 November 1982 motion to continue based on the unavailability of the State's material witnesses. Trial Judge Wood found that R. J. Harrison, one of the two investigating officers, was unable to appear in court due to illness. We cannot assume, as defendant would have us do, that Officer Harrison's testimony was not essential to this case simply because there were two investigating officers. Judge Wood appropriately concluded that Officer Harrison was an essential

witness and that his illness presented a sufficient ground to grant the continuance. In accord with N.C. Gen. Stat. § 15A-701(b)(7), the trial judge found as a fact that "the ends of justice served by granting the continuance outweigh the best interests of the public and defendant in a speedy trial." Thus, we hold that the 49 day period, from the date of the order on 15 November 1982 until the beginning of the next criminal court session on 3 January 1983, was properly excluded.

Further, with regard to this 15 November 1982 motion, the State offered that another material witness, Patricia Jones had "recently conceived a child" and therefore, was also unavailable to testify. According to the evidence, Mrs. Jones gave birth to a son on 28 October 1982. We assume that the use of the word "conceived" was inadvertent and that the word "delivered" was intended. We believe that the trial court was justified in finding Mrs. Jones, who was the victim's mother, to be an essential witness in this case. Although her testimony may have been merely corroborative, the support and security she would have provided for her young seven-year-old daughter testifying before strangers would be immeasurable. There existed sufficient grounds on which the trial court could conclude that Mrs. Jones was genuinely unavailable.

At a hearing on the defendant's motion to dismiss for the State's failure to provide a speedy trial, the State again moved to continue the trial from 7 February 1983 until 6 March 1983 on the grounds that a material witness, to wit, Mrs. Patricia Jones, was unavailable. The district attorney related to the trial judge the great difficulty he was experiencing in getting this witness to cooperate. Accordingly, the court granted an excluded continuance "because of [the] unavailability of a material witness" and issued a material witness order for Mrs. Jones. We find the trial court made sufficient findings of fact upon which to base its order to continue. This period of 27 days was properly excluded from the speedy trial time limit.

We note, at this juncture, that the combination of the excluded periods of 49 and 27 days, which resulted from the two continuances examined previously, provides a total of 76 days of excludable time. Upon subtracting this 76 day period from the time within which the defendant's case was brought to trial, to

wit, 190 days, there remains exactly 114 days. With these exclusions, the State clearly complied with the statutory requirement of bringing a case to trial within the prescribed 120 days. Thus, it is not necessary that this Court pursue any further the written examination of the remaining continuances granted to the State. This assignment is overruled.

[2] Defendant next argues that he was deprived of his constitutional right to a speedy trial as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, Sec. 18 of the North Carolina Constitution.

The leading federal case on this constitutional guarantee is *Barker v. Wingo*, 407 U.S. 514, 33 L.Ed. 2d 101 (1972), which we cited with approval in *State v. Smith*, 289 N.C. 143, 221 S.E. 2d 247 (1976). We said in *Smith* that the following interrelated factors were to be considered in determining whether a defendant has been denied his constitutional right to a speedy trial: "(1) length of delay; (2) reason for the delay; (3) defendant's assertion of his right to a speedy trial; and (4) prejudice to the defendant resulting from the delay." *Id.* at 148, 221 S.E. 2d at 250.

First, the delay's duration is not *per se* determinative of whether a violation has occurred. *State v. Hudson*, 295 N.C. 427, 245 S.E. 2d 686 (1978). This Court has held that a delay of twenty-two months is not of great significance but is merely the "triggering mechanism" that precipitates the speedy trial issue. *State v. Hill*, 287 N.C. 207, 214 S.E. 2d 67 (1975). We do not believe that, in this case, a delay of seven months, from the date of defendant's indictment to the commencement of his trial, in and of itself, constitutes an unreasonable or prejudicial delay.

The defendant carries the burden of demonstrating that the reason for the delay was due to the neglect or willfulness of the prosecution. *State v. Marlow*, 310 N.C. 507, 313 S.E. 2d 532 (1984). Our review of the record and briefs does not disclose, as defendant contends, evidence of intentional, capricious or oppressive delay. We further note that defendant failed to assert his constitutional right to a speedy trial at any time prior to or during trial. Defendant's motion to dismiss for failure of the State to provide him with a speedy trial, filed on 28 January 1983, was based solely on the North Carolina Speedy Trial Act and did not allege any violation of defendant's constitutional right. Because the

right to a speedy trial is a fundamental right under our State and Federal Constitutions, this Court has held that "failure to demand a speedy trial does not constitute a waiver of that right, but it is a factor to be considered." *Hill* at 212, 214 S.E. 2d at 71.

Finally and most importantly, we find that the defendant has failed to show any evidence of resulting prejudice. Defendant was not subject to any lengthy pre-trial incarceration, since he was released on bond the day of his arrest. Nothing in the record discloses that defendant's ability to present his defense has been in any way impaired by the delay. We conclude that no prejudice resulted. This assignment of error is without merit.

[3] Defendant contends that the trial court abused its discretion in admitting the testimony of the seven-year-old witness for the prosecution. In this connection, we find Justice Lake's words in *State v. Turner*, 268 N.C. 225, 150 S.E. 2d 406 (1966), regarding the competency of children to testify, to be applicable and noteworthy. We quote the relevant passage as follows:

> There is no age below which one is incompetent, as a matter of law, to testify. The test of competency is the capacity of the proposed witness to understand and to relate under the obligation of an oath facts which will assist the jury in determining the truth of the matters as to which it is called upon to decide. This is a matter which rests in the sound discretion of the trial judge in the light of his examination and observation of the particular witness. In the present case, the child was examined with reference to her intelligence, understanding and religious beliefs concerning the telling of a falsehood, all of which took place out of the presence of the jury. The record indicates that she was alert, intelligent and fully aware of the necessity for telling the truth.

Id. at 230, 150 S.E. 2d at 410.

The record discloses that the young witness, in the instant case, certainly knew the quality of truth. She stated during voir dire that she knew that God would "get" people who did not tell the truth, and that she would also get a spanking. Her answers to questions demonstrated a sufficient level of intelligence to give evidence and an understanding of the importance to tell the truth.

We find no basis for concluding that the trial court abused its discretion in ruling the child competent to testify.

[4] Defendant's final assignment of error concerns the trial court's denial of his motion to set aside the jury's verdict on the grounds that the State's evidence was insufficient, as a matter of law, to sustain a conviction. As this Court held in *State v. Witherspoon*, 293 N.C. 321, 237 S.E. 2d 822 (1977), such a motion is "addressed to the sound discretion of the trial judge whose ruling is not reviewable on appeal in absence of manifest abuse of discretion." We believe the trial court acted within its discretion in denying the defendant's motion to set aside the verdict since the record discloses ample evidence to support the jury's verdict. This assignment of error is overruled.

This defendant received a trial free of prejudicial error.

No error.

CITY OF BURLINGTON v. TOWN OF ELON COLLEGE

No. 449PA83

(Filed 30 April 1984)

Municipal Corporations § 2— annexation proceeding of same area by two municipal corporations—municipality instituting annexation proceeding first given priority

In an action instituted by the City of Burlington alleging that it had prior exclusive jurisdiction to annex a certain area contiguous to its boundaries, the superior court erred in finding defendant Town of Elon College to have legally annexed the same area where the Town of Elon College's annexation proceedings were voluntary and were completed prior to the City of Burlington's annexation proceedings, but where the City of Burlington's involuntary annexation proceedings were instituted first. In cases where one municipality institutes valid annexation proceedings first, that municipality should be given priority under the prior jurisdiction rule, and subsequent annexation proceedings, of whatever nature, are of no force and effect.

ON discretionary review prior to determination by the Court of Appeals to review the judgment of *McLelland, Judge*, entered at the 18 July 1983 Civil Session of ALAMANCE County Superior Court, denying plaintiff's motion for summary judgment and

granting defendant's motion for summary judgment, plaintiff and defendant appealed to the Court of Appeals. We allowed plaintiff's petition pursuant to G.S. 7A-31 on 6 December 1983.

Plaintiff instituted this action alleging that it had prior exclusive jurisdiction to annex certain areas contiguous to its boundaries pursuant to G.S. 160A-45 *et seq.* The salient facts surrounding the controversy, as stipulated by the parties, may be summarized as follows:

1. The plaintiff, City of Burlington, and the defendant, Town of Elon College, are municipal corporations organized and existing under the laws of North Carolina and are located in Alamance County, North Carolina.

2. On 19 April 1983, the City Council of the City of Burlington at its regular meeting, adopted a resolution of intent to consider annexation of an area contiguous to the existing corporate limits of the City of Burlington.

3. The City of Burlington prepared a report setting forth plans and specifications for the above-mentioned area, including maps and plans to provide municipal services to the area. The report was adopted by the City Council of Burlington at its regular meeting on 3 May 1983.

4. A Notice of Public Hearing to consider the annexation by the plaintiff was published in the Burlington Times-News, a proper newspaper for such advertising, on 2 May, 9 May, 16 May and 23 May 1983. The notice indicated that a hearing would be held on 7 June 1983, and that the report of the City Council on annexation would be available in the office of the City Clerk of the City of Burlington for public inspection at least fourteen (14) days prior to 7 June 1983, the date of the public hearing.

5. On or about 16 May 1983, the Town of Elon College received voluntary petitions for annexation from a number of owners of property situated in the territory included in the proposed area of annexation of the City of Burlington.

6. On or about 16 May 1983, the Town of Elon College Board of Aldermen called for and ordered a public hearing on the voluntary petitions for annexation of the property to the Town of Elon College for 7:30 p.m., 31 May 1983.

7. The annexation proceeding by the Town of Elon College was a voluntary proceeding upon petition of the people affected. The annexation proceeding instituted by the City of Burlington was an involuntary proceeding.

8. The area proposed to be annexed by the plaintiff and the areas proposed to be annexed by the defendant meet the legislative standards contained in the applicable North Carolina General Statutes, with the exception that the defendant contends that the plaintiff may not annex areas that were previously annexed by the defendant, as such would be in violation of N.C.G.S. § 160A-48(b)(3). The plaintiff and the defendant, in compliance with the applicable statutes, contend that they are capable and will provide or extend to the areas to be annexed each major municipal service performed in each municipality at the time of annexation.

9. On 31 May 1983, and again on 13 June 1983, the Board of Aldermen of the Town of Elon College, acting pursuant to voluntary petitions of property owners, officially annexed property which was situated within the area proposed to be annexed by the City of Burlington. The two annexations by the Town of Elon College were to become effective at 12:01 o'clock a.m. on 1 June 1983 and at 12:01 o'clock a.m. on 14 June 1983.

10. The plaintiff, City of Burlington, at a special meeting of its City Council on 16 June 1983, adopted an ordinance annexing areas including the areas in question previously annexed by the Town of Elon College. This ordinance of the plaintiff was to become effective on the 1st day of August 1983.

Plaintiff's complaint alleged it had prior jurisdiction of the areas annexed by defendant, and prayed that defendant be enjoined from annexing the areas. Plaintiff subsequently filed a supplemental complaint requesting a declaratory judgment that defendant's annexations were null and void. Defendant's answer and counterclaim prayed for a declaratory judgment that plaintiff's annexation of the areas in question was null and void and further prayed that plaintiff be enjoined from enforcing annexation as to the areas already annexed by the Town of Elon College. Both parties moved for summary judgment, and after considering the pleadings, exhibits, affidavits, and stipulations of fact filed by the parties, the trial judge made appropriate findings

of fact not inconsistent with those stipulated by the parties. The trial court then made the following pertinent conclusions of law:

> (1) The Defendant, Town of Elon College, has complied with the applicable law in annexing the properties herein described based upon voluntary petitions filed by the citizens of the affected areas. As of June 1 and June 14, 1983, the properties hereinbefore described were legally annexed by the Town of Elon College, said ordinances having been adopted on May 31 and June 13, 1982, respectively.
>
> (2) The earlier commencement by the Plaintiff by involuntary proceedings of annexation did not vest authority in the Plaintiff to annex to the Plaintiff those properties already annexed by the Defendant pursuant to voluntary proceedings.
>
> (3) Voluntary and involuntary annexation proceedings in this State are not equivalent.
>
> (4) The provisions of the ordinance of annexation enacted by the Plaintiff on June 16, 1983, which included areas previously annexed by the Defendant, Town of Elon College, were ineffective.
>
> (5) Summary judgment is appropriate in this matter on behalf of the Defendant.

The trial court entered judgment in favor of the defendant and declared that plaintiff's annexation of the subject areas was ineffective. In addition, the court permanently enjoined plaintiff from exercising any authority in the areas previously annexed by defendant.

Plaintiff and defendant gave notice of appeal to the Court of Appeals, and plaintiff subsequently petitioned for, and was granted, review by this Court prior to determination by the Court of Appeals.

Robert M. Ward, City Attorney, for plaintiff-appellant/appellee.

Bateman and Stedman, by Charles L. Bateman, for defendant-appellant/appellee.

BRANCH, Chief Justice.

The sole issue presented in this case is whether the trial court erred in concluding that the Town of Elon College prevailed in its annexation of the areas which had been included in the City of Burlington's proposed annexation plan. This issue relies, in turn, on the applicability of the "prior jurisdiction" rule to this dispute.

The doctrine of prior jurisdiction is discussed in 2 McQuillin, Municipal Corporations § 7.22a (3d ed. 1966), which reads, in pertinent part, as follows:

> The rule that among separate equivalent proceedings relating to the same subject matter, that one which is prior in time is prior in jurisdiction to the exclusion of those subsequently instituted, applies, generally speaking, to and among proceedings for the municipal incorporation, annexation, or consolidation of a particular territory, *i.e.*, in proceedings of this character, while the one first commenced is pending, jurisdiction to consider and determine others concerning the same territory is excluded. Thus, where two or more bodies or tribunals have concurrent jurisdiction over a subject matter, the one first acquiring jurisdiction may proceed, and subsequent purported assumptions of jurisdiction in the premises are a nullity.

We note at the outset that the prior jurisdiction rule is the majority rule and is applied "universally" in "conflicts between two municipalities attempting to assert jurisdiction over the same territory."[1] Comment, Municipal Corporations: Prior Jurisdiction Rule, 7 W.F.L. Rev. 77, 79 (1970). *See e.g., People v. Town of Corte Madera*, 115 Cal. App. 2d 32, 251 P. 2d 988 (1952); *City of Daytona Beach v. City of Port Orange*, 165 So. 2d 768 (Fla. 1964); *Town of Clive v. Colby*, 255 Iowa 483, 123 N.W. 2d 331 (1963); *City of Lincolnshire v. Highbaugh Realty Co.*, 278 S.W. 2d 636 (Ky. 1955). Additionally, we recognize that the prior jurisdiction rule is

1. Our research discloses no cases in which the rule has not been followed by the courts. We note in passing, however, that Virginia has statutorily abrogated the longstanding rule by providing for a judicial determination of such disputes, "taking into consideration the interests of all parties to the case." Va. Code Annot. § 15.1-1037 (1981).

based upon priority in time and "ordinarily is determined by the time of the commencement or initiation of the proceedings, and not by the time of completion thereof." 2 McQuillin, *supra* at 378. The time of commencement of proceedings, for purposes of the rule, is the "taking of the first mandatory public procedural step in the statutory process for . . . annexation of territory." *Id.*

Applying the foregoing principles to the facts of the instant case leads inevitably and indisputably to the conclusion that the plaintiff City of Burlington, by adopting its Resolution of Intent to Annex on 19 April 1983, took the "first mandatory public procedural step in the statutory process" and thereby acquired prior jurisdiction of the disputed areas. Consequently, any subsequent attempts by defendant Town of Elon College to acquire jurisdiction were null and void.

Even so, defendant Town of Elon College contends that the doctrine of prior jurisdiction does not apply to the facts of this case. Defendant contends that, for purposes of the prior jurisdiction rule, voluntary and involuntary annexation proceedings are not "equivalent proceedings," and hence the rule does not apply. 2 McQuillin, *supra.* Defendant relies for its contention upon the case of *Town of Hudson v. City of Lenoir*, 279 N.C. 156, 181 S.E. 2d 443 (1971). That case involved an annexation dispute over an area located between two towns. Hudson sought to annex the area by the involuntary annexation method. Lenoir had received petitions for voluntary annexation from owners of real property in the area. Both proceedings were instituted on the same day, 17 June 1969. The City of Lenoir's voluntary annexation proceeding was completed first. The trial court entered judgment for the City of Lenoir. Upon appeal to this Court, Justice Huskins, writing for the Court, explicitly recognized the majority "prior jurisdiction" rule, but held that the rule was not applicable to the facts of that case. The Court stated:

> The record shows that upon dissolution of the restraining order both Hudson and Lenoir began annexation proceedings anew on the same day, June 17, 1969. Therefore, neither municipality could have gained exclusive jurisdiction under the "first to start" rule.

Id. at 160-61, 181 S.E. 2d at 446.

However, the Court went on to give a second reason for the inapplicability of the prior jurisdiction rule, and it is that basis of inapplicability which defendant Town of Elon College urges us to adopt in the instant case. In *Hudson*, the Court buttressed its holding with the following statement:

> Aside from the fact that neither municipality was prior to the other in initiating annexation proceedings, the two proceedings were not "equivalent." The voluntary procedure initiated by the landowners and future municipal taxpayers has understandably been made simpler and quicker than the involuntary annexation procedures available to and followed by Hudson. The variations in procedural requirements with respect to voluntary and involuntary annexation make it possible for property owners in the affected area to inject an element of choice as to which municipality will govern them. . . . It is significant here that the landowners affected preferred to be in Lenoir rather than Hudson.

Id. at 161, 181 S.E. 2d at 447.

In our opinion, the above language is an incorrect statement of the law. For purposes of the prior jurisdiction rule, annexation proceedings, regardless of their nature, are "equivalent proceedings," and it is of no consequence which town or city the landowners prefer. In fact, it appears to be the very essence of the *involuntary* annexation procedures that the affected landowners have no choice, as long as the annexing body complies with the applicable statutes. G.S. 160A-33 *et seq.* and G.S. 160A-45 *et seq.* As stated by the Municipal Government Study Commission in 1959:

> We believe in protection of the essential rights of every person, but we believe that the rights and privileges of residents of urban fringe areas must be interpreted in the context of the rights and privileges of every person in the urban area. We do not believe that an individual who chooses to buy a lot and build a home in the vicinity of a city thereby *acquires* the right to stand in the way of action which is deemed necessary for the good of the entire urban area. By his very choice to build and live in the vicinity of the city, he has chosen to identify himself with an urban population, to assume the responsibilities of urban living, and to reap the

> benefits of such location. Therefore, sooner or later his property must become subject to the regulations and services that have been found necessary and indispensable to the health, welfare, safety, convenience and general prosperity of the entire urban area. Thus we believe that individuals who choose to live on urban-type land adjacent to a city must anticipate annexation sooner or later. And once annexed, they receive the rights and privileges of every other resident of the city, to participate in city elections, and to make their point of view felt in the development of the city. This is the proper arena for the exercise of political rights, as this General Assembly has evidenced time and again in passing annexation legislation without recourse to an election.

Report of the Municipal Government Study Commission 10 (1950) (emphasis in original).

To the extent, therefore, that our holding in *Town of Hudson v. City of Lenoir*, 279 N.C. 156, 181 S.E. 2d 443 (1971), conflicts with our holding here, that case is overruled.

Thus, in cases where one municipality institutes valid annexation proceedings first, that municipality should be given priority under the prior jurisdiction rule, and subsequent annexation proceedings, of whatever nature, are of no force and effect. We believe adherence to the prior jurisdiction doctrine is not only consistent with the majority rule, but is in keeping with the spirit and intent of our annexation statutes.

In the instant case, plaintiff City of Burlington instituted its procedures first and thus is entitled to the benefit of the prior jurisdiction rule. We therefore hold that the trial court erred in entering summary judgment for defendant. The judgment and restraining order against plaintiff are vacated and the case is remanded to the Alamance County Superior Court for entry of judgment in accordance with this opinion.

Vacated and remanded.

STATE OF NORTH CAROLINA v. RICHARD RAYMOND SILER, III

No. 46A84

(Filed 30 April 1984)

Narcotics § 4.7— trafficking in cocaine—instruction on simple possession

In a prosecution for trafficking in cocaine by possessing at least 28 but not more than 200 grams of cocaine, testimony by defendant that he snorted cocaine from a small, unweighed plastic bag in a codefendant's car but that he did not know about larger amounts of cocaine found in a bank bag under the seat and in the trunk of the codefendant's car required the trial court to charge on the lesser offense of possession under G.S. 90-95(d)(2), and the court's instruction that the jury should consider whether defendant was guilty of simple possession if they should find that defendant possessed less than 28 grams was sufficient since there was no evidence as to the amount of cocaine in the small bag.

APPEAL by defendant from the decision of the Court of Appeals, 66 N.C. App. 165, 311 S.E. 2d 23 (1984), finding no error in the judgment entered by *Rousseau, Judge*, at the 8 December 1982 Session of FORSYTH County Superior Court.

Defendant was charged in indictments, proper in form, with felonious trafficking in cocaine and with conspiracy to traffic in cocaine. Defendant entered a plea of not guilty to each charge.

Evidence for the State tended to show that defendant and Luther Caudle had been friends for a number of years, and that, on 11 May 1982, defendant telephoned Caudle and asked whether they "were going to be able to play all eighteen holes." Caudle, as witness for the State, testified that defendant's question was an inquiry as to whether Caudle would be able to obtain eight ounces of cocaine. According to Caudle, defendant also asked if they "could play an additional nine" which Caudle interpreted as a request for four additional ounces of cocaine. Caudle agreed to request the cocaine and did, in fact, obtain approximately eleven ounces. Caudle took four ounces of the drug and placed it in a bank bag and put the bag under the driver's seat in the automobile which he was driving. Also inside the bank bag was a small bag with an unknown quantity of cocaine in it. The remaining cocaine was contained in a paper bag in the trunk of the car. Caudle was to meet defendant later in the evening at the Ramada Inn in Clemmons, North Carolina. Upon arriving there at approximately

8:30 p.m., Caudle saw defendant in a blue Toyota driven by Jackie Tart. At some point, defendant entered the car with Caudle, and Caudle pulled out the bank bag and took the smaller bag out of it. He and defendant snorted some of the cocaine from the small bag. Shortly thereafter, Caudle drove alone to a nearby Li'l General Store. Subsequently, several officers, acting upon information provided by a confidential source and upon information gained through surveillance of the men's activities that evening, arrested Caudle, Tart and defendant. A search of the automobile which Caudle was driving revealed a blue bank bag underneath the driver's seat. The bank bag contained a plastic bag with white powder and a smaller plastic bag with white powder. A grocery bag containing more plastic bags of white powder was found in the trunk. A search of the Toyota in which defendant was riding revealed no unlawful substances.

H. T. Raney, Jr., a forensic chemist with the State Bureau of Investigation and expert witness for the State, testified that the white powder found in the three big bags was cocaine and that the total weight of the cocaine amounted to over 300 grams. No analysis was performed on the substance in the small bag, and its weight was undetermined.

Defendant testified in his own behalf and admitted his friendship with Caudle and their plans on 11 May 1982 to meet in Clemmons. However, defendant testified that he was to go to Clemmons with Jackie Tart for the purpose of introducing Tart to a Mr. Shouse. Defendant and Caudle were then to leave from Clemmons and go to Myrtle Beach and play golf. Defendant denied making any arrangements regarding cocaine and denied any knowledge that Caudle had any cocaine in the automobile in either the bank bag or the trunk. However, he admitted that at one point at the Ramada Inn, he got into Caudle's car and snorted some of the cocaine from the small plastic bag.

The jury returned verdicts of guilty of conspiracy to traffic in cocaine and of trafficking in cocaine. The cases were consolidated for judgment and defendant received an active sentence of fourteen years. Upon appeal, the Court of Appeals, in an opinion by Judge Hill, concurred in by Chief Judge Vaughn, found no error in the judgment. Judge Becton dissented on the grounds that the trial judge should have instructed on the lesser included of-

fenses of felony and misdemeanor possession. Defendant appealed to this Court as a matter of right pursuant to G.S. 7A-30.

Rufus L. Edmisten, Attorney General, by John R. B. Matthis, Special Deputy Attorney General, and Philip A. Telfer, Assistant Attorney General, for the State.

Bruce C. Fraser for defendant-appellant.

BRANCH, Chief Justice.

Defendant's sole contention upon appeal is that the trial judge erroneously failed to charge on the lesser included offenses of misdemeanor possession and felony possession. Defendant points out that the crime of "trafficking," as defined in G.S. 90-95(h)(3)a, requires that a party possess at least 28, but not more than 200, grams of cocaine. Defendant maintains that while there is evidence to support a finding that he "trafficked," *i.e.*, possessed at least 28 grams, there is also evidence from which the jury could have found that he possessed less than the requisite 28 grams. Defendant's own testimony was that he only knew about the small plastic bag of cocaine on the front seat of Caudle's car. No analysis was done to verify the weight of the substance in this small bag. Thus, defendant maintains that the jury could have found that he possessed less than 28 grams and would thereby be guilty of only misdemeanor or felony possession under G.S. 90-95(d)(2). The Court of Appeals majority rejected defendant's contention, holding the evidence insufficient to support a charge on the lesser included offense. We disagree. Nevertheless, we conclude that the trial judge correctly charged the jury under the circumstances of this case. The court charged, in pertinent part, as follows:

> So, coming back down to the possession, trafficking by possession, I charge if you find from the evidence beyond a reasonable doubt that on or about the 11th day of May of this year, the defendant knowingly possessed cocaine and the amount of which the defendant possessed was more than 28 grams but less than 200 grams, it would be your duty to return a verdict of guilty of possessing more than 28 grams but less than 200 grams of cocaine. However, if you do not so find or have a reasonable doubt as to one or both of these

> things, you would not return a verdict of guilty of possession of more than 28 grams but less than 200 grams of cocaine, in which case you would consider whether the defendant is guilty of possessing cocaine.
>
> The difference in the two charges being that in possessing of cocaine, the State need not prove the amount he possessed as long as some cocaine was possessed.
>
> I charge if you find from the evidence beyond a reasonable doubt that on or about the 11th day of May, 1982, the defendant knowingly possessed cocaine, it would be your duty to return a verdict of guilty of possessing cocaine, it would be your duty to return a verdict of guilty of possessing cocaine. (sic)
>
> However, if you have a reasonable doubt as to any one of these things, then it would be your duty to return a verdict of not guilty.

The court went on to charge on the possible verdicts:

> Your verdict must be unanimous. That is, all twelve of you must be of the same accord. I would suggest when you go to make up your verdicts, you select one of your group as foreman to lead you in your deliberations and to mark the papers that will be handed to you as you go out.
>
> They read in part: As to the possession of cocaine, there's a blank space, guilty of possession of more than 28 grams but less than 200 grams, another blank space, guilty of possession of cocaine; another blank space, not guilty.
>
> Have your foreman put an x mark or check mark by your unanimous verdict, date it and sign it and return it open court.

Thus, the jury was instructed that if they should find that defendant possessed less than 28 grams, they should consider whether he was guilty of simple possession. Under the circumstances of this case, there being no evidence as to the amount of cocaine in the smaller bag, the trial judge's charge on the lesser included offense was adequate.

The decision of the Court of Appeals finding no error in the trial court's instruction as modified is affirmed.

Modified and affirmed.

ROSE ACOSTA JACOBS v. MICHAEL GRADY LOCKLEAR

No. 611A83

(Filed 30 April 1984)

Negligence § 35.4— contributory negligence not shown—failure to grant judgment notwithstanding verdict error as a matter of law

It was error *as a matter of law* for the trial court to deny plaintiff's motion for judgment n.o.v. on the issue of whether plaintiff contributed to her own injuries in an automobile accident and for a new trial on the issue of damages where there was no evidence upon which to submit the issue of contributory negligence to the jury. Contrary to the assertion of the Court of Appeals, the trial judge had no discretion in this matter.

APPEAL by defendant from a decision of the Court of Appeals, 65 N.C. App. 147, 308 S.E. 2d 748 (1983), one judge dissenting, granting plaintiff a new trial following judgment for the defendant entered by *Lane, S. J.*, at the 17 August 1982 Civil Session of Superior Court, ROBESON County. Heard in the Supreme Court 12 April 1984.

Page & Baker, P.A., by H. Mitchell Baker, III, attorney for defendant-appellant.

Britt and Britt, by William S. Britt, attorney for plaintiff-appellee.

PER CURIAM.

Plaintiff brought this action seeking to recover for personal injuries sustained as a result of an automobile accident. The accident occurred on the night of 6 July 1980 following a party attended by plaintiff, defendant, family and friends. Plaintiff and her family were standing in front of plaintiff's car waiting for the traffic to subside. Defendant's automobile was parked approximately ten to twelve feet in front of plaintiff's automobile. Plain-

tiff saw defendant approach his automobile but did not hear or see him start the car because she was engaged in conversation. Defendant was intoxicated. Without warning, he placed his car in reverse, backed it toward the group of people standing in front of plaintiff's car, and pinned the plaintiff between the front of her car and the rear of his car. Plaintiff sustained injuries to her legs.

At the conclusion of the evidence, the plaintiff moved for a directed verdict on the issue of negligence. The motion was denied and the following issues were submitted and answered by the jury:

1. Was the plaintiff, ROSE ACOSTA JACOBS, injured or damaged by the negligence of the defendant, MICHAEL GRADY LOCKLEAR?

   Answer: Yes.

2. Did the plaintiff, ROSE ACOSTA JACOBS, by her own negligence contribute to her injury or damage?

   Answer: Yes.

3. What amount, if any, is the plaintiff, ROSE ACOSTA JACOBS, entitled to recover for personal injury?

   Answer: _____.

After the verdict was returned, plaintiff's counsel moved *inter alia* for a judgment n.o.v. and to set aside the verdict as being against the greater weight of the evidence. These motions were denied.

The Court of Appeals concluded that "[a]s a matter of law, there being no evidence upon which to submit to the jury an issue of contributory negligence, it was prejudicial error to do so." *Id.* at 150, 308 S.E. 2d at 750. The Court of Appeals granted the plaintiff a new trial. We agree with the reasoning and the conclusion reached by the Court of Appeals that the trial court erred in submitting the issue of contributory negligence to the jury.

It was error *as a matter of law* for the trial court to deny plaintiff's motion for a new trial. In its opinion, the Court of Appeals stated that "the plaintiff has shown an abuse of discretion by the trial court in its denial of plaintiff's motion for a new

trial." *Id.* Contrary to this assertion of the Court of Appeals, the trial judge had no discretion in this matter.

The case is remanded to the Court of Appeals for further remand to the trial court for entry of judgment n.o.v. on the issue of plaintiff's contributory negligence. Plaintiff is entitled to a new trial on the issue of damages only.

Modified and Affirmed.

STATE OF NORTH CAROLINA v. JOHN FITZGERALD STINSON

No. 25A84

(Filed 30 April 1984)

1. **Criminal Law § 138— aggravating circumstances that defendant had a prior conviction punishable by more than 60 days and that defendant had served a prison term for that conviction properly considered**

There was no error in a trial judge finding as aggravating circumstances both that defendant had a prior conviction punishable by more than 60 days' confinement and that the period of time for which the sentence for that conviction was suspended had not yet expired.

2. **Criminal Law § 138— aggravating circumstances that sentence necessary to deter others and lesser sentence would unduly depreciate seriousness of defendant's crime improperly considered**

The trial court erred in finding as aggravating circumstances that: "The sentence pronounced by the court is necessary to deter others from the commission of a similar offense" and "a lesser sentence than that pronounced by the court would unduly depreciate the seriousness of the defendant's crime."

APPEAL by defendant from a decision of the Court of Appeals finding no error in either the trial or sentencing proceedings conducted before *Judge Albright,* presiding at the 4 October 1982 Criminal Session of CABARRUS County Superior Court. The opinion of the Court of Appeals is by *Judge Arnold* with *Judge Hedrick* concurring and *Judge Becton* dissenting. 65 N.C. App. 570, 309 S.E. 2d 528 (1983).

Rufus L. Edmisten, Attorney General, by Thomas H. Davis, Jr., Assistant Attorney General, for the State.

Robert M. Critz and David H. Black for defendant appellant.

PER CURIAM.

[1] The Court of Appeals correctly determined the issues brought forward in defendant's brief. This case is distinguishable from *State v. Isom*, 65 N.C. App. 223, 309 S.E. 2d 283 (1983), relied on by Judge Becton in his dissenting opinion. In *Isom* the Court of Appeals concluded that it was improper for the trial judge to find as aggravating circumstances both that a defendant had a prior conviction punishable by more than sixty days' confinement and that he had served a prior prison term for that conviction. In the instant case the period during which defendant's sentence for a prior felony conviction was suspended had not yet expired at the time he committed the offense for which he was being tried. It was proper, therefore, for the trial court to consider both the fact of his prior conviction and the fact that the period for which the sentence was suspended had not yet expired as aggravating circumstances.

[2] We find, however, error which, although not assigned by defendant, does appear on the face of the judgment in both the burglary and the attempted rape cases. In both cases the trial court found as aggravating circumstances: "The sentence pronounced by the court is necessary to deter others from the commission of a similar offense" and "a lesser sentence than that pronounced by the court would unduly depreciate the seriousness of the defendant's crime." It was error for the trial court to find these aggravating circumstances. *State v. Chatman*, 308 N.C. 169, 301 S.E. 2d 71 (1983).

For this error the judgments imposed against defendant in both the burglary and the attempted rape cases must be vacated and the matter remanded for a new sentencing hearing. *State v. Ahearn*, 307 N.C. 584, 300 S.E. 2d 689 (1983).

Insofar as the Court of Appeals found no error in defendant's trial and no error on the points it discussed with regard to defendant's sentences, the decision is affirmed. For the reasons stated herein, however, the Court of Appeals' decision finding no error in the sentencing proceeding is reversed; the sentences imposed upon defendant are vacated; and the case is remanded to the Court of Appeals for further remand by it to Cabarrus County Superior Court for resentencing. The result is that the Court

of Appeals' decision is affirmed in part and reversed in part, and the case remanded for resentencing.

Affirmed in part;

Reversed in part; and

Remanded for resentencing.

PHYLLIS C. SNUGGS, JUNE C. ALMOND, AND CAROL F. TROUTMAN v. STANLY COUNTY DEPARTMENT OF PUBLIC HEALTH, AN AGENCY OF THE COUNTY OF STANLY; HAROLD LITTLE, CHAIRMAN, AND FLOYD HUNEYCUTT, ALTON CROWELL, DR. CLAUDE N. BALLENGER, SHIRLEY LOWDER, ERNEST A. WHITLEY, DAVID A. CHAMBERS, IRA STOVALL, AND DR. TOMMIE NORWOOD, MEMBERS, STANLY COUNTY BOARD OF HEALTH; COUNTY OF STANLY, A BODY POLITIC; BEECHER R. GRAY, INDIVIDUALLY AND IN HIS FORMER REPRESENTATIVE CAPACITY AS DIRECTOR OF STANLY COUNTY DEPARTMENT OF PUBLIC HEALTH; CARLTON B. HOLT, R. C. HINKLE, DR. MAX GARBER, MATTIE LITTLE, AND EVELYN HATLEY, FORMER CHAIRMAN AND MEMBERS, RESPECTIVELY OF THE STANLY COUNTY BOARD OF HEALTH

No. 411PA83

(Filed 30 April 1984)

Constitutional Law § 17— state courts' ability to exercise concurrent subject matter jurisdiction over claims arising under 42 U.S.C. § 1983

State courts may exercise concurrent subject matter jurisdiction over claims arising under 42 U.S.C. § 1983; therefore, where plaintiffs instituted actions in superior court seeking recovery under 42 U.S.C. § 1983 while their appeals were still pending before the State Personnel Commission, it was error for the Court of Appeals to affirm a trial court's dismissal of the actions under Rule 12(b)(1) of the North Carolina Rules of Civil Procedure on the ground of lack of jurisdiction over the subject matter. Instead, defendants' motions should be viewed as motions to dismiss for failure to state a claim upon which relief may be granted pursuant to G.S. 1A-1, Rule 12(b)(6) since plaintiffs have failed to allege that they do not have adequate remedies under state law which provide due process.

ON discretionary review of a decision of the Court of Appeals, 63 N.C. App. 86, 303 S.E. 2d 646 (1983), affirming a judgment of *Judge Hairston* presiding in Superior Court, STANLY County. Heard in the Supreme Court 11 April 1984.

Morton & Grigg, by Ernest H. Morton, Jr., for plaintiff appellant Phyllis C. Snuggs.

Gerald R. Chandler, for plaintiff appellants June C. Almond and Carol F. Troutman.

Frank B. Aycock, III, for defendant appellees.

PER CURIAM.

Plaintiffs were employees of defendant, the Stanly County Department of Public Health prior to 27 September 1979 when they were each dismissed. Each plaintiff was served with written notice of termination at the time of her dismissal. Almost eight months later, in response to the plaintiffs' motions, each was served with a supplemental statement of charges or reasons for dismissal. Each plaintiff appealed her dismissal to the State Personnel Commission. On 25 September 1981, while their appeals were still pending before the State Personnel Commission, the plaintiffs instituted these actions in Superior Court, Stanly County seeking recovery under 42 U.S.C. § 1983. On 12 May 1982, the trial court allowed the defendants' motions to dismiss the actions under Rule 12(b)(1) of the North Carolina Rules of Civil Procedure on the ground of lack of jurisdiction over the subject matter. The Court of Appeals affirmed.

State courts may exercise concurrent subject matter jurisdiction over claims arising under 42 U.S.C. § 1983. *Maine v. Thiboutot*, 448 U.S. 1, 3, n. 1, 65 L.Ed. 2d 555, 100 S.Ct. 2502 (1980); *Williams v. Greene*, 36 N.C. App. 80, 243 S.E. 2d 156, *rev. denied*, 295 N.C. 471, 246 S.E. 2d 12 (1978). The Court of Appeals erred in affirming the trial court's dismissal of the plaintiffs' claims for lack of jurisdiction over the subject matter.

We elect to treat the defendants' motions as motions brought under Rule 12(b)(6) to dismiss for failure to state a claim upon which relief may be granted. When the defendants' motions are viewed as motions brought under Rule 12(b)(6), they must be allowed since the plaintiffs have failed to allege that they do not have adequate remedies under State law which provide due process. *See Parratt v. Taylor*, 451 U.S. 527, 68 L.Ed. 2d 420, 101 S.Ct. 1908 (1981). *But c.f. Patsy v. Florida Board of Regents*, 457 U.S. 496, 73 L.Ed. 2d 172, 102 S.Ct. 2557 (1982) (State remedies

need not be exhausted prior to bringing a § 1983 action in the Federal Courts). Therefore, the actions giving rise to this appeal are remanded to the Court of Appeals for further remand to the Superior Court, Stanly County, for the entry of orders under Rule 12(b)(6) dismissing the plaintiffs' claims for failure to state a claim upon which relief may be granted. The plaintiffs shall be allowed thirty days from the date of certification of this opinion within which to file amended complaints in Superior Court.

Modified and remanded.

STATE OF NORTH CAROLINA v. JOSEPH P. HIGGINS, JR.

No. 58A84

(Filed 30 April 1984)

APPEAL by the State pursuant to N.C. Gen. Stat. § 7A-30(2) from the decision of the Court of Appeals, *Judge Wells* with *Judge Webb* concurring and *Judge Whichard* dissenting, reported in 66 N.C. App. 1, 310 S.E. 2d 644 (1984), which granted the defendant a new trial. The defendant had appealed from the judgment of *Brannon, J.*, entered at the 16 December 1982 Session of CUMBERLAND County Superior Court.

Attorney General Rufus L. Edmisten, by Special Deputy Attorney General Charles J. Murray and Associate Attorney Floyd M. Lewis, for the State.

Van Camp, Gill & Crumpler, P.A., by James R. Van Camp, for the defendant.

PER CURIAM.

Defendant was convicted of felonious breaking or entering, felonious larceny, and assault with a deadly weapon with intent to kill inflicting serious injury. At trial the State introduced into evidence, over defendant's objection, certain pawnshop tickets signed by the defendant. The Court of Appeals correctly determined that this evidence was not admissible for the purpose of establishing a motive for the crimes with which defendant was

charged and further, that the State improperly used this evidence to impeach collaterally defendant's responses to the State's questions on cross-examination. The Court of Appeals' decision to grant a new trial is

Affirmed.

FMS MANAGEMENT SYSTEMS, INC. v. E. H. THOMAS AND JESSE M. WALLER

No. 19A84

(Filed 30 April 1984)

APPEAL of right, pursuant to G.S. 7A-30(2), from a decision of a divided panel of the Court of Appeals, affirming the trial court's granting of plaintiff's motion for judgment on the pleadings in an action on a Florida deficiency judgment. The opinion of the Court of Appeals by *Judge Vaughn*, with *Judge Braswell* concurring and *Judge Wells* dissenting, is reported at 65 N.C. App. 561, 309 S.E. 2d 697 (1983).

Young, Moore, Henderson & Alvis, P.A., by Edward B. Clark and B. T. Henderson, II, for plaintiff appellee.

Parker Whedon for defendant appellants.

PER CURIAM.

The pertinent facts are accurately stated in the decision of the Court of Appeals. For the reasons there stated, the decision of the Court of Appeals is

Affirmed.

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

BALLENGER v. BURRIS INDUSTRIES

No. 158P84.

Case below: 66 N.C. App. 556.

Petition by defendants for discretionary review under G.S. 7A-31 denied 30 April 1984.

BEST v. FELLOWS

No. 470P83.

Case below: 63 N.C. App. 789.

Petition by defendant for discretionary review under G.S. 7A-31 denied 30 April 1984.

BISHOP v. REINHOLD

No. 130P84.

Case below: 66 N.C. App. 379.

Petition by defendants for discretionary review under G.S. 7A-31 denied 30 April 1984.

ELLER v. ELLER

No. 125P84.

Case below: 66 N.C. App. 377.

Petition by defendant for discretionary review under G.S. 7A-31 denied 30 April 1984.

FORSYTH CITIZENS v. CITY OF WINSTON-SALEM

No. 147P84.

Case below: 67 N.C. App. 164.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 30 April 1984. Motion by defendant to dismiss appeal for lack of substantial constitutional question allowed 30 April 1984.

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

FREEMAN v. FINNEY

No. 23P84.

Case below: 65 N.C. App. 526.

Petition by defendants for discretionary review under G.S. 7A-31 denied 30 April 1984.

GEITNER v. TOWNSEND

No. 136P84.

Case below: 67 N.C. App. 159.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 30 April 1984.

IN RE ASSESSMENT OF ADDITIONAL TAXES AGAINST VILLAGE PUBLISHING CORP.

No. 127PA84.

Case below: 66 N.C. App. 423.

Petition by petitioner for discretionary review under G.S. 7A-31 allowed 30 April 1984. Motion by Attorney General to dismiss appeal for lack of substantial constitutional question denied 30 April 1984.

IN RE DURHAM ANNEXATION ORDINANCE

No. 148P84.

Case below: 66 N.C. App. 472.

Petition by several petitioners for discretionary review under G.S. 7A-31 denied 30 April 1984.

IN RE NORRIS

No. 109P84.

Case below: 65 N.C. App. 269.

Petition by respondent for writ of certiorari to North Carolina Court of Appeals denied 30 April 1984.

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

IN RE TRUESDELL

No. 429PA83.

Case below: 63 N.C. App. 258.

Petition by Department of Social Services for discretionary review under G.S. 7A-31 allowed 30 April 1984. Motion of respondent Sophia Renee Truesdell to dismiss appeal for lack of substantial constitutional question denied 30 April 1984.

JULIAN BAPTIST CHURCH, INC. v. BROWN

No. 131P84.

Case below: 66 N.C. App. 377.

Petition by Church and Brown for discretionary review under G.S. 7A-31 Denied 30 April 1984.

NESTLER v. CHAPEL HILL/CARRBORO BD. OF EDUCATION

No. 114P84.

Case below: 66 N.C. App. 232.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 30 April 1984. Motion by defendant to dismiss appeal for lack of substantial constitutional question allowed 30 April 1984.

NEWTON v. NEWTON

No. 151P84.

Case below: 67 N.C. App. 172.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 30 April 1984.

STATE v. CARTER

No. 90P84.

Case below: 66 N.C. App. 21.

Petition by defendant for discretionary review under G.S. 7A-31 denied 30 April 1984.

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

STATE v. CAYTON

No. 153P84.

Case below: 66 N.C. App. 554.

Petition by defendant for discretionary review under G.S. 7A-31 denied 30 April 1984.

STATE v. EARNEST

No. 489P83.

Case below: 64 N.C. App. 162.

Petition by defendant for discretionary review under G.S. 7A-31 denied 30 April 1984.

STATE v. FARROW

No. 82P84.

Case below: 66 N.C. App. 147.

Petition by defendant for discretionary review under G.S. 7A-31 denied 30 April 1984. Motion by Attorney General to dismiss appeal for lack of substantial constitutional question allowed 30 April 1984.

STATE v. GROSS

No. 115P84.

Case below: 66 N.C. App. 364.

Petition by defendant for discretionary review under G.S. 7A-31 denied 30 April 1984.

STATE v. HOLLOWAY

No. 138A84.

Case below: 66 N.C. App. 491.

Petition by defendant for discretionary review as to issues in addition to those presented as the basis for the dissenting opinion of the Court of Appeals under G.S. 7A-30, 7A-31, and Appellate Rule 16(b) allowed 30 April 1984. Motion by Attorney General to dismiss appeal as to additional issues for lack of substantial constitutional question denied 30 April 1984.

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

STATE v. JOE'L

No. 169P84.

Case below: 67 N.C. App. 177.

Petition by defendant for discretionary review under G.S. 7A-31 denied 30 April 1984. Motion by Attorney General to dismiss appeal for lack of substantial constitutional question allowed 30 April 1984.

STATE v. JOHNSON

No. 128P84.

Case below: 66 N.C. App. 444.

Petition by Attorney General for discretionary review under G.S. 7A-31 denied 30 April 1984.

STATE v. McLEOD

No. 135PA84.

Case below: 67 N.C. App. 186.

Petition by defendant for discretionary review under G.S. 7A-31 allowed 30 April 1984. Motion by Attorney General to dismiss appeal for lack of substantial constitutional question denied 30 April 1984.

STATE v. PHILLIPS

No. 120P34.

Case below: 66 N.C. App. 453.

Petition by Attorney General for discretionary review under G.S. 7A-31 denied 30 April 1984.

STATE v. SMITH

No. 162P84.

Case below: 66 N.C. App. 570.

Petition by defendant for discretionary review under G.S. 7A-31 denied 30 April 1984.

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

STATE v. WELDON

No. 12PA84.

Case below: 65 N.C. App. 376.

Petition by defendant for discretionary review under G.S. 7A-31 allowed 30 April 1984.

STATE v. WILSON

No. 169P84.

Case below: 67 N.C. App. 177.

Petition by defendant for discretionary review under G.S. 7A-31 denied 30 April 1984. Motion by Attorney General to dismiss appeal for lack of substantial constitutional question allowed 30 April 1984.

STATE v. WRIGHT

No. 160P84.

Case below: 66 N.C. App. 555.

Petition by defendant for discretionary review under G.S. 7A-31 denied 30 April 1984.

TAYLOR v. GILLESPIE

No. 106P84.

Case below: 66 N.C. App. 302.

Petition by defendant for discretionary review under G.S. 7A-31 denied 30 April 1984.

ZWIGARD v. MOBIL OIL

No. 23P84.

Case below: 65 N.C. App. 526.

Petition by defendants for discretionary review under G.S. 7A-31 denied 30 April 1984.

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

PETITIONS TO REHEAR

LOWDER v. ALL STAR MILLS

No. 89PA83.

Case below: 309 N.C. 695.

Petition by defendants denied 30 April 1984.

RENWICK v. GREENSBORO NEWS; RENWICK v. NEWS AND OBSERVER

No. 412A83.

Case below: 310 N.C. 312.

Petition by plaintiff denied 30 April 1984.

APPENDIXES

AMENDMENTS TO RULES GOVERNING
ADMISSION TO PRACTICE OF LAW

AMENDMENT TO BAR RULES RELATING TO
DISCIPLINE AND DISBARMENT OF ATTORNEYS

AMENDMENT TO BAR RULES
RELATING TO TRUST ACCOUNTS

AMENDMENT TO CODE OF
PROFESSIONAL RESPONSIBILITY

AMENDMENTS TO BAR RULES
RELATING TO APPOINTMENT OF
COUNSEL FOR INDIGENT DEFENDANTS

AMENDMENT TO BAR RULES RELATING TO
STANDING COMMITTEES OF THE COUNCIL

BAR RULES RELATING TO DISCIPLINE
AND DISBARMENT OF ATTORNEYS

AMENDMENTS TO RULES GOVERNING ADMISSION TO PRACTICE OF LAW

The following amendments to the Rules Governing Admission to the Practice of Law in the State of North Carolina were duly adopted by the Council of the North Carolina State Bar at its regular quarterly meeting on April 13, 1984.

BE IT RESOLVED that Rules .0404, .0501 and .0502 of the Rules Governing Admission to the Practice of Law in the State of North Carolina as appear in 289 NC 742 and as amended in 293 NC 759, 295 NC 747, 296 NC 746, 304 NC 746, 306 NC 793 and 307 NC 707 be amended as follows:

.0404 (1), (2), (3) and (4) are rewritten and a new section designated (5) is added to read as follows:

.0404 FEES

(1) is a resident of the State of North Carolina and who is not a licensed attorney in any other jurisdiction shall be accompanied by a fee of $240.00.

(2) is a resident of the State of North Carolina and who is a licensed attorney in any other jurisdiction shall be accompanied by a fee of $400.00.

(3) is a nonresident of the State of North Carolina and who is not a licensed attorney in any other jurisdiction shall be accompanied by a fee of $240.00 plus such fee as the National Conference of Bar Examiners or its successor may charge from time to time for processing an application of a nonresident.

(4) is a nonresident of the State of North Carolina and who is a licensed attorney in any other jurisdiction shall be accompanied by a fee of $400.00 plus such other fee as the National Conference of Bar Examiners or its successor may charge from time to time for processing an application of a nonresident.

(5) is filing to take the North Carolina Bar Examination using a Supplemental Application shall be accompanied by a fee of $200.00.

.0501 is amended by adding a new section designated as (9) as follows:

.0501 REQUIREMENTS FOR GENERAL APPLICANTS

(9) If the general applicant is a licensed attorney then he be in good professional standing in every state or territory of the United States or the District of Columbia in which the applicant has been licensed to practice law and not under pending charges of misconduct.

.0502 (6) is amended by rewriting the same to read as follows:

.0502 REQUIREMENTS FOR COMITY APPLICANTS

(6) Be at all times, in good professional standing in every state, or territory of the United States, or the District of Columbia in which the applicant has been licensed to practice law, and not under pending charges of misconduct while the application is pending before the Board.

NORTH CAROLINA
WAKE COUNTY

I, B. E. James, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules Governing the Practice of Law in the State of North Carolina were duly adopted by the Council of the North Carolina State Bar and that said Council did by resolution, at a regular quarterly meeting, unanimously adopt said amendments to the Rules Governing Admission to the Practice of Law in the State of North Carolina as provided in General Statutes Chapter 84.

Given over my hand and the Seal of the North Carolina State Bar, this the 18th day of April, 1984.

B. E. JAMES
Secretary

After examining the foregoing amendments to the Rules Governing Admission to the Practice of Law of the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 28th day of August, 1984.

JOSEPH BRANCH
Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules Governing Admission to the Practice of Law of the Rules and Regulations of the North Carolina State Bar be spread upon the Minutes of the Supreme Court and that they be published in the forthcoming volume of the Reports as provided by the Act incorporating the North Carolina State Bar.

This the 28th day of August, 1984.

FRYE, J.
For the Court

AMENDMENT TO BAR RULES RELATING TO DISCIPLINE AND DISBARMENT OF ATTORNEYS

The following amendments to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on April 13, 1984.

BE IT RESOLVED by the Council of the North Carolina State Bar that Article IX, Sections 4, 5, 8, 9, 10, 14, 17, 24 and 25 as appear in 205 NC 861 and as amended in 288 NC 747, 293 NC 750 and 308 NC 819 be and the same are amended as follows:

AMENDMENTS TO ARTICLE IX OF THE RULES OF DISCIPLINE AND DISBARMENT

Section 4. State Bar Council—Powers and Duties in Discipline and Disability matters.

Rewrite subsection (5) as follows:

(5) to accept or reject the surrender of the license to practice law of any member of The North Carolina State Bar.

Rewrite subsection (6) as follows:

(6) to order the disbarment of any member whose resignation is accepted or to refer the matter of discipline to the Disciplinary Hearing Commission for hearing and determination.

Add new subsection (7):

(7) to review the report of any Hearing Committee upon a Petition for Reinstatement of a disbarred attorney or member transferred to inactive status because of a disability and make final determination as to whether the license shall be restored.

Section 5. Chairman of the Grievance Committee—Powers and Duties.

Add new subsection (A)(11):

(11) to determine whether proceedings should be instituted to activate a suspension which has been stayed.

Section 8. Chairman of the Hearing Commission—Powers and Duties.

Rewrite subsection (A)(1) as follows:

(1) to receive complaints alleging misconduct and petitions alleging the disability of a member filed by the Grievance Commit-

tee; petitions requesting reinstatement or restoration of license by members of The North Carolina State Bar who have been involuntarily transferred to inactive status, suspended, or disbarred; motions seeking the activation of suspensions which have been stayed; and affidavits of resignation from members who have surrendered their licenses.

Rewrite the first sentence of subsection (A)(2) as follows:

(2) to assign three members of the Commission, consisting of two members of The North Carolina State Bar and one layman, to hear such complaints, petitions, motions, or hold hearings on tender of surrender of license.

Section 9. Hearing Committee—Powers and Duties.

Rewrite subsection (1) as follows:

(1) to hold hearings on complaints alleging misconduct, petitions seeking a determination of disability or reinstatement, motions seeking the activation of suspensions which have been stayed, and affidavits of resignation.

Rewrite subsection (10) as follows:

(10) to report to the Council its findings of facts and recommendations after hearings on petitions for reinstatement of disbarred attorneys or members transferred to inactive status because of a disability.

Add new subsection (11):

(11) to enter orders reinstating suspended attorneys or denying reinstatement. Orders denying reinstatement may include additional sanctions in the event violations of petitioner's order of suspension are found.

Add new subsection (12):

(12) to enter orders of discipline against attorneys who have surrendered their licenses.

Add new subsection (13):

(13) to enter orders activating suspensions which have been stayed or continuing the stays of such suspensions.

Section 10. Secretary—Powers and Duties in Discipline and Disability Matters.

Add new subsection (5).

(5) to enter orders of reinstatement where petitions for reinstatement of suspended attorneys are unopposed by the Counsel.

Section 14. Formal Hearing.

Add new section 14(19.1) to read:

(19.1): In any case in which a period of suspension is stayed upon compliance by the Defendant with conditions, the Disciplinary Hearing Commission shall retain jurisdiction of the matter until all conditions are satisfied. If, during the period the stay is in effect, the Counsel receives information tending to show that a condition has been violated, he may, with the consent of the Chairman of the Grievance Committee, file a motion in the cause with the Secretary specifying the violation and seeking an order requiring the Defendant to show cause why the stay should not be lifted and the suspension activated for violation of a condition. The Counsel shall also serve a copy of any such motion upon the Defendant. The Secretary shall promptly transmit the motion to the Chairman of the Disciplinary Hearing Commission who, if he enters an order to show cause, shall appoint a Hearing Committee as provided in Section 8(A)(2), appointing the members of the Hearing Committee that originally heard the matter wherever practicable, schedule a time and a place for a hearing, and notify the Counsel and the defendant of the composition of the Hearing Committee and the time and place for the hearing. After such a hearing, the Hearing Committee may enter an order lifting the stay and activating the suspension, or any portion thereof, and taxing the defendant with the costs, if it finds that The North Carolina State Bar has proven, by the greater weight of the evidence, that the Defendant has violated a condition. If the Hearing Committee finds that The North Carolina State Bar has not carried its burden, then it shall enter an order continuing the stay. In any event, the Hearing Committee shall include in its order Findings of Fact and Conclusions of Law in support of its decision.

Section 17. Surrender of License while Proceeding Pending.

Rewrite subsection (2) as follows:

The Council may accept a member's resignation only if: (a) the affidavit required under (1) above satisfies the requirements stated therein, or (b) upon full waiver of all future right to apply for reinstatement of license as an attorney. If the Council accepts a member's resignation it shall enter an order disbarring the member unless the member has requested in his affidavit that discipline be determined by the Disciplinary Hearing Commission, in which case the Secretary shall refer the matter to the Chairman of the Disciplinary Hearing Commission for hearing.

Rewrite subsection (3) as follows:

Whenever any matter is referred to the Disciplinary Hearing Commission pursuant to (2) above, the Chairman shall appoint a Hearing Committee as provided in Section 8(A)(2), schedule a time and place for a hearing, and notify the Counsel and the resigning member of the composition of the Hearing Committee and the time and place of the hearing. The hearing shall be as contemplated in Section 14(19) and shall result in an order of the Disciplinary Hearing Commission imposing discipline and taxing costs against the resigning member.

Section 24. The Heading Should Be Amended to Read As Follows:

Disbarred or suspended attorneys; winding up of practice, notice to clients; effective date of suspension or disbarment; condition precedent to reinstatement.

Section 25. Reinstatement.

Rewrite Section 25(A) and add new Section 25(B) as follows:

(A) After Disbarment:

(1) No person who has been disbarred may have his license restored but upon order of the Council after the filing of a verified petition for reinstatement and the holding of a hearing before a hearing committee of the Disciplinary Hearing Commission as provided herein.

(2) No person who has been disbarred may petition for reinstatement until the expiration of at least five years from the effective date of the disbarment.

(3) (a) The petitioner shall have the burden of proving the following by clear, cogent and convincing evidence:

(1) that he possesses the moral qualifications required for admission to practice law in this state;

(2) that his resuming the practice of law within the state will be neither detrimental to the integrity and standing of the bar, nor the administration of justice, nor subversive of the public interest;

(3) that he is a citizen, or that his citizenship has been restored if he has been convicted of a felony;

(4) that he has complied with Section 24 of these rules;

(5) that he has complied with all applicable orders of the Disciplinary Hearing Commission and the Council;

(6) that he has complied with the orders and judgments of any court relating to the matters resulting in the disbarment;

(7) that he has not engaged in the unauthorized practice of law during the period of disbarment;

(8) that he has not engaged in any conduct during the period of disbarment constituting grounds for discipline under N.C. General Statute § 84-28 (b); and

(9) that he exhibits knowledge and understanding of the current Code of Professional Responsibility.

(b) If less than seven (7) years has elapsed between the effective date of disbarment and the filing of the petition for reinstatement, the petitioner shall also have the burden of proving by the greater weight of the evidence that he has the competency and learning in the law required to practice law in this state. Factors which may be considered in deciding this issue include: experience in the practice of law, areas of expertise, certification of expertise, participation in continuing legal education programs, periodic review of advance sheets and legal periodicals, and the attainment of a passing grade on a regularly scheduled written Bar Examination administered by The North Carolina Board of Law Examiners and taken voluntarily by the Petitioner.

(c) If seven (7) years or more have elapsed between the effective date of disbarment and the filing of the petition for reinstatement, reinstatement shall be conditioned upon the Petitioner's attaining a passing grade on a regularly scheduled written Bar Examination administered by The North Carolina Board of Law Examiners.

(4) (a) Verified petitions for reinstatement of disbarred attorneys shall be filed with the Secretary. Upon receipt of the petition, the Secretary shall transmit the petition to the Chairman of the Disciplinary Hearing Commission and serve a copy on the Coun-

sel. The Chairman shall within seven (7) days appoint a Hearing Committee as provided in Section 8(A)(2), schedule a time and place for hearing, and notify the Counsel and the petitioner of the composition of the Hearing Committee and the time and place of the hearing, which shall be conducted in accordance with The North Carolina Rules of Civil Procedure for non-jury trials in so far as possible and the Rules of Evidence applicable in Superior Court.

(b) As soon as possible after the conclusion of the hearing, the Hearing Committee shall file a report containing its findings, conclusions, and recommendations to the Council. This report shall be promptly transmitted to the Council.

(c) The whole record shall be transmitted to the Council unless the record is shortened by agreement of both the petitioner and Counsel.

(5) The Council shall review the report of the Hearing Committee and the record, and determine whether, and upon what conditions, the petitioner shall be reinstated.

(6) The Council in its discretion may direct that the necessary expenses incurred in the investigation and processing of a petition for reinstatement be paid by the petitioner.

(7) No person who has been disbarred and has unsuccessfully petitioned for reinstatement may reapply until the expiration of one (1) year from the date of the last order denying reinstatement.

(B) After Suspension:

(1) No attorney who has been suspended may have his license restored but upon order of the Disciplinary Hearing Commission or the Secretary after the filing of a verified petition as provided herein.

(2) No attorney who has been suspended is eligible for reinstatement until the expiration of the period of suspension and, in no event, until thirty (30) days have elapsed from the date of filing the petition for reinstatement. Petitions for reinstatement may be filed no sooner than ninety (90) days prior to the expiration of the period of suspension.

(3) Any suspended attorney seeking reinstatement must file a verified petition with the Secretary, a copy of which the Secretary shall transmit to the Counsel. The petitioner must have satisfied the following requirements to be eligible for reinstatement and facts demonstrating satisfaction must be set forth in the petition:

(a) compliance with section 24 of the rules;

(b) compliance with all applicable orders of the Disciplinary Hearing Commission and the Council; and

(c) abstention from the unauthorized practice of law during the period of suspension.

(4) The Counsel shall conduct any necessary investigation regarding the compliance of the petitioner with the requirements set forth in Section 25(B)(3), and the Counsel may file a response to the petition with the Secretary prior to the date the petitioner is first eligible for reinstatement. The Counsel shall serve a copy of any response filed upon the petitioner.

(5) If the Counsel does not file a response to the petition prior to the date the petitioner is first eligible for reinstatement, then the Secretary shall issue an order of reinstatement.

(6) If the Counsel does file a timely response to the petition, such response must set forth specific objections supported by factual allegations sufficient to put the petitioner on notice of the events and occurrences at issue.

(7) The Secretary shall, upon the filing of a response to the petition, refer the matter to the Chairman of the Disciplinary Hearing Commission. The Chairman shall within seven (7) days appoint a Hearing Committee as provided in Section 8(A)(2), schedule a time and place for a hearing, and notify the Counsel and the petitioner of the composition of the Hearing Committee and the time and place of the hearing. The hearing shall be conducted in accordance with the North Carolina Rules of Civil Procedure for non-jury trials in so far as possible and the Rules of Evidence applicable in Superior Court.

(8) The Hearing Committee shall determine whether or not the petitioner's license should be reinstated and enter an appropriate Order which may include additional sanc-

tions in the event violations of the petitioner's order of suspension are found. In any event, the Hearing Committee must include in its order findings of fact and conclusions of law in support of its decision and tax such costs as it deems appropriate for the necessary expenses attributable to the investigation and processing of the petition against the petitioner.

Existing Section 25(B) shall be renumbered Section 25(C).

NORTH CAROLINA
WAKE COUNTY

I, B. E. James, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar have been duly adopted by the Council of the North Carolina State Bar and that said Council did by resolution, at a regular quarterly meeting unanimously adopt said amendments to the Rules and Regulations of the North Carolina State Bar as provided in General Statutes Chapter 84.

Given over my hand and the Seal of the North Carolina State Bar, this the 18th day of April, 1984.

B. E. JAMES
Secretary

After examining the foregoing amendment to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same is not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 28th day of August, 1984.

JOSEPH BRANCH
Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendment to the Rules and Regulations of the North Carolina State Bar be spread upon the Minutes of the Supreme Court and that they be published in the forthcoming volume of the Reports as provided by the Act incorporating the North Carolina State Bar.

This the 28th day of August, 1984.

FRYE, J.
For the Court

The following amendments to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its meeting on January 18, 1985.

BE IT RESOLVED by the Council of the North Carolina State Bar that Article VI, Section 5c as appears in 288 NC 743 and Article IX, Sections 12(5), 13(7); and 23(A)(1) and (2) as appear in 288 NC 743, 293 NC 750, 294 NC 755 and 308 NC 820 be and the same are hereby rewritten to read as follows:

ARTICLE VI

Section 5. Standing Committees of the Council—

c. Committee on Grievances—Grievance Committee of not less than fifteen members, one of whom shall be designated as Chairman. AT LEAST ONE VICE-CHAIRMAN SHALL BE DESIGNATED. The Committee shall have as members at least three councilors from each of the JUDICIAL divisions of the State. The Grievance Committee shall have the powers and duties set forth in Article IX of these rules, and shall report on the status of grievances, investigations and complaints at regular or special meetings of the Council as the Executive Committee may direct.

ARTICLE IX

Section 12. Investigations; initial determination.

(5) FOR REASONABLE CAUSE, the Chairman of the Grievance Committee may issue subpoenas to compel the attendance of witnesses, including the accused, for examination concerning the grievance and may compel the production of books, papers, and other documents or writings deemed necessary or material to the inquiry. Each subpoena shall be issued by the Chairman of the Grievance Committee, or by the Secretary at the direction of the Chairman. The counsel, ASSISTANT COUNSEL, INVESTIGATOR, OR ANY MEMBERS OF THE GRIEVANCE COMMITTEE DESIGNATED BY THE CHAIRMAN may examine any such witness under oath or otherwise.

Section 13. Preliminary Hearing.

(7) At any preliminary hearing held by the Grievance Committee, a quorum of ONE-HALF of the members shall be required to conduct any business. Affirmative vote of a majority of members present shall be necessary for a finding that probable cause ex-

ists. The Chairman shall not be counted for quorum purposes and shall be eligible to vote regarding the disposition of any grievance only in case of a tie among the regular voting members.

Section 23. Imposition of Discipline; Findings of Incapacity or Disability; Notice to Courts.

(A)(1) Reprimand. A letter of reprimand shall be prepared by the Chairman of the Grievance Committee or the Chairman OF THE HEARING COMMITTEE of the Disciplinary Hearing Commission depending upon the agency ordering the reprimand. The letter of reprimand shall be served upon the accused attorney or defendant and a copy shall be filed with the Secretary and shall be considered confidential.

(A)(2) Public Censure, suspension, or disbarment. The Chairman OF THE HEARING COMMITTEE of the Disciplinary Hearing Commission or the Chairman of the Grievance Committee shall file the order of public censure, suspension or disbarment with the Secretary. The Secretary shall cause a certified copy of the order to be entered upon the judgment docket of the superior court of the county wherein is located the last address listed on the register of members by the disciplined member and filed with the Clerk of the Supreme Court of North Carolina. A judgment of suspension or disbarment shall be effective throughout the State.

NORTH CAROLINA
WAKE COUNTY

I, B. E. James, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar have been duly adopted by the Council of the North Carolina State Bar and that said Council did by resolution, at a regular quarterly meeting unanimously adopt said amendment to the Rules and Regulations of the North Carolina State Bar as provided in General Statutes Chapter 84.

Given over my hand and the Seal of the North Carolina State Bar, this 23rd day of January, 1985.

B. E. JAMES
Secretary

After examining the foregoing amendments to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 30th day of January, 1985.

JOSEPH BRANCH
Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar be spread upon the Minutes of the Supreme Court and that they be published in the forthcoming volume of the Reports as provided by the Act incorporating the North Carolina State Bar.

This the 30th day of January, 1985.

VAUGHN, J.
For the Court

AMENDMENT TO BAR RULES RELATING TO TRUST ACCOUNTS

The following amendment to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar was duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on April 13, 1984.

BE IT RESOLVED by the Council of the North Carolina State Bar that Article IX, Section 28 as appears in 205 NC 361 and as amended in 288 NC 770 be and the same is hereby rewritten to read as follows:

§ 28 Trust Accounts; audit

(1) For reasonable cause, the Chairman of the Grievance Committee is impowered to issue an investigative subpoena to a member compelling the production of any records required to be kept relative to the handling of client funds and property by the Code of Professional Responsibility for inspection, copying, or audit by the Counsel or his staff. For the purposes of this rule, any of the following shall constitute reasonable cause:

(a) any sworn statement of grievance received by The North Carolina State Bar alleging facts which, if true, would constitute misconduct in the handling of a client's funds or property;

(b) any facts coming to the attention of The North Carolina State Bar, whether through random review as contemplated by subpart (2) of this rule or otherwise, which, if true, would constitute a probable violation of any provision of the Code of Professional Responsibility concerning the handling of client funds or property.

(c) any finding of probable cause, indictment, or conviction relative to a criminal charge involving moral turpitude.

The grounds supporting the issuance of any such subpoena shall be set forth upon the face of the subpoena.

(2) The Chairman of the Grievance Committee may randomly issue investigative subpoenas to members compelling the production of any records required to be kept relative to the handling of client funds or property by the Code of Professional Responsibility for inspection by the Counsel or his staff to determine compliance with

the procedures and record-keeping requirements established by the Code of Professional Responsibility. Prior to the issuance of any such subpoena, procedures for random selection shall be adopted by the Council. Any such subpoena shall disclose upon its face its random character and contain a verification of the Secretary that it was issued in accordance with the procedures referred to above. No member shall be subject to random selection under this sub-section more frequently than once in three years.

(3) No subpoena issued pursuant to this rule may compel production within five days of service.

(4) The Rules of Evidence applicable in the Superior Courts of the State shall govern the use of any material subpoenaed pursuant to this rule in any hearing before the Disciplinary Hearing Commission. Where practicable, notice of The North Carolina State Bar's intended use at hearing of any such material shall be given to any client involved, unless such client is already aware of such intended use, and, upon good cause shown by such client, the admission of the same shall be under such conditions as shall be reasonably calculated thereafter to protect the confidences of such client. Permissible means of protection shall not prejudice the subject attorney and may include, but are not limited to, excision, in camera production, retention in sealed envelopes, or similar devices.

(5) No assertion of attorney-client privilege or confidentiality shall operate to prevent an inspection or audit of a trust account as provided in this rule.

NORTH CAROLINA
WAKE COUNTY

I, B. E. James, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar have been duly adopted by the Council of the North Carolina State Bar and that said Council did by resolution, at a regular quarterly meeting unanimously adopt said amendment to the Rules and Regulations of the North Carolina State Bar as provided in General Statutes Chapter 84.

Given over my hand and the Seal of the North Carolina State Bar, this the 17th day of April, 1984.

B. E. JAMES
Secretary

After examining the foregoing amendment to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same is not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 29th day of August, 1984.

JOSEPH BRANCH
Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendment to the Rules and Regulations of the North Carolina State Bar be spread upon the Minutes of the Supreme Court and that they be published in the forthcoming volume of the Reports as provided by the Act incorporating the North Carolina State Bar.

This the 29th day of August, 1984.

FRYE, J.
For the Court

AMENDMENT TO CODE OF PROFESSIONAL RESPONSIBILITY

The following amendment to the Code of Professional Responsibility of the Certificate of Organization of the North Carolina State Bar was duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on April 13, 1984.

BE IT RESOLVED by the Council of the North Carolina State Bar that Article X, Canon 9 of the Canons of Ethics and Rules of Professional Responsibility of the Certificate of Organization of the North Carolina State Bar as appears in 205 NC 865 and as amended in 283 NC 847 be amended by deleting the current DR9-102 and rewriting the same to read as follows:

DR9-102 Preserving Identity of Funds and Property of a Client.

(A) PRESERVING THE IDENTITY OF CLIENT FUNDS AND PROPERTY, PROHIBITION OF COMMINGLING OF ATTORNEY AND CLIENT FUNDS AND PROPERTY.

(1) Any property received by a lawyer in a fiduciary capacity shall at all times be held and maintained separately from the lawyer's property, designated as such, and disbursed only in accordance with these rules.

(2) As a prerequisite to the receipt of any money or funds belonging to another person or entity, either from a client or from third parties, a lawyer shall maintain one or more bank accounts, separately identifiable from any business or personal account of the lawyer, which account or accounts shall be clearly labeled and designated as a trust account. The account or accounts shall be maintained at a bank in North Carolina, unless otherwise directed in writing by the client. For purposes of Disciplinary Rule 9-102, the following definitions will apply:

(a) a "bank" is defined as a federally or North Carolina chartered bank, savings and loan association, or credit union.

(b) a "trust account" is an account maintained under the Disciplinary Rules in which the lawyer holds any funds in a fiduciary relationship, including those held on behalf of or belonging to a client, other than those funds held as a court appointed fiduciary.

(c) the term "lawyer" shall include all members of the North Carolina State Bar and any law firm in which they are members unless the context clearly indicates otherwise.

(d) the term "client" shall include all persons, firms, or entities for which the lawyer performs any services, including acting as an escrow agent.

(e) the term "instrument" shall include any instrument under the Uniform Commercial Code and any record of the electronic transfer of funds.

(3) All money or funds received by a lawyer either from a client or from a third party to be delivered all or in part to a client, except that received for payment of fees presently owed to the lawyer by the client or in reimbursement for expenses properly advanced by the lawyer on behalf of the client, shall be deposited in a lawyer trust account. No funds belonging to the lawyer shall be deposited into the trust account or accounts except:

(a) funds sufficient to open or maintain an account, pay any bank service charges, or pay any intangibles tax, or

(b) funds belonging in part to a client and in part presently or potentially to the lawyer. Such funds shall be deposited into the trust account, but the portion belonging to the lawyer shall be withdrawn when the lawyer becomes entitled to the funds unless the right of the lawyer to receive the portion of the funds is disputed by the client, in which event the disputed portion shall remain in the trust account until the dispute is resolved.

(4) Except as authorized by Disciplinary Rule 9-102(C), interest earned on funds deposited in a trust account (less any deduction for bank service charges, fees of the bank, and intangible taxes collected by the bank with respect to the funds) shall belong to the client or clients whose funds have been deposited. The lawyer shall have no right or claim to such interest. A lawyer shall not use or pledge the funds held in a trust account to obtain credit or other personal financial benefit.

(5) Any property or securities belonging to a client received by a lawyer shall be promptly identified and labeled as the property of the client and placed in a safe deposit box or other place of safekeeping as soon as practicable. The lawyer shall notify the client of the location of the property kept for safekeeping by the lawyer. Any safe deposit box used to safekeep client property shall be located in this state unless the client consents in writing to another location. The lawyer shall not keep any property belonging to the lawyer in such safe deposit box and shall notify the institution where the box is located that the contents of the box are held by the lawyer in a fiduciary capacity.

(6) Any property or titles to property, personal or real, delivered to the attorney as security for the payment of any fees or other obligation owed to the lawyer by the client shall be held in trust under these Disciplinary Rules and shall clearly indicate that the property is held in trust as security for the obligation and shall not appear as a direct conveyance to the lawyer. This provision does not apply where the transfer of the property is for payment of fees presently owed to the lawyer by the client; such transfers are subject to the Disciplinary Rules governing fees and other business transactions between the lawyer and client.

(B) RECORD KEEPING AND ACCOUNTING OF CLIENT FUNDS OR PROPERTY

(1) A lawyer shall promptly notify a client of the receipt of any funds, securities, or property belonging in whole or in part to the client.

(2) A lawyer shall maintain complete records of all funds, securities, or other property of a client received by the lawyer. A lawyer shall retain the records required under Disciplinary Rule 9-102 for a period of six (6) years following completion of the transactions generating the records.

(3) The minimum records of funds received and disbursed by the lawyer shall consist of the following:

(a) A journal, file of receipts, file of deposit slips, or checkbook stubs listing the source, client, and date of the receipt of all trust funds. All receipts of trust money shall be deposited intact with the lawyer retaining a duplicate deposit slip or other rec-

ord sufficiently detailed to show the identity of the item. Where the funds received are a mix of trust funds and non-trust funds, then the deposit shall be made to the trust account intact and the non-trust portion shall be withdrawn when the bank has credited the account upon final settlement or payment of the instrument.

(b) A journal, which may consist of cancelled checks, showing the date, recipient of all trust fund disbursements, and the client balance against which the instrument is drawn. An instrument drawn from the account for payment of the fees or expenses to the lawyer shall be made payable to the lawyer and indicate from which client balance the payment is drawn. No instruments drawn on the trust account shall be payable to cash or bearer.

(c) A file or ledger containing a record for each person or entity from whom or for whom trust money has been received which shall accurately maintain the current balance of funds held in the trust account for that person.

(d) All cancelled checks drawn on the trust account whether or not the checks constitute the journal required in (b) above.

(e) Any bank statements or documents received from the bank regarding the account, including but not limited to notices of the return of any instrument drawn on the account for insufficient funds.

(4) A lawyer shall reconcile the trust account balances of funds belonging to all clients at least quarterly. A lawyer shall render to the client appropriate accountings of the receipt and disbursement of any funds, securities, or property belonging to the client in the possession of the lawyer. Accountings of funds shall be in writing. An accounting shall be provided to the client upon the completion of the disbursement of the funds, securities, or property held by the lawyer, at such other times as may be reasonably requested by the client, and at least annually if funds are retained for a period of more than one year.

(5) A lawyer shall promptly pay or deliver to the client or to third persons as directed by the client the funds,

securities, or properties belonging to the client to which the client is entitled in the possession of the lawyer.

(6) Every lawyer maintaining a trust account shall file with the bank where the account is maintained a directive to the drawee bank as follows: Such bank shall report to the Executive Director of the North Carolina State Bar, solely for its information, when any check drawn on the trust account is returned for insufficient funds. No trust account shall be maintained in any bank which does not agree to make such reports pursuant to the directive.

(7) A lawyer shall produce any of the records required to be kept by this rule upon lawful demand made in accordance with the rules and regulations of The North Carolina State Bar.

(C) INTEREST ON LAWYERS' TRUST ACCOUNTS

(1) Pursuant to a plan promulgated by the North Carolina State Bar and approved by the North Carolina Supreme Court, a lawyer may elect to create or maintain an interest bearing trust account for those funds of clients which, in his good faith judgment, are nominal in amount or are expected to be held for a short period of time. A lawyer may be compelled to invest on behalf of a client in accordance with Disciplinary Rule 9-102(A)(4), only those funds not nominal in amount or not expected to be held for a short period of time. Funds deposited in a permitted interest bearing trust account under the plan must be available for withdrawal upon request and without delay. The account shall be maintained in a depository institution authorized by state or federal law to do business in North Carolina and insured by the Federal Deposit Insurance Corporation, the Federal Savings and Loan Insurance Corporation, or the North Carolina Guaranty Corporation. A lawyer participating in the plan shall deliver to all clients from whom or for whose benefit such funds are received a notice reading substantially as follows and comply with its provisions:

IMPORTANT NOTICE TO CLIENTS.
THIS OFFICE PARTICIPATES IN THE
NORTH CAROLINA PLAN REGARDING THE
GENERATION OF INTEREST ON ATTORNEYS'
TRUST ACCOUNTS.

Under this plan, funds deposited on behalf of a client that are nominal in amount or are expected to be held for a short period of time will be deposited in an interest bearing trust account and the interest generated will be remitted to the North Carolina State Bar to fund programs for the public's benefit. The costs of maintaining an interest bearing account on an individual client's funds which are nominal in amount or held for a short period of time exceed the amount of interest that may be earned on such funds. Therefore, such client funds are placed in one trust account from which distribution is made at the client's direction and, until recent changes in banking laws, the trust account could not earn interest. Under current law, a trust account is permitted to earn interest under certain circumstances. It is only when all client funds are deposited into the single account with the interest going to a public purpose that such an account can be established. Under no conditions, including any request that the funds not be placed in such an account, can the client benefit individually from the interest earned. The attorney will not receive any of the interest generated under the plan.

(2) Lawyers or law firms electing to deposit client funds in a trust account under the plan shall direct the depository institution:

(a) to remit interest or dividends, as the case may be (less any deduction for bank service charges, fees of the depository institution, and intangible taxes collected with respect to the deposited funds) at least quarterly to the North Carolina State Bar;

(b) to transmit with each remittance to the North Carolina State Bar a statement showing the name of the lawyer or law firm maintaining the account with respect to which the remittance is sent and

the rate of interest applied in computing the remittance;

(c) to transmit to the depository lawyer or law firm at the same time a report showing the amount remitted to the North Carolina State Bar and the rate of interest applied in computing the remittance;

(3) Certificates of Deposit may be obtained by a lawyer or law firm on some or all of any deposited funds of clients, so long as there is no impairment of the right to withdraw or transfer principal immediately.

NORTH CAROLINA
WAKE COUNTY

I, B. E. James, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendment to the Code of Professional Responsibility of the North Carolina State Bar have been duly adopted by the Council of the North Carolina State Bar and that said Council did by resolution, at a regular quarterly meeting unanimously adopt said amendment to the Rules and Regulations of the North Carolina State Bar as provided in General Statutes Chapter 84.

Given over my hand and the Seal of the North Carolina State Bar, this the 18th day of April, 1984.

B. E. JAMES
Secretary

After examining the foregoing amendment to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same is not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 29th day of August, 1984.

JOSEPH BRANCH
Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendment to the Rules and Regulations of the North Carolina State Bar be spread upon the Minutes of the Supreme Court and that it be published in the forthcoming volume of the Reports as provided by the Act incorporating the North Carolina State Bar.

This amendment shall be effective on and after the 1st day of January, 1985.

By order of the Court in Conference, this 29th day of August, 1984.

FRYE, J.
For the Court

AMENDMENTS TO BAR RULES RELATING TO APPOINTMENT OF COUNSEL FOR INDIGENT DEFENDANTS

The following amendments to the Rules and Regulations of the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on July 13, 1984 and October 19, 1984.

BE IT RESOLVED by the Council of the North Carolina State Bar that Article VI, Section 5 as appears in 275 NC 709 and 294 NC 750-751 be and the same are hereby amended by rewriting Sections 4.1; 4.2; 4.5 and 4.6 to read as follows:

4.1 The North Carolina State Bar shall adopt a model plan for the appointment of counsel for indigent persons charged with certain crimes or otherwise entitled to representation. Each judicial district bar not served by a public defender's office shall adopt a plan for the appointment of counsel for indigent persons which provides for the appointment of experienced counsel for persons charged with serious crimes, with respect to which the Model plan may serve as a guide or example. Such plan may be applicable to the entire district, or, at the election of the district bar, separate plans may be adopted by the district bar for use in each separate county within the district.

4.2 Such plan or plans as adopted by the judicial district bar shall be certified to the Council of the North Carolina State Bar for its approval, following which the plan or plans shall be certified to the Clerk of Superior Court of each county to which each plan is applicable by the Secretary of the North Carolina State Bar and shall constitute the method by which counsel shall be selected in said districts for appointment of counsel to indigent defendants. Thereafter all appointments of counsel for indigent defendants in said district shall be made in conformity with such plan or plans, unless the trial judge in the exercise of his discretion deems it proper in furtherance of justice to appoint as counsel for an indigent defendant or defendants some lawyer or lawyers residing and practicing in the judicial district, who is or are not on the plan or list certified to the Clerk of Superior Court, and if so, he is authorized to appoint as counsel to represent an indigent defendant some lawyer or lawyers not on said plan or list residing and practicing in the judicial district.

4.5 The Clerk of Superior Court of each county shall file or record in his office, maintain and keep current the plan for the assignment of counsel applicable to said county as certified to him by the Secretary of the North Carolina State Bar.

4.6 The Clerk of Superior Court of each county shall keep a record of all counsel eligible for appointment under the plan applicable to said county as certified to him by the Secretary of the North Carolina State Bar.

REGULATIONS FOR APPOINTMENT OF COUNSEL IN INDIGENT CASES IN THE _____ JUDICIAL DISTRICT

ARTICLE I

PURPOSE

The purpose of these regulations is to provide for effective representation of indigent criminal defendants at all stages of trial and appellate proceedings.

ARTICLE II

APPLICABILITY

These regulations apply to any criminal case arising in the _____ Judicial District in which the Court has determined that the defendant is entitled to the appointment of Counsel. Reference to the masculine gender shall be construed to include both male and female persons. Reference to the singular shall, as appropriate, be construed to include the plural.

ARTICLE III

LISTS OF ATTORNEYS

Section 3.1. Any attorney engaged in the private practice of law primarily in the _____ Judicial District who

(a) maintains an office in the _____ Judicial District, and

(b) practices criminal law in the Courts of the _____ _____Judicial District to an appreciable extent, or intends or desires to do so,

may be placed on one of three lists governing the appointment of counsel in criminal cases involving indigent persons. No other attorneys will be placed on the lists.

Section 3.2. Attorneys included on the first list may only be appointed to represent defendants charged with misdemeanors or felonies punishable by imprisonment for not more than five years.

Section 3.3. Attorneys on the second list may be appointed to represent defendants charged with misdemeanors or felonies other than capital crimes, provided that an attorney may request the Committee on Indigent Appointments that he not be subject to appointment to represent defendants charged only with misdemeanors. If the Committee approves the request, the list shall reflect the limited availability of that attorney for appointments.

Section 3.4. Attorneys on the third list may be appointed to represent defendants charged with any crimes, provided that an attorney may request the Committee on Indigent Appointments that he not be subject to appointment to represent defendants charged only with misdemeanors. If the Committee approves the request, the list shall reflect the limited availability of that attorney for appointments.

Section 3.5. To insure an orderly transition from operation under any regulations presently in effect to operation under these regulations, the Committee on Indigent Appointments shall, prior to the effective date of these regulations, meet and develop three lists of attorneys of the types described herein from the roster of attorneys currently accepting appointments in indigent cases in the _____ Judicial District. The first list shall include all such attorneys who have been licensed less than two years or who have been admitted by comity. The second list shall include all such attorneys who have been licensed for two years or more. The third list shall include all such attorneys who have had not less than five years experience in the general practice of law and who have demonstrated proficiency in the field of criminal trial practice. With respect to these initial lists, any other requirement not otherwise met by any listed attorney is hereby waived unless the Committee determines that it ought not to be waived.

Section 3.6. Subject to the exception contained in Section 3.5, requirements for inclusion on the three lists are as follows:

(a) An attorney licensed to practice law in North Carolina may be included on the first list if the Committee on Indigent Appointments finds that:

(1) He is competent to represent criminal defendants charged with misdemeanors and felonies, and

(2) Two attorneys who have engaged in the practice of law in the _____ Judicial District for not less than three years preceding the Committee's consideration, at least one of whom being included on one of the three lists, have stated in writing that they believe he is competent to represent criminal defendants charged with misdemeanors and felonies and that they recommend that he be included on the list, provided that the recommending attorneys may not be members of the petitioning attorney's law firm at the time of recommendation.

(b) An attorney who has been licensed to practice law in North Carolina for not less than two years or who has been admitted to the North Carolina State Bar by comity may be included on the second list if the Committee finds that:

(1) He has demonstrated proficiency in the field of criminal trial practice and has the ability to handle appellate matters, and

(2) Two attorneys who have engaged in the private practice of law in the _____ Judicial District for not less than four years preceding the Committee's consideration, at least one of whom being included on one of the three lists, have stated in writing that they believe he is competent to represent criminal defendants charged with felonies and that they recommend that he be included on the list, provided that the recommending attorneys may not be members of the petitioning attorney's law firm at the time of recommendation, and

(3) He is competent to represent criminal defendants charged with felonies.

(c) An attorney who has been licensed to practice law in North Carolina for not less than five years may be included on the third list if the Committee finds that:

(1) He has demonstrated proficiency in the field of criminal trial practice and has the ability to handle appellate matters, and

(2) Two attorneys who have engaged in the private practice of law in the _____ Judicial District for not less than five years preceding the Committee's consideration, at least one of whom being included on one of the three lists, have stated in writing that they believe he is competent to represent defendants charged with capital crimes and that they recommend that he be included on the third list, provided that the recommending attorneys may not be members of the petitioning attorney's law firm at the time of recommendation, and

(3) He has not less than five years experience in the general practice of law, provided that the term "general practice of law" shall be deemed to include service as a prosecuting attorney in any District Attorney's office, and

(4) He is competent to represent criminal defendants charged with capital crimes.

ARTICLE IV

COMMITTEE ON INDIGENT APPOINTMENTS

Section 4.1. A Committee on Indigent Appointments is hereby established to assist in the implementation of these regulations. The Committee shall have authority to act when the regulations become effective.

Section 4.2. All members of the Committee shall be attorneys who

(a) Are included on one of the appointment lists, and

(b) Have practiced criminal law in the _____ Judicial District, whether as a prosecutor or defense counsel, for not less than five years, and

(c) Are knowledgeable about practicing attorneys in the _____ Judicial District.

Section 4.3. The Committee shall consist of _____ members appointed by the President of the _____ Judicial District Bar. At least one member shall be appointed from each county in the District. Members of the Committee shall be appointed for terms of two years, except that initially a minority of the members shall be designated to serve one year terms in order to stagger terms. The appointments shall be made by letter, a copy of which shall be maintained in the records of the Committee. No member shall serve two consecutive terms, except that a person who has been appointed to replace a member who did not complete his term may be appointed to a full term following his completion of the partial term. Any member who resigns or otherwise becomes ineligible to continue serving as a member shall be replaced for his term as soon as practicable.

Section 4.4. The President of the _____ Judicial District Bar shall appoint one of the members as Chairman of the Committee, who shall serve at the pleasure of the President as shall all other members of the Committee.

Section 4.5. The Committee shall meet at the call of the Chairman upon reasonable notice. The first meeting shall be on _____. Thereafter, the Committee shall meet as often as is necessary to dispatch its business.

Section 4.6. The Committee shall have complete authority to accomplish the following:

(a) Supervise the administration of these regulations;

(b) Review requests from attorneys concerning their placement on any list and obtain information pertaining to such placement;

(c) Approve or disapprove an attorney's addition to or deletion from any list or the transfer of any attorney from one list to another, provided that an attorney's request to be deleted from a list or transferred to a lower numbered list shall not require Committee approval.

(d) Establish procedures with which to carry out its business;

(e) Interview attorneys seeking placement on any list and witnesses for or against such placement.

Section 4.7. A majority of the Committee must be present at any meeting in order to constitute a quorum. The Committee may take no action unless a quorum is present. A majority vote in favor of a motion or any proposed action shall be required in order for the motion to pass or for the action to be taken.

Section 4.8. The Committee shall meet in private, except it may invite persons to make limited appearances to be interviewed. Discussions of the Committee, its records, and its actions shall be treated as confidentially as possible. The names of the members of the Committee shall not be confidential.

ARTICLE V

PLACEMENT OF ATTORNEYS ON LIST

Section 5.1. Any attorney who wishes to have his name added to or deleted from any list, or to have his name transferred from one list to another, shall file a written request with the Administrator. The request shall include information that will facilitate the Committee's determination whether the attorney meets the standards set forth in Article III for placement on a certain list. The written statements of competency required by Article III must be attached to the request.

Section 5.2. The Administrator shall maintain records for the Committee and shall advise each member of the Committee of the name of the requesting attorney and the nature of his request before the Committee meets to review the request. The Administrator shall assure that all requests properly filed are brought to the Committee's attention at the next meeting at which it is practicable for the Committee to review the request.

Section 5.3. The Administrator shall assure that all District Court Judges, Resident Superior Court Judges, any special Superior Court Judge with a permanent office in the _____ Judicial District, and the District Attorney for the _____ Judicial District are advised of any request concerning placement on any list so that such officials will have an opportunity to comment on the request to the Committee.

Section 5.4. When the Committee meets to review placement requests, it may require any requesting attorney to appear before it to be interviewed and may require information in addition to that submitted in the request. Any member of the Committee may discuss requests with other members of the Bar in a

confidential manner and may relate information obtained thereby to the other members. Rules of Evidence do not apply with respect to the review of requests. The Committee may hold a request in abeyance for a reasonable period of time while obtaining additional information.

Section 5.5. The Committee shall determine whether an attorney requesting to be added to a list when he is not currently on any list or to be transferred from a lower numbered list to a higher numbered list (such as from the first list to the second list) meets all the applicable standards set out in Article III. The request shall be granted or the addition or transfer allowed if the Committee finds that he does meet all the standards. Conversely, the request shall be denied if the Committee does not find that he meets all the standards. The findings shall be reduced to writing and kept in the regular records of the Committee by the Administrator. The Committee shall assure that the requesting attorney is given prompt notice of the action taken with respect to his request and is advised of the basis for denial if the request is not granted.

Section 5.6. Only the Senior Resident Superior Court Judge may, in his discretion, delete the name of an attorney from a list or transfer an attorney from a higher numbered list to a lower numbered list.

Section 5.7. If at any time it reasonably appears to the Committee that an attorney no longer meets a standard set forth in Article III for the list on which he is placed, or that he can no longer meet the responsibilities of representing indigent defendants with respect to such list, the Committee shall direct the attorney to show cause why he should not be deleted from the list or transferred from a higher numbered list to a lower numbered list. If the attorney cannot show sufficient cause, the Committee may take appropriate action, including suspending the attorney from receiving appointments in indigent cases for a definite or indefinite time, or deleting his name from the list he is on, or transferring him from a higher numbered list to a lower numbered list. Appropriate written findings shall be made by the Committee in this regard, and the attorney shall be informed of the basis of any action taken.

Section 5.8. Whenever an attorney who provides information to the Committee, collectively or through any member, requests that his name not be used or that his information be treated confidentially, his request shall be granted unless doing so results in manifest unfairness.

ARTICLE VI

APPOINTMENT PROCEDURE (NON-CAPITAL CASES)

Section 6.1. The Administrator shall provide the clerk in each courtroom in the District and Superior Criminal Courts of the _____ Judicial District with current lists of attorneys subject to appointment in indigent cases. Attorneys shall be appointed only in accordance with the lists on which they appear, and only in cases to be tried in counties in which they maintain offices, unless they agree in advance to accept cases from other counties.

Section 6.2. Each courtroom clerk shall maintain an alphabetical record of attorneys subject to appointment to represent indigents. Beside each attorney's name shall appear the number of any list he is on. The Court shall proceed in alphabetical sequence in appointing attorneys. If an attorney's name is passed over because he is not on a list relating to particular charge, the Court shall return to his name for the next appointment consistent with his lists. The Court may pass over the name of any attorney known not to be reasonably available because of vacation, illness, or other reasons.

Section 6.3. In its discretion, the Court may appoint an attorney in any case without regard to alphabetical sequence or an attorney not maintaining an office in the county where the case is to be tried.

Section 6.4. The Clerk shall provide notice of the appointment to the attorney concerned as soon as possible. Further, the Clerk shall advise the defendant of the name of his attorney.

Section 6.5. The Court may appoint an attorney to represent more than one defendant in a single case.

ARTICLE VII

APPOINTMENTS IN CAPITAL CASES

Section 7.1. In addition to the provisions of Article VI, the provisions of this Article shall apply to the appointment of counsel in capital cases.

Section 7.2. An indigent defendant charged with a capital offense shall be entitled to be represented by one counsel, except that in appropriate cases in the discretion of the Court, one additional counsel may be appointed at either the trial or appellate

level, or both levels. The assistant counsel may be on the second list or the third list of attorneys.

Section 7.3. No attorney shall be appointed to represent at the trial level any indigent defendant charged with a capital crime:

(a) Who has less than five years experience in the general practice of law, provided that the Court may, in its discretion, appoint as assistant counsel an attorney who has less experience; or

(b) Who has not been found by the Court appointing him to have a demonstrated proficiency in the field of criminal trial practice.

For the purpose of this section, the term "general practice of law" shall be deemed to include service as a prosecuting attorney in any District Attorney's office.

ARTICLE VIII

APPELLATE APPOINTMENTS

Section 8.1. If a criminal defendant who has given notice of appeal from a conviction is found to be eligible, because of indigency, for appointment of counsel at the appellate level, the attorney representing the defendant at the trial level shall be appointed to represent the defendant at the appellate level if the attorney is included on at least one of the lists described herein, and, if not, may be appointed only with his (the attorney's) consent. If the attorney representing the defendant at the trial level was retained, he may be appointed to represent the defendant at the appellate level even though he does not meet all the requirements of Article III or the other pertinent provisions of these regulations. For good cause, the attorney at the trial level may be relieved of responsibility for the appeal. Whenever it is otherwise necessary to appoint an attorney to represent an indigent person at the appellate level, the attorney appointed shall be selected in a manner consistent with appointment of counsel at the trial level.

Section 8.2. No attorney shall be appointed to represent at the appellate level any indigent defendant convicted of a capital crime:

(a) Who has less than five years experience in the general practice of law, provided, however, that the

Court may, in its discretion, appoint as assistant counsel an attorney who has less experience; or

(b) Who has not been found by the Court to have a demonstrated proficiency in the field of appellate practice.

For the purpose of this section, the term "general practice of law" shall be deemed to include service as a prosecuting attorney in any District Attorney's office.

ARTICLE IX

ADMINISTRATION

Section 9.1. The Senior Resident Superior Court Judge for the _____ Judicial District shall designate a person to serve as Administrator of these regulations.

Section 9.2. The Administrator will perform the duties described previously and particularly shall:

(a) Maintain records relating to these regulations and to the actions of the Committee on Indigent Appointments;

(b) Keep current the three lists of attorneys;

(c) Assist the courtroom clerks and the Clerk of Superior Court in carrying out these regulations;

(d) Attend meetings of the Committee as appropriate;

(e) Inform the judges of the District and the District Attorney and the members of the Committee of requests by attorneys concerning placement on any lists;

(f) Perform other administrative tasks necessary to the implementation of these regulations.

Section 9.3. The Administrator shall have such office, supplies, and equipment as can be provided by the Senior Resident Superior Court Judge or the Committee.

Section 9.4. The Clerk of Superior Court of each county in the _____ Judicial District shall file and keep current these regulations for the assignment of counsel as certified to him by the Secretary of the North Carolina State Bar.

Section 9.5. The Clerk of Superior Court of each county in the _____ Judicial District shall keep a record of all counsel eligible for appointment under these regulations and a permanent record of all appointments made in his county.

ARTICLE X

MISCELLANEOUS

Section 10.1. These regulations are issued pursuant to Article IV of the rules and regulations promulgated in accordance with North Carolina General Statute 7A-459 by the North Carolina State Bar Council, entitled Regulations Relating to the Appointment of Counsel for Indigent Defendants in Certain Criminal Cases, as set out in Appendix VIII of Volume 4A of The General Statutes of North Carolina, Constitutions and Appendix (published by The Michie Company). Nothing contained herein shall be construed or applied inconsistently with the regulations established by the North Carolina State Bar Council or with other provisions of State law.

Section 10.2. It is recognized that the Court has the inherent discretionary power in any case to decline to appoint a particular attorney to represent an indigent person. It is also recognized that occasionally the Court may determine that the interests of justice would be best served by appointing a particular lawyer to handle a particular case even though he is not next in alphabetical sequence or does not maintain an office in the county where the case is to be tried.

Section 10.3. These regulations shall be construed liberally in order to carry out the purpose stated in Article I.

Section 10.4. These regulations shall become effective on _____, and shall supersede any existing regulations or plan concerning the appointment of counsel in indigent cases.

APPROVED AND PROMULGATED THIS _____ DAY OF _____, 198_____.

NORTH CAROLINA
WAKE COUNTY

I, B. E. James, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its meetings on July 13, 1984 and October 19, 1984.

Given over my hand and the Seal of the North Carolina State Bar, this the 29th day of October, 1984.

B. E. JAMES
Secretary

After examining the foregoing amendments to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 15th day of NOVEMBER, 1984.

JOSEPH BRANCH
Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar be spread upon the Minutes of the Supreme Court and that they be published in the forthcoming volume of the Reports as provided by the Act incorporating the North Carolina State Bar.

This the 19th day of NOVEMBER, 1984.

FRYE, J.
For the Court

AMENDMENT TO BAR RULES RELATING TO STANDING COMMITTEES OF THE COUNCIL

The following amendment to the Rules, Regulations and the Certificate of Organization of the North Carolina State Bar was duly adopted by the Council of the North Carolina State Bar at its October 19, 1984 quarterly meeting.

BE IT RESOLVED by the Council of the North Carolina State Bar that Article VI, Section 5, Standing Committees of the Council, as appear in 221 NC 587 and as amended in 268 NC 734, 274 NC 608, 277 NC 742, 302 NC 637, 307 NC 725 and 308 NC 823 be and the same is hereby amended by adding a new section to read as follows:

m. Committee to Study the Competence of New Admittees. The purpose is to give assistance to new admittees to improve their practical skills and enhance their ability to serve the public competently.

NORTH CAROLINA
WAKE COUNTY

I, B. E. James, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendment to the Rules and Regulations of the North Carolina State Bar was duly adopted by the Council of the North Carolina State Bar at its meeting on October 19, 1984.

Given over my hand and the Seal of the North Carolina State Bar, this the 30th day of October, 1984.

B. E. JAMES
Secretary

After examining the foregoing amendment to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same is not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 4th day of December 1984.

JOSEPH BRANCH
Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendment to the Rules and Regulations of the North Carolina State Bar be spread upon the Minutes of the Supreme Court and that they be published in the forthcoming volume of the Reports as provided by the Act incorporating the North Carolina State Bar.

This the 4th day of December, 1984.

FRYE, J.
For the Court

RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR

ARTICLE IX
DISCIPLINE AND DISBARMENT OF ATTORNEYS
DISABILITY PROCEDURES

The following amendments to the rules and regulations of the North Carolina State Bar were originally adopted by the Council of the North Carolina State Bar at its quarterly meetings on October 24, 1974; July 18, 1975; October 16, 1975; and January 16, 1976. The rules were originally approved by the Supreme Court of North Carolina on the 4th day of November 1975. Since that date they have been amended from time to time which makes it imperative that they be reprinted in full in this issue of the Supreme Court Reports.

VI

Section 5. Standing Committees of the Council—

c. Committee on Grievances—

Grievance Committee of not less than fifteen members, one of whom shall be designated as Chairman. At least one vice-chairman shall be designated. The Committee shall have as members at least three councilors from each of the judicial divisions of the State. The Grievance Committee shall have the powers and duties set forth in Article IX of these rules, and shall report on the status of grievances, investigations and complaints at regular or special meetings of the Council as the Executive Committee may direct.[1]

ARTICLE IX

Discipline and Disbarment of Attorneys

Determination of Disability.

§ 1. General Provisions.

Discipline for misconduct is not intended as punishment for wrongdoing but is for the protection of the public, the courts and the legal profession. The fact that certain misconduct has re-

1. Amended by the Council and approved by the Supreme Court on 1/30/85, 310 NC 765.

mained unchallenged when done by others, when done at other times or that it has not been made the subject of disciplinary proceedings earlier, shall not be an excuse for any member of the bar.[2]

§ 2. Proceeding for Discipline.

The procedure to discipline members of the bar of this State shall be in accordance with the provisions hereinafter set forth.

District Bars shall not conduct separate proceedings to discipline members of the bar but shall assist and cooperate with The North Carolina State Bar in reporting and investigating matters of alleged misconduct on the part of the members of The North Carolina State Bar.

§ 3. Definitions.

Subject to additional definitions contained in other provisions of this chapter, the following words and phrases, when used in this article, shall have, unless the context clearly indicates otherwise, the meanings given to them in this section:

(1) **accused or accused attorney:** a member of The North Carolina State Bar who has been accused of misconduct or whose conduct is under investigation, but as to which conduct there has not yet been a determination of whether probable cause exists.

(2) **Appellate Division:** The Appellate Division of the General Court of Justice.

(3) **certificate of conviction:** the certified copy of any judgment wherein a member of The North Carolina State Bar is convicted of a criminal offense, forwarded to the Secretary-Treasurer by the clerk of any state or federal court.

(4) **Chairman of the Grievance Committee:** councilor appointed to serve as chairman of the Grievance Committee of The North Carolina State Bar.

(5) **Commission:** The Disciplinary Hearing Commission of The North Carolina State Bar.

2. In the second printing of the RED BOOK by the North Carolina State Bar, Revised Edition, August, 1978, there was a misprint which contained a proviso that had not been approved by the Supreme Court. The above language is the language approved by the Supreme Court.

(6) **Commission Chairman:** the Chairman of the Hearing Commission of The North Carolina State Bar.

(7) **complainant or complaining witness:** any person who has complained of the conduct of any member of The North Carolina State Bar to any officer or agency of The North Carolina State Bar.

(8) **complaint:** a formal pleading filed in the name of The North Carolina State Bar with the Commission Chairman against a member of The North Carolina State Bar after a finding of probable cause.

(9) **Council:** the Council of The North Carolina State Bar.

(10) **Councilor:** a member of The Council of The North Carolina State Bar.

(11) **Counsel:** the Counsel of The North Carolina State Bar appointed by the Council.

(12) **court or courts of this State:** a court authorized and established by the Constitution or laws of the State of North Carolina.

(13) **defendant:** a member of The North Carolina State Bar against whom a complaint is filed after a finding of probable cause.

(14) **disabled or disability:** condition of mental or physical incapacity interfering with the professional judgment or competence of an attorney; habitual intemperance; or the wilful and persistent failure to perform professional duties.

(15) **grievance:** alleged misconduct.

(16) **Grievance Committee:** the Grievance Committee of The North Carolina State Bar.

(17) **Hearing Committee:** a hearing committee designated under § 14(4).

(18) **incapacity or incapacitated:** condition determined in a judicial proceeding under the laws of this or any other jurisdiction that an attorney is mentally defective, an inebriate, mentally disordered, or incompetent from want of understanding to manage his or her own affairs by reason of the excessive use of intoxicants, drugs, or other cause.

(19) **Investigation:** the gathering of information with respect to alleged misconduct or disability or to reinstatement.

(20) **Investigator:** any person designated to assist in investigation of alleged misconduct or of reinstatement.

(21) **Letter of Caution:** communication from the Grievance Committee to an attorney stating that past conduct of the attorney, while not the basis for discipline, is not professionally acceptable or may be the basis for discipline if continued or repeated.

(22) **Letter of Notice:** a communication to an accused attorney setting forth the substance of a grievance.

(23) **Office of the Counsel:** the office and staff maintained by the Counsel of The North Carolina State Bar.

(24) **Office of the Secretary:** the office and staff maintained by the Secretary-Treasurer of The North Carolina State Bar.

(25) **party:** after a complaint has been filed, The North Carolina State Bar as plaintiff and the accused attorney as defendant.

(26) **plaintiff:** after a complaint has been filed, The North Carolina State Bar.

(27) **preliminary hearing:** hearing by the Grievance Committee to determine whether probable cause exists.

(28) **probable cause:** a finding by the Grievance Committee that there is reasonable cause to believe that a member of The North Carolina State Bar is guilty of misconduct justifying disciplinary action.

(29) **Secretary:** the Secretary-Treasurer of The North Carolina State Bar.

(30) **serious crime:** the commission of, attempt to commit, conspiracy to commit, solicitation or subornation of, any felony, or any crime that involves bribery, embezzlement, false pretenses and cheats, fraud, interference with the judicial or political process, larceny, misappropriation of funds or property, overthrow of the government, perjury or willful failure to file a tax return.

(31) **Supreme Court:** the Supreme Court of North Carolina.

(32) **consolidation of cases:** a hearing by a Hearing Committee of multiple charges, whether related or unrelated in substance, brought against one defendant.[3]

3. Amended by the Council and approved by Supreme Court on 5/11/77, 292 NC 743.

§ 4. State Bar Council—Powers and Duties in Discipline and Disability Matters.

The Council of The North Carolina State Bar shall have the power and duty:

(1) to supervise and conduct discipline and incapacity or disability proceedings in accordance with the provisions hereinafter set forth.

(2) to appoint members of the Disciplinary Hearing Commission as provided by statute.

(3) to appoint a Counsel. The Counsel shall serve at the pleasure of the Council. The Counsel shall be a member of The North Carolina State Bar but shall not be permitted to engage in the private practice of law.

(4) to order the transfer of a member to inactive status when such member has been judicially declared incompetent or has been committed to institutional care voluntarily or involuntarily because of incompetence or disability.

(5) to accept or reject the surrender of the license to practice law of any member of The North Carolina State Bar.[4]

(6) to order the disbarment of any member whose resignation is accepted or to refer the matter of discipline to the Disciplinary Hearing Commission for hearing and determination.[5]

(7) to review the report of any Hearing Committee upon a Petition for Reinstatement of a disbarred attorney or member transferred to inactive status because of a disability and make final determination as to whether the license shall be restored.[6]

§ 5. Chairman of the Grievance Committee—Powers and Duties.

(A) The Chairman of the Grievance Committee shall have the power and duty:

(1) to supervise the activities of the Counsel.

---

4. Amended by the Council and approved by Supreme Court on 8/28/84, 310 NC 756.

5. Amended by the Council and approved by Supreme Court on 8/28/84, 310 NC 756.

6. Amended by the Council and approved by Supreme Court on 8/28/84, 310 NC 756.

(2) to recommend to the Grievance Committee that an investigation be initiated.

(3) to recommend to the Grievance Committee that a grievance be dismissed.

(4) to direct a Letter of Notice to an accused attorney.

(5) to issue, at the direction and in the name of the Grievance Committee, a Letter of Caution, a Private Reprimand, or a Public Censure to an accused attorney.[7]

(6) to notify an accused attorney that a grievance has been dismissed, and to notify the complainant in accordance with § 21.[8]

(7) to call meetings of the Grievance Committee for the purpose of holding preliminary hearings.

(8) to issue subpoenas in the name of The North Carolina State Bar or direct the Secretary to issue such subpoenas.

(9) to administer oaths or affirmations to witnesses.

(10) to file and verify complaints and petitions in the name of The North Carolina State Bar.

(11) to determine whether proceedings should be instituted to activate a suspension which has been stayed.[9]

(B) The President, Vice-Chairman or senior Council member of the Grievance Committee shall perform the functions of the Chairman of the Grievance Committee in any matter when the Chairman is absent or disqualified.

§ 6. Grievance Committee—Powers and Duties.

The Grievance Committee shall have the power and duty:

(1) to direct the Counsel to investigate any alleged misconduct or disability of a member of The North Carolina State Bar coming to its attention.

---

7. Amended by the Council and approved by Supreme Court on 3/6/84, 308 NC 819.

8. Amended by the Council and approved by Supreme Court on 1/24/78, 293 NC 749.

9. Amended by the Council and approved by Supreme Court on 8/28/84, 310 NC 756.

(2) to hold preliminary hearings, find probable cause and direct that complaints be filed.

(3) to dismiss grievances upon a finding of no probable cause.

(4) to issue a Letter of Caution to an accused attorney in cases wherein misconduct is not established but the activities of the accused attorney are deemed to be improper or may become the basis for discipline if continued or repeated.

(5) to issue a private reprimand to an accused attorney in cases wherein minor misconduct is established.

(6) to issue a public censure of an accused attorney in cases wherein a complaint and hearing are not warranted but the conduct warrants more than a private reprimand.[10]

(7) to direct that petitions be filed seeking a determination whether a member of The North Carolina State Bar is disabled from continuing the practice of law by reason of mental infirmity or illness or because of addiction to drugs or intoxicants.[11]

§ 7. Counsel—Powers and Duties.

The Counsel shall have the power and duty:

(1) to investigate all matters involving alleged misconduct whether initiated by the filing grievance or otherwise.

(2) to recommend to the Chairman of the Grievance Committee that a matter be dismissed because the grievance is frivolous or falls outside the Council's jurisdiction; that a Letter of Caution or private reprimand be issued; or that the matter be passed upon by the Grievance Committee to determine whether probable cause exists.

(3) to prosecute all disciplinary proceedings before the Grievance Committee, Hearing Committees and the courts.

(4) to represent The North Carolina State Bar in any trial, hearing or other proceeding concerned with the alleged disability of a member due to mental infirmity, illness, or addiction to drugs or intoxicants.

10. Amended by the Council and approved by Supreme Court on 3/6/84, 308 NC 819.

11. Amended by the Council and approved by Supreme Court on 3/6/84, 308 NC 819.

(5) to appear on behalf of The North Carolina State Bar at hearings conducted by the Grievance Committee, Hearing Committees, or any other agency or court concerning any motion or other matter arising out of a disciplinary or disability proceeding.

(6) to appear at hearings conducted with respect to petitions for reinstatement or restoration of license by suspended or disbarred attorneys, to cross-examine witnesses testifying in support of the petition and to present evidence, if any, in opposition to the petition.

(7) to employ assistant counsel, investigators and other administrative personnel in such numbers as the Council may from time to time authorize.

(8) to maintain permanent records of all matters processed and the disposition of such matters.

(9) to perform such other duties as the Council may from time to time direct.

§ 8. Chairman of the Hearing Commission—Powers and Duties.

(A) The Chairman of the Disciplinary Hearing Commission of The North Carolina State Bar shall have the power and duty:

(1) to receive complaints alleging misconduct and petitions alleging the disability of a member filed by the Grievance Committee; petitions requesting reinstatement or restoration of license by members of The North Carolina State Bar who have been involuntarily transferred to inactive status, suspended, or disbarred; motions seeking the activation of suspensions which have been stayed; and affidavits of resignation from members who have surrendered their licenses.[12]

(2) to assign three members of the Commission, consisting of two members of The North Carolina State Bar and one layman, to hear such complaints, petitions, motions, or hold hearings on tender of surrender of license.[13] The Chairman shall designate one of the attorney members as

12. Amended by the Council and approved by Supreme Court on 8/24/84, 310 NC 756.

13. Amended by the Council and approved by Supreme Court on 8/28/84, 310 NC 757.

chairman of the Hearing Committee. Provided: that no member shall be appointed to serve on any committee reviewing a petition for reinstatement in a case wherein that member served on the Hearing Committee that originally ordered the discipline or transfer to inactive status. The Chairman of the Hearing Commission may designate himself to serve as one of the attorney members of any Hearing Committee and shall be chairman of any Hearing Committee on which he serves.

(3) to set the time and place for the hearing on each complaint or petition.

(4) to subpoena witnesses and compel their attendance, and to compel the production of books, papers, and other documents deemed necessary or material to any hearing. The Chairman may designate the Secretary to issue such subpoenas.

(5) to file findings, conclusions and orders of the Hearing Committees with the Secretary.

(6) may in his discretion consolidate for hearing two or more cases in which a subsequent complaint or complaints have been served upon a defendant within ninety days of the date of service of the first or a preceding complaint.[14]

(7) to prepare and issue letters of private reprimand.[15]

(B) The Vice-Chairman of the Disciplinary Hearing Commission shall perform the function of the Chairman in any matter when the Chairman is absent or disqualified.

§ 9. Hearing Committee—Powers and Duties.

Hearing Committees of the Disciplinary Hearing Commission of The North Carolina State Bar shall have the following powers and duties:

(1) to hold hearings on complaints alleging misconduct, petitions seeking a determination of disability or reinstatement, mo-

14. Amended by the Council and approved by Supreme Court on 5/11/77, 292 NC 743.

15. Amended by the Council and approved by Supreme Court on 1/24/78, 293 NC 749.

tions seeking the activation of suspensions which have been stayed, and affidavits of resignation.[16]

(2) to enter orders regarding discovery and other procedures in connection with such hearings, including, in disability matters, the examination of a member by such qualified medical experts as the committee shall designate.

(3) to subpoena witnesses and compel their attendance, and to compel the production of books, papers and other documents deemed necessary or material to any hearing. Subpoenas shall be issued by the chairman of the Hearing Committee in the name of the Disciplinary Hearing Commission of The North Carolina State Bar. The chairman may direct the Secretary to issue such subpoenas.

(4) to administer oaths or affirmations to witnesses at hearings.

(5) to make findings of fact and conclusions of law.

(6) to enter orders dismissing complaints in matters before the committee.

(7) to enter orders of discipline against attorneys in matters before the committee.

(8) to tax costs of the disciplinary procedures against any defendant against whom discipline is imposed: Provided, however, that such costs shall not include the compensation of any member of the Council, committees or agencies of The North Carolina State Bar.

(9) to enter orders transferring a member to inactive status on the grounds of incapacity or disability to continue the practice of law.

(10) to report to the Council its findings of facts and recommendations after hearings on petitions for reinstatement of disbarred attorneys or members transferred to inactive status because of a disability.[17]

(11) to enter orders reinstating suspended attorneys or denying reinstatement. Orders denying reinstatement may include ad-

16. Amended by the Council and approved by Supreme Court on 8/24/84, 310 NC 757.

17. Amended by the Council and approved by Supreme Court on 8/28/84, 310 NC 757.

ditional sanctions in the event violations of petitioner's order of suspension are found.[18]

(12) to enter orders of discipline against attorneys who have surrendered their licenses.[19]

(13) to enter orders activating suspensions which have been stayed or continuing the stays of such suspensions.[20]

§ 10. Secretary—Powers and Duties in Discipline and Disability Matters.

The Secretary shall have the following powers and duties in regard to discipline and disability procedures:

(1) to receive complaints for transmittal to the Counsel.

(2) to issue summons and subpoenas when so directed by the President, the Chairman of the Grievance Committee, the Chairman of the Disciplinary Hearing Commission, or the chairman of any Hearing Committee.

(3) to maintain a record and file of all grievances not dismissed as frivolous or determined to be outside the jurisdiction of The North Carolina State Bar by the Grievance Committee.

(4) to perform all necessary ministerial acts normally performed by the Clerk of the Superior Court in Complaints filed before the Disciplinary Hearing Commission.[21]

(5) to enter orders of reinstatement where petitions for reinstatement of suspended attorneys are unopposed by the Counsel.[22]

§ 11. Grievances—Form and Filing.

(1) A grievance may be filed by any person against a member of The North Carolina State Bar. Such grievance may be writ-

18. Amended by the Council and approved by Supreme Court on 8/28/84, 310 NC 757.

19. Amended by the Council and approved by Supreme Court on 8/28/84, 310 NC 757.

20. Amended by the Council and approved by Supreme Court on 8/28/84, 310 NC 757.

21. Amended by the Council and approved by Supreme Court on 11/13/80, 300 NC 753.

22. Amended by the Council and approved by Supreme Court on 8/28/84, 310 NC 757.

ten or oral, verified or unverified, and may be made initially to the Counsel. The Counsel may require that a grievance be reduced to writing in affidavit form and may prepare and distribute standard forms for this purpose. Such standard forms shall be available in the Office of the Counsel, the Office of the Secretary, and the offices of the several clerks of court in this State. Grievances reduced to writing on such standard form shall be transmitted by the complainant to the Office of the Secretary.

(2) Upon the direction of the Council or the Grievance Committee the Counsel shall undertake the investigation of such conduct of any member of The North Carolina State Bar as may be specified by the Council or Grievance Committee.

(3) The Counsel may undertake an investigation of any matter coming to the attention of the Counsel involving alleged misconduct of a member of The North Carolina State Bar: Provided that such investigation has been authorized by the Chairman of the Grievance Committee.

§ 12. Investigations; initial determination.

(1) Subject to the policy supervision of the Council and the control of the Chairman of the Grievance Committee, the Counsel, or other personnel under the authority of the Counsel, shall make such investigation of the grievance as may be appropriate and submit to the Chairman of the Grievance Committee a report detailing the findings of the investigation.

(2) Within fifteen days of the receipt of the initial or any interim report of the Counsel concerning any grievance, the Chairman of the Grievance Committee may; (1) treat the report as a final report and advise the Counsel to discontinue investigation; (2) direct the Counsel to conduct further investigation, including contact with the accused attorneys in writing or otherwise; or (3) send a Letter of Notice to the accused attorney.

(3) If a Letter of Notice is sent to the accused attorney, it shall be by registered or certified mail and shall direct that a response be made within fifteen days of receipt of the Letter of Notice. Such response shall be in a full and fair disclosure of all the facts and circumstances pertaining to the alleged misconduct.[23]

23. Amended by the Council and approved by Supreme Court on 9/7/83, 307 NC 723.

(4) If a timely response to a Letter of Notice is made, the Chairman of the Grievance Committee shall direct the Counsel to conduct further investigation or shall terminate the investigation and so inform the Counsel.

(5) For reasonable cause, the Chairman of the Grievance Committee may issue subpoenas to compel the attendance of witnesses, including the accused, for examination concerning the grievance and may compel the production of books, papers, and other documents or writings deemed necessary or material to the inquiry. Each subpoena shall be issued by the Chairman of the Grievance Committee, or by the Secretary at the direction of the Chairman. The counsel, assistance counsel, investigator, or any members of the grievance committee designated by the chairman may examine any such witness under oath or otherwise.[24]

(6) Within forty-five days of the receipt of the final report of the Counsel, or the termination of an investigation, the Chairman shall convene the Grievance Committee for a preliminary hearing or seek approval of the Committee of the dismissal of the grievance.

(7) Neither the unwillingness nor neglect of the complainant to sign a grievance, nor settlement, compromise or restitution shall, in itself, justify abatement of an investigation into the conduct of an attorney.

§ 13. Preliminary Hearing.

(1) The Grievance Committee shall determine whether there is probable cause to believe that a member of The North Carolina State Bar is guilty of misconduct justifying disciplinary action.

(2) The Chairman of the Grievance Committee shall have the power to administer oaths and affirmations.

(3) The Chairman shall keep a record of the number of members concurring in the finding of every grievance and shall file the record with the Secretary, but the record shall not be made public except on order of the Council.

(4) The Chairman shall have the power to subpoena witnesses and compel their attendance, and compel the production of

24. Amended by the Council and approved by Supreme Court on 1/30/85, 310 NC 765.

books, papers, and other documents deemed necessary or material to any preliminary hearing. The Chairman may designate the Secretary to issue such subpoenas.

(5) The Counsel, and assistant counsel, the witness under examination, interpreters when needed, and, if deemed necessary, a stenographer or operator of a recording device may be present while the Committee is in session, and deliberating, but no persons other than members may be present while the Committee is voting.[25]

(6) Disclosure of matters occurring before the Committee other than its deliberations and the vote of any member may be made to the Counsel or the Secretary for use in the performance of their duties. Otherwise a member, attorney, interpreter, stenographer, operator of a recording device, or any typist who transcribes recorded testimony may disclose matters occurring before the Committee only when so directed by a court of record preliminarily to or in connection with a judicial proceeding.

(7) At any preliminary hearing held by the Grievance Committee, a quorum of one-half of the members shall be required to conduct any business. Affirmative vote of a majority of members present shall be necessary for a finding that probable cause exists. The Chairman shall not be counted for quorum purposes and shall be eligible to vote regarding the disposition of any grievance only in case of a tie among the regular voting members.[26]

(8) If probable cause is found, the Chairman shall direct the Counsel to prepare and file a complaint against the accused attorney. If no probable cause is found the grievance shall be dismissed.

(9) If no probable cause is found but it is determined by the Grievance Committee that the conduct of the accused attorney is not in accord with accepted professional practice, or may be the subject of discipline if continued or repeated, the Committee may issue a Letter of Caution to the accused attorney. A record of such Letter of Caution shall be maintained in the Office of the Secretary.

---

25. Amended by the Council and approved by Supreme Court on 5/11/77, 292 NC 743.

26. Amended by the Council and approved by Supreme Court on 1/30/85, 310 NC 765.

(10) If probable cause is found but it is determined by the Grievance Committee that a complaint and hearing are not warranted, the Committee may issue a private reprimand to the accused attorney. A record of such private reprimand shall be maintained in the Office of the Secretary, and a copy of the private reprimand shall be served upon the accused attorney as provided in G.S. § 1A-1 Rule 4. Within fifteen days after service the accused attorney may refuse the private reprimand and request that charges be filed. Such refusal and request shall be addressed to the Grievance Committee and filed with the Secretary. The Counsel shall thereafter prepare and file a complaint against the accused attorney.[27]

(11) If probable cause is found and it is determined by the Grievance Committee that a complaint and hearing are not warranted but the conduct warrants more than a Private Reprimand, the Committee may issue a notice of proposed public censure to the accused attorney. A copy of the proposed public censure shall be served upon the accused attorney as provided in G.S. § 1A-1, Rule 4. The accused attorney must be advised that he may accept the public censure within fifteen days after service upon him or a formal complaint will be filed before the Disciplinary Hearing Commission. The accused attorney's acceptance must be in writing, addressed to the Grievance Committee and filed with the Secretary. Once the public censure is accepted by the accused, the discipline becomes public and must be filed as provided by § 23(A)(2).[28]

(12) Formal complaints shall be issued in the name of The North Carolina State Bar as plaintiff, signed or verified by the Chairman of the Grievance Committee.[29]

§ 14. Formal Hearing.

(1) Complaints shall be filed in the Office of the Secretary. The Secretary shall cause a summons and a copy of the complaint to be served upon the defendant attorney and thereafter a copy of the complaint shall be delivered to the Chairman of

27. Amended by the Council and approved by Supreme Court on 1/24/78, 293 NC 749.

28. Amended by the Council and approved by Supreme Court on 3/6/84, 308 NC 819.

29. Amended by the Council and approved by Supreme Court on 3/6/84, 308 NC 819.

the Disciplinary Hearing Commission, informing the Chairman of the date service on the defendant was effected.

(2) Service of complaints and other documents or papers shall be accomplished as set forth in G.S. § 1A-1 Rule 4.

(3) Complaints in disciplinary actions shall set forth the charges with sufficient precision to clearly apprise the defendant attorney of the conduct which is the subject of the complaint.

(4) Within seven days of the receipt of return of service of a complaint in the office of the Secretary, the Chairman of the Disciplinary Hearing Commission shall designate a Hearing Committee from among the members of the Commission. The Chairman shall notify the Counsel and the Defendant of the composition of the Hearing Committee. Such notice shall also contain the time and place determined by the Chairman for the hearing to commence. The commencement of the hearing shall be initially scheduled not less than sixty nor more than ninety days from the date of service of the complaint upon the Defendant, unless one or more subsequent complaints have been served on the Defendant within ninety days from the date of service of the first or a preceding complaint.

When one or more subsequent complaints have been served on the Defendant within ninety days from the date of service of the first or a preceding complaint, the Chairman of the Disciplinary Hearing Commission may consolidate the cases for hearing, and the hearing shall be initially scheduled not less than sixty nor more than ninety days from the date of service of the last complaint upon the Defendant attorney.[30]

(5) Within twenty days after the service of the complaint, unless further time is allowed by the Chairman upon good cause shown, the defendant shall file an answer to the complaint with the Secretary and shall deliver a copy to the Counsel.

(6) Failure to file an answer admitting, denying or explaining the complaint, or asserting the grounds for failing to do so, within the time limited or extended, shall be grounds for entry of the Defendant's default and in such case the allegations contained in the complaint shall be deemed admitted. The Secretary shall enter the Defendant's default when the fact of default is made to appear by motion of counsel for the Plaintiff or otherwise. The Plaintiff may thereupon apply to

30. Amended by the Council and approved by Supreme Court on 11/13/80, 300 NC 753 (Amended previously: 5/11/77, 292 NC 743; & 6/6/78, 294 NC 753).

the Hearing Committee for a default order imposing discipline, and the Hearing Committee shall thereupon enter an order, make findings of fact and conclusions of law based on the admissions, and order the discipline deemed appropriate. The Hearing Committee may, in its discretion, hear such further or additional evidence as it deems necessary prior to entering the order of discipline. For good cause shown, the Hearing Committee may set aside the Secretary's entry of default. After an order imposing discipline has been entered by the Hearing Committee upon the Defendant's default, the Hearing Committee may set aside the order in accordance with Rule 60(b) of the Rules of Civil Procedure.[31]

(7) Discovery shall be available to the parties in accordance with the North Carolina Rules of Civil Procedure, G.S. § 1A-1 Rules 26-37. Any discovery undertaken must be completed before the date scheduled for commencement of the hearing unless the time for discovery is extended, for good cause shown, by the Chairman. The Chairman may thereupon reset the time for the hearing to commence to accommodate completion of reasonable discovery.

(8) In order to provide opportunity for the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment, for settlement of a proceeding, or any of the issues therein, or consideration of means by which the conduct of the hearing may be facilitated and the disposition of the proceeding expedited, conferences between the parties for such purposes may be held at any time prior to or during hearings as time, the nature of the proceeding, and the public interest may permit. Any settlement or compromise of any issue in the case shall be subject to the approval of the Hearing Committee.

(9) At the discretion of the Chairman of the Hearing Committee a conference may be ordered prior to the date set for commencement of the hearing, and upon five days notice to the parties, for the purpose of obtaining admissions or otherwise narrowing the issues presented by the pleadings. Such conference may be held before any member of the committee designated by its chairman. At any prehearing or other conferences which may be held to expedite the orderly conduct and disposition of any hearing, there may be considered, in

31. Amended by the Council and approved by Supreme Court on 11/13/80, 300 NC 754.

addition to any offers of settlement or proposals of adjustment, the possibility of the following:

(a) the simplification of the issues.

(b) the exchange and acceptance of service of exhibits proposed to be offered in evidence.

(c) the obtaining of admission as to, or stipulations of, facts not remaining in dispute, or the authenticity of documents which might properly shorten the hearing.

(d) the limitation of the number of witnesses.

(e) the discovery or production of data.

(f) such other matters as may properly be dealt with to aid in expediting the orderly conduct and disposition of the proceeding.

(9.1) The Chairman of the Hearing Committee may hear and dispose of all pretrial motions excepting only motions the granting of which would result in continuance or dismissal of the charges or final judgment for either party.[32]

(10) The initial hearing date as set by the Chairman in accordance with subsection (4) of this section may be reset by the Chairman pursuant to subsections (5) and (7) of this section, and said initial hearing or reset hearing may be continued by the Hearing Committee for a period not to exceed thirty days, for good cause shown.[33]

(11) Unless necessary to afford the accused due process, no more than one continuance of a hearing and no more than one extension of time for filing of pleadings shall be granted. No continuance of any hearing other than adjournment from day to day shall be granted by a Hearing Committee after the hearing has commenced, except for reasons that would work an extreme hardship in the absence of a continuance; provided further the Chairman of the Disciplinary Hearing Commission may continue a hearing on his own motion, or by motion of either party, in order to await the filing of a controlling decision of an appellate court.[34]

32. Amended by the Council and approved by Supreme Court on 6/6/78, 294 NC 753.

33. Amended by the Council and approved by Supreme Court on 5/11/77, 292 NC 744.

34. Amended by the Council and approved by Supreme Court on 6/6/78, 294 NC 754 (Amended previously: 5/11/77, 292 NC 744).

(12) The defendant shall appear in person before the Hearing Committee at the time and place named by the Chairman. The hearing shall be open except that for good cause shown the Chairman of the Hearing Committee may exclude from the hearing room all persons except the parties, counsel, and those engaged in the hearing. No hearing shall be closed to the public over the objection of the defendant. The defendant shall, except as otherwise provided by law, be competent and compellable to give evidence in behalf of either of the parties. The defendant may be represented by counsel, who shall enter an appearance. Pleadings and proceedings before a Hearing Committee shall conform as nearly as is practicable with requirements of the Rules of Civil Procedure and for trials of non-jury civil causes in the Superior Courts except as otherwise provided hereunder.

(13) Pleadings or other documents in formal proceedings required or permitted to be filed under these rules must be received for filing at the Office of the Secretary within the time limits, if any, for such filing. The date of receipt by the Office of the Secretary and not the date of deposit in the mails is determinative.

(13.1) All papers presented to the Disciplinary Hearing Commission for filing shall be on letter size paper (8½ x 11 inches) with the exception of exhibits. The Secretary shall require a party to refile any paper that does not conform to this size. This rule shall become effective on July 1, 1982. Prior to that date either letter or legal size papers will be accepted.[35]

(14) When a defendant appears in his own behalf in a hearing he shall file with the Office of the Secretary, with proof of delivery of a copy to the Counsel, an address at which any notice or other written communication required to be served upon him may be sent, if such address differs from the last reported to the Secretary by the defendant.

(15) When a defendant is represented by counsel in a hearing, counsel shall file with the Office of the Secretary, with proof of delivery of a copy to the Counsel, a written notice of such appearance which shall state his name, address and telephone number, the name and address of the defendant on whose behalf he appears, and the caption and docket

35. Amended by the Council and approved by Supreme Court on 5/4/82, 307 NC 721.

number of the proceeding. Any additional notice or other written communication required to be served on or furnished to a defendant during the pendency of the hearing may be sent to the counsel of record for such defendant at the stated address of the counsel in lieu of transmission to the defendant.

(16) The Hearing Committee shall have the power to subpoena witnesses and compel their attendance, and to compel the production of books, papers and other documents deemed necessary or material to any hearing. Such process shall be issued in the name of the Committee by its chairman, or the chairman may designate the Secretary of The North Carolina State Bar to issue such process. The defendant shall have the right to invoke the powers of the Committee with respect to compulsory process for witnesses and for the production of books, papers, and other writings and documents.

(17) In any hearing admissibility of evidence shall be governed by the rules of evidence applicable in the superior court of the State at the time of the hearing. The Chairman of the Hearing Committee shall rule on the admissibility of evidence, subject to the right of any member of the Hearing Committee to question his ruling and, in the event of such question, the entire Hearing Committee shall then rule on the matter of evidence in question.[36]

(18) If the Hearing Committee finds that the charges of misconduct are not established by clear, cogent and convincing evidence, it shall enter an order dismissing the complaint. If the Hearing Committee finds that the charges of misconduct are established by clear, cogent and convincing evidence, the Hearing Committee shall enter an order for discipline. In either instance, the Committee shall file a separate order which shall include the Committee's findings of fact and conclusions of law.[37]

(18.1) The Secretary will provide that a complete record shall be made of the evidence received during the course of all hearings before the Disciplinary Hearing Commission as provid-

36. Amended by the Council and approved by Supreme Court on 6/6/78, 294 NC 754.

37. Amended by the Council and approved by Supreme Court on 11/13/80, 300 NC 754 (Amended previously: 6/6/78, 294 NC 755).

ed by N.C.G.S. 7A-95 for trials in the Superior Court. The Secretary will preserve the record and the pleadings, exhibits and briefs of the parties. The Secretary shall provide that the record will be transcribed as required.[38]

(19) If the charges of misconduct are established, the Hearing Committee shall then consider any evidence relevant to the discipline to be imposed, including the record of all previous misconduct for which the defendant has been disciplined in this State or any other jurisdiction and any evidence in mitigation of the offense. A summary of this evidence shall accompany the transcript of the hearing.[39]

(19.1) In any case in which a period of suspension is stayed upon compliance by the Defendant with conditions, the Disciplinary Hearing Commission shall retain jurisdiction of the matter until all conditions are satisfied. If, during the period the stay is in effect, the Counsel receives information tending to show that a condition has been violated, he may, with the consent of the Chairman of the Grievance Committee, file a motion in the cause with the Secretary specifying the violation and seeking an order requiring the Defendant to show cause why the stay should not be lifted and the suspension activated for violation of a condition. The Counsel shall also serve a copy of any such motion upon the Defendant. The Secretary shall promptly transmit the motion to the Chairman of the Disciplinary Hearing Commission who, if he enters an order to show cause, shall appoint a Hearing Committee as provided in Section 8(A)(2), appointing the members of the Hearing Committee that originally heard the matter wherever practicable, schedule a time and a place for a hearing, and notify the Counsel and the defendant of the composition of the Hearing Committee and the time and place for the hearing. After such a hearing, the Hearing Committee may enter an order lifting the stay and activating the suspension, or any portion thereof, and taxing the defendant with the costs, if it finds that The North Carolina State Bar has proven, by the greater weight of the evidence, that the Defendant has violated a condition. If the Hearing Committee finds that The North Carolina State Bar has not carried its burden, then it shall enter an

38. Amended by the Council and approved by Supreme Court on 11/13/80, 300 NC 754.

39. Amended by the Council and approved by Supreme Court on 5/11/77, 292 NC 744.

order continuing the stay. In any event, the Hearing Committee shall include in its order Findings of Fact and Conclusions of Law in support of its decision.[40]

(20) All reports and orders of the Hearing Committee shall be signed by the members of the Committee or by the Chairman of the Hearing Committee on behalf of the Hearing Committee and shall be filed with the Secretary. The copy to the Defendant shall be served by registered or certified mail, return receipt requested. If the Defendant's copy mailed by registered or certified mail is returned as unclaimed, or undeliverable, then service shall be as provided in Rule 4 of the Rules of Civil Procedure.[41]

(21) In all hearings conducted pursuant to this section, a complete record shall be made of evidence received during the course of the hearing. Such transcript shall be made in the form and by means authorized for civil trials in the courts of this State.

§ 15. Effect of a Finding of Guilt in any Criminal Case.

(1) Any member of The North Carolina State Bar convicted of a serious crime in any state or federal court, whether such a conviction results from a plea of guilty or nolo contendere or from a verdict after trial, shall, upon the conviction becoming final by affirmation on appeal or expiration of the time within which to perfect an appeal, an appeal not having been perfected, be suspended from the practice of law pending the disposition of any disciplinary proceeding in progress or commenced upon such conviction.

(2) A certificate of the conviction of an attorney for any crime shall be conclusive evidence of guilt of that crime in any disciplinary proceeding instituted against a member.

(3) Upon the receipt of a certificate of conviction of a member of a serious crime, the Grievance Committee will immediately authorize the filing of a complaint if one is not then pending. In the hearing on such complaint the sole issue to be determined will be the extent of the final discipline to be imposed: Provided, that no hearing based solely upon a certificate of

40. Amended by the Council and approved by Supreme Court on 8/28/84, 310 NC 758 (Amended previously: 6/6/78, 294 NC 755).

41. Amended by the Council and approved by Supreme Court on 5/4/82, 307 NC 721 (Amended previously: 11/13/80, 300 NC 754).

conviction will commence until all appeals from the conviction are concluded.

(4) Upon the receipt of certificate of conviction of a member for a crime not constituting a serious crime, the Grievance Committee will commence whatever action, including the filing of a complaint, it may deem appropriate.

§ 16. Reciprocal Discipline.

(1) Upon receipt of a certified copy of an order demonstrating that a member of The North Carolina State Bar has been disciplined in another jurisdiction, the Grievance Committee shall forthwith issue a notice directed to the accused attorney containing a copy of the order from the other jurisdiction, and an order directing that the accused attorney inform the Committee within 30 days from service of the notice, of any claim by the accused attorney that the imposition of the identical discipline in this State would be unwarranted, and the reasons therefor. This notice is to be served on the accused attorney in accordance with the provisions of G.S. § 1A-1, Rule 4.

(2) In the event the discipline imposed in the other jurisdiction has been stayed there, any reciprocal discipline imposed in this State shall be deferred until such stay expires.

(3) Upon the expiration of 30 days from service of the notice issued pursuant to the provisions of (1) above, the Grievance Committee shall impose the identical discipline unless the accused attorney demonstrates:

(a) that the procedure was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process; or

(b) there was such an infirmity of proof establishing the misconduct as to give rise to the clear conviction that the Grievance Committee could not consistently with its duty accept as final the conclusion on that subject; or

(c) that the imposition of the same discipline would result in grave injustice; or

(d) that the misconduct established has been held to warrant substantially different discipline in this State.

Where the Grievance Committee determines that any of said elements exists, the Committee shall dismiss the case or direct that a complaint be filed.

(4) In all other respects, a final adjudication in another jurisdiction that an attorney has been guilty of misconduct shall establish the misconduct for purposes of a disciplinary proceeding in this State.

§ 17. Surrender of License While Proceeding Pending.

(1) A member who is the subject of an investigation into allegations of misconduct on his part may tender his license to practice, but only by delivering to the Council an affidavit stating that he desires to resign and that:

(a) the resignation is freely and voluntarily rendered; is not the result of coercion or duress; and the member is fully aware of the implications of submitting the resignation;

(b) the member is aware that there is presently pending investigation or other proceedings regarding allegations that the member has been guilty of misconduct, the nature of which shall specifically be set forth;

(c) the member acknowledges that the material facts upon which the complaint is predicated are true; and

(d) the resignation is being submitted because the member knows that if charges were predicated upon the misconduct under investigation the member could not successfully defend against them.

(2) The Council may accept a member's resignation only if: (a) the affidavit required under (1) above satisfies the requirements stated therein, or (b) upon full waiver of all future right to apply for reinstatement of license as an attorney. If the Council accepts a member's resignation it shall enter an order disbarring the member unless the member has requested in his affidavit that discipline be determined by the Disciplinary Hearing Commission, in which case the Secretary shall refer the matter to the Chairman of the Disciplinary Hearing Commission for hearing.[42]

(3) Whenever any matter is referred to the Disciplinary Hearing Commission pursuant to (2) above, the Chairman shall appoint a Hearing Committee as provided in Section 8(A)(2), schedule a time and place for a hearing, and notify the Counsel and the resigning member of the composition of the

42. Amended by the Council and approved by Supreme Court on 8/28/84, 310 NC 758.

Hearing Committee and the time and place of the hearing. The hearing shall be as contemplated in Section 14(19) and shall result in an order of the Disciplinary Hearing Commission imposing discipline and taxing costs against the resigning member.[43]

(4) The order suspending or disbarring the member on consent shall be a matter of public record. However, the affidavit required under (1) above shall not be publicly disclosed or made available for use in any other proceeding except upon order of a court or the Council.

§ 18. Disability Hearings.

(1) Where a member of The North Carolina State Bar has been judicially declared incompetent or otherwise incapacitated or has been committed voluntarily or involuntarily to a hospital for the mentally disordered under the provisions of Chapter 122 of the General Statutes or similar laws of any jurisdiction, the Council, upon proper proof of the fact, shall enter an order transferring such member to inactive status effective immediately and for an indefinite period until the further order of the Council. A copy of such order shall be served upon such member, his guardian, or the director of the institution to which the member has been committed.

(2) When evidence has been obtained that a member of The North Carolina State Bar has been disabled, the Grievance Committee shall conduct a hearing in a manner that shall conform as nearly as is possible to the procedure set forth in § 13 of this Article. The Grievance Committee shall determine whether a petition alleging disability will be filed in the name of The North Carolina State Bar by the Chairman of the Grievance Committee.

(3) Whenever the Grievance Committee files a petition alleging the disability of a member, the Chairman of the Hearing Commission shall appoint a Hearing Committee as provided in §§§ 8(A)(2) and 14(4) to determine whether such member is disabled. The Hearing Committee shall conduct a hearing on the petition and receive whatever evidence it deems necessary or proper, including the examination of the member by such qualified medical experts as the Hearing Committee shall designate. If, upon due consideration of the matter, the

43. Amended by the Council and approved by Supreme Court on 8/28/84, 310 NC 759.

Hearing Committee concludes that the member is disabled, it shall enter an order transferring the member to inactive status on the ground of such disability for an indefinite period and until the further order of the Council. Any hearing in a pending disciplinary proceeding against the member shall be held in abeyance. The Hearing Committee shall provide for such notice to the member of proceedings in the matter as it deems proper and advisable and may appoint an attorney to represent the member if he or she is without adequate representation.

(4) In any proceeding seeking a transfer to inactive status under this section, the burden of proof shall be on the petitioner.

(5) If, during the course of a disciplinary proceeding, the defendant contends that he is suffering from a disability which makes it impossible for him to defend adequately, the proceeding shall be held in abeyance pending a determination by the Hearing Committee whether such disability exists. If the Hearing Committee concludes that such disability does exist, the disciplinary proceeding shall be held in abeyance until the Hearing Committee shall determine that such disability has been removed. If the Hearing Committee shall determine that the disability contended by the defendant is also one defined in § 3(12), it shall proceed under the provisions of (3) above as if a petition alleging such disability had been filed by the Grievance Committee. If as a result of such proceeding, the defendant is transferred to inactive status, the disciplinary proceeding shall be held in abeyance as long as the defendant remains in inactive status. If thereafter the defendant is returned to active status by the Council and a Hearing Committee determines that he is able to defend adequately, it may resume the disciplinary proceeding.

§ 19. Enforcement of Powers.

In proceedings before any committee, if any person refuses to respond to a subpoena, or refuses to take the oath or affirmation as a witness or thereafter refuses to be examined, or refuses to obey any order in aid of discovery, or refuses to obey any lawful order of the committee contained in its decision rendered after hearing, the Counsel or Secretary may apply to the appropriate court for an order directing that person to take the requisite action.

§ 20. Notice to Accused of Action and Dismissal.

In every disciplinary case wherein the accused attorney has received a Letter of Notice, and the grievance has been dismissed, the accused attorney shall be notified of the dismissal by letter by the Chairman of the Grievance Committee. The Chairman shall have discretion to give similar notice to the accused attorney in cases wherein a Letter of Notice has not been issued but the Chairman deems such notice to be appropriate.

§ 21. Notice to Complainant.

(1) If the Grievance Committee finds probable cause, the Chairman of the Grievance Committee shall advise the complainant that the grievance has been received and considered and has been referred to the Disciplinary Hearing Commission for hearing.[44]

(2) If final action on a grievance is taken by the Grievance Committee in the form of a Letter of Caution, or a private reprimand, the Chairman of the Grievance Committee shall advise the complainant that the grievance has been received and considered and that final action has been taken thereon but that the result is confidential and may be disclosed only upon the order of a court. If final action on a grievance is a dismissal, complainant and accused attorney shall be so notified.[45]

§ 22. Appointment of Counsel to Protect Clients' Interests When Attorney Disappears, Dies or is Transferred to Inactive Status Because of Disability.

(1) Whenever a member of The North Carolina State Bar has been transferred to inactive status because of incapacity or disability, or disappears, or dies, and no partner, personal representative or other party capable of conducting the attorney's affairs is known to exist, the Senior Resident Judge of the Superior Court in the district wherein is located the last address on the register of members, if it is in this State, shall be requested by the Secretary to appoint an attorney or attorneys to inventory the files of the inactive, disappeared

44. Amended by the Council and approved by Supreme Court on 1/24/78, 293 NC 750.

45. Amended by the Council and approved by Supreme Court on 1/24/78, 293 NC 750.

or deceased member and to take such action as seems indicated to protect the interests of the inactive, disappeared or deceased member and his or her clients.

(2) Any member so appointed shall not be permitted to disclose any information contained in any files so inventoried without the consent of the client to whom such files relates except as necessary to carry out the order of the court which appointed the attorney to make such inventory, or to assume the representation of any such client.

§ 23. Imposition of Discipline; Findings of Incapacity or Disability; Notice to Courts.

(A) Upon the final determination of a disciplinary proceeding wherein discipline is imposed, one of the following actions shall be taken:[46]

(1) Reprimand. A letter of reprimand shall be prepared by the Chairman of the Grievance Committee or the Chairman of the Hearing Committee of the Disciplinary Hearing Commission, depending upon the agency ordering the reprimand. The letter of reprimand shall be served upon the accused attorney or defendant and a copy shall be filed with the Secretary, and shall be considered confidential.[47]

(2) Public censure, suspension or disbarment. The Chairman of the Hearing Committee of the Disciplinary Hearing Commission or the Chairman of the Grievance Committee shall file the order of public censure, suspension or disbarment with the Secretary. The Secretary shall cause a certified copy of the order to be entered upon the judgment docket of the superior court of the county wherein is located the last address listed on the register of members by the disciplined member and filed with the Clerk of the Supreme Court of North Carolina. A judgment of suspension or disbarment shall be effective throughout the State.[48]

46. Amended by the Council and approved by Supreme Court on 6/6/78, 294 NC 755 (Amended previously: 1/24/78, 293 NC 750).

47. Amended by the Council and approved by Supreme Court on 1/30/85, 310 NC 766 (Amended previously: 1/24/78, 293 NC 750, and 6/6/78, 294 NC 755).

48. Amended by the Council and approved by Supreme Court on 1/30/85, 310 NC 766 (Amended previously: 1/24/78, 293 NC 750 and 3/6/84, 308 NC 819).

(B) Upon the final determination of incapacity or disability the President of the Council or the Chairman of the Disciplinary Hearing Commission, depending upon the agency entering the order, shall file with the Secretary a copy of the order transferring the member to inactive status. The Secretary shall cause a certified copy of the order to be entered upon the judgment docket of the superior court of the county wherein is located the last address listed on the register of members by the disabled member and also upon the minutes of the Supreme Court of North Carolina.

§ 24. Disbarred or suspended attorneys; winding up of practice, notice to clients; effective date of suspension or disbarment; condition precedent to reinstatement.[49]

(1) A disbarred or suspended member of The North Carolina State Bar shall promptly notify by registered or certified mail, return receipt requested, all clients being represented in pending matters, other than litigation or administrative proceedings, of the disbarment or suspension and consequent inability of the member to act as an attorney after the effective date of disbarment or suspension and shall advise such clients to seek legal advice elsewhere.

(2) A disbarred or suspended member shall promptly notify, or cause to be notified by registered or certified mail, return receipt requested, each client who is involved in pending litigation or administrative proceedings, and the attorney or attorneys for each adverse party in such matter or proceeding of the disbarment or suspension and consequent inability to act as an attorney after the effective date of the disbarment or suspension. The notice to be given to the client shall recommend the prompt substitution of another attorney or attorneys in the case.

In the event the client does not obtain substitute counsel before the effective date of the disbarment or suspension, it shall be the responsibility of the disbarred or suspended member to move in the court or agency in which the proceeding is pending for leave to withdraw.

The notice to be given to the attorney or attorneys for an adverse party shall state the place of residence of the client of the disbarred or suspended attorney.

49. Amended by the Council and approved by Supreme Court on 8/28/84, 310 NC 759.

(3) Orders imposing suspension or disbarment shall be effective thirty days after being served upon the defendant. The disbarred or suspended attorney, after entry of the disbarment or suspension order, shall not accept any new retainer or engage as attorney for another in any new case or legal matter of any nature. However, during the period from the entry date of the order to its effective date the member may wind up and complete, on behalf of any client, all matters which were pending on the entry date.

(4) Within ten days after the effective date of the disbarment or suspension order, the disbarred or suspended attorney shall file with the Secretary an affidavit showing that he or she has fully complied with the provisions of the order and with the provisions of this section, and all other state, federal and administrative jurisdictions to which he or she is admitted to practice. Such affidavit shall also set forth the residence or other address of the disbarred or suspended member to which communications may thereafter be directed.

(5) The disbarred or suspended member shall keep and maintain records of the various steps taken under this section so that, upon any subsequent proceeding, proof of compliance with this section and with the disbarment or suspension order will be available. Proof of compliance with this section shall be a condition precedent to any petition for reinstatement.

§ 25. Reinstatement.

(A) After Disbarment:

(1) No person who has been disbarred may have his license restored but upon order of the Council after the filing of a verified petition for reinstatement and the holding of a hearing before a hearing committee of the Disciplinary Hearing Commission as provided herein.

(2) No person who has been disbarred may petition for reinstatement until the expiration of at least five years from the effective date of the disbarment.

(3) (a) The petitioner shall have the burden of proving the following by clear, cogent and convincing evidence:

(1) that he possesses the moral qualifications required for admission to practice law in this state;

(2) that his resuming the practice of law within the state will be neither detrimental to the integrity

and standing of the bar, nor the administration of justice, nor subversive of the public interest;

(3) that he is a citizen, or that his citizenship has been restored if he has been convicted of a felony;

(4) that he has complied with Section 24 of these rules;

(5) that he has complied with all applicable orders of the Disciplinary Hearing Commission and the Council;

(6) that he has complied with the orders and judgments of any court relating to the matters resulting in the disbarment;

(7) that he has not engaged in the unauthorized practice of law during the period of disbarment;

(8) that he has not engaged in any conduct during the period of disbarment constituting grounds for discipline under N.C. General Statute § 84-28(b); and

(9) that he exhibits knowledge and understanding of the current Code of Professional Responsibility

(b) If less than seven (7) years has elapsed between the effective date of disbarment and the filing of the petition for reinstatement, the petitioner shall also have the burden of proving by the greater weight of the evidence that he has the competency and learning in the law required to practice law in this state. Factors which may be considered in deciding this issue include: experience in the practice of law, areas of expertise, certification of expertise, participation in continuing legal education programs, periodic review of advance sheets and legal periodicals, and the attainment of a passing grade on a regularly scheduled written Bar Examination administered by The North Carolina Board of Law Examiners and taken voluntarily by the Petitioner.

(c) If seven (7) years or more has elapsed between the effective date of disbarment and the filing of the petition for reinstatement, reinstatement shall be conditioned upon the Petitioner's attaining a passing grade on a regularly scheduled written Bar Examination administered by The North Carolina Board of Law Examiners.

(4) (a) Verified petitions for reinstatement of disbarred attorneys shall be filed with the Secretary. Upon receipt of the petition, the Secretary shall transmit the petition to the Chairman of the Disciplinary Hearing Commission and serve a copy on the Counsel. The Chairman shall within seven (7) days appoint a Hearing Committee as provided in Section 8(A)(2), schedule a time and place for hearing, and notify the Counsel and the petitioner of the composition of the Hearing Committee and the time and place of the hearing, which shall be conducted in accordance with The North Carolina Rules of Civil Procedure for non-jury trials in so far as possible and the Rules of Evidence applicable in Superior Court.

(b) As soon as possible after the conclusion of the hearing, the Hearing Committee shall file a report containing its findings, conclusions, and recommendations to the Council. This report shall be promptly transmitted to the Council.

(c) The whole record shall be transmitted to the Council unless the record is shortened by agreement of both the petitioner and Counsel.

(5) The Council shall review the report of the Hearing Committee and the record, and determine whether, and upon what conditions, the petitioner shall be reinstated.

(6) The Council in its discretion may direct that the necessary expenses incurred in the investigation and processing of a petition for reinstatement be paid by the petitioner.

(7) No person who has been disbarred and has unsuccessfully petitioned for reinstatement may reapply until the expiration of one (1) year from the date of the last order denying reinstatement.

(B) After Suspension:

(1) No attorney who has been suspended may have his license restored but upon order of the Disciplinary Hearing Commission or the Secretary after the filing of a verified petition as provided herein.

(2) No attorney who has been suspended is eligible for reinstatement until the expiration of the period of suspen-

sion and, in no event, until thirty (30) days have elapsed from the date of filing the petition for reinstatement. Petitions for reinstatement may be filed no sooner than ninety (90) days prior to the expiration of the period of suspension.

(3) Any suspended attorney seeking reinstatement must file a verified petition with the Secretary, a copy of which the Secretary shall transmit to the Counsel. The petitioner must have satisfied the following requirements to be eligible for reinstatement and facts demonstrating satisfaction must be set forth in the petition:

(a) compliance with section 24 of the rules;

(b) compliance with all applicable orders of the Disciplinary Hearing Commission and the Council; and

(c) abstention from the unauthorized practice of law during the period of suspension.

(4) The Counsel shall conduct any necessary investigation regarding the compliance of the petitioner with the requirements set forth in Section 25(B)(3), and the Counsel may file a response to the petition with the Secretary prior to the date the petitioner is first eligible for reinstatement. The Counsel shall serve a copy of any response filed upon the petitioner.

(5) If the Counsel does not file a response to the petition prior to the date the petitioner is first eligible for reinstatement, then the Secretary shall issue an order of reinstatement.

(6) If the Counsel does file a timely response to the petition, such response must set forth specific objections supported by factual allegations sufficient to put the petitioner on notice of the events and occurrences at issue.

(7) The Secretary shall, upon the filing of a response to the petition, refer the matter to the Chairman of the Disciplinary Hearing Commission. The Chairman shall within seven (7) days appoint a Hearing Committee as provided in Section 8(A)(2), schedule a time and place for a hearing, and notify the Counsel and the petitioner of the composition of the Hearing Committee and the time and place of the hearing. The hearing shall be conducted in accordance with the North Carolina Rules of Civil Procedure for non-

jury trials in so far as possible and the Rules of Evidence applicable in Superior Court.

(8) The Hearing Committee shall determine whether or not the petitioner's license should be reinstated and enter an appropriate Order which may include additional sanctions in the event violations of the petitioner's order of suspension are found. In any event, the Hearing Committee must include in its order findings of fact and conclusions of law in support of its decision and tax such costs as it deems appropriate for the necessary expenses attributable to the investigation and processing of the petition against the petitioner.

(C) After transfer to inactive status because of disability:[50]

(1) No member of The North Carolina State Bar transferred to inactive status because of incapacity or disability may resume active status until reinstated by order of the Council. Any member transferred to inactive status because of incapacity or disability shall be entitled to apply for reinstatement to active status once a year or at such shorter intervals as is stated in the order transferring the member to inactive status or any modification thereof.

(2) Petitions for reinstatement by members transferred to inactive status because of disability shall be filed with the Secretary. Upon receipt of the petition the Secretary shall refer the petition to the Chairman of the Disciplinary Hearing Commission. The Chairman shall appoint a Hearing Committee as provided in § 8(A)(2) and 14(4). The Hearing Committee shall promptly schedule a hearing at which the petitioner shall have the burden of demonstrating by clear and convincing evidence that the disability has been removed and the petitioner is fit to resume the practice of law. Upon such petition the Hearing Committee may take or direct such action as it deems necessary or proper to a determination of whether the disability has been removed, including a direction for an examination of the petitioner by such qualified medical experts as the Hearing Committee shall designate. In its discretion, the Hearing Committee may direct that the expense of such an examination shall be paid by the petitioner. At the con-

50. Amended by the Council and approved by Supreme Court on 8/28/84, 310 NC 763.

clusion of the hearing, the Hearing Committee shall promptly file a report containing its findings and recommendations and transmit them together with the record, to the Council. The Council shall review the report of the Hearing Committee and the record, and determine whether, and upon what conditions, the petitioner shall be reinstated.

(3) Where a member has been transferred to inactive status by an order of the Council based on incapacity as defined in § 3(17) or after commitment on the grounds of incompetency and thereafter, in proceedings duly taken the member has been judicially declared to be competent or the incapacity has been removed, the Council may dispense with further evidence that the incapacity has been removed and may direct his or her reinstatement to active status upon such terms as are deemed proper and advisable.

(4) The filing of a petition for reinstatement to active status by a member of The North Carolina State Bar transferred to inactive status because of disability shall be deemed to constitute a waiver of any doctor-patient privilege with respect to any treatment of the attorney during the period of the disability. The petitioner shall be required to disclose the name of every psychiatrist, psychologist, physician and hospital or other institution by whom or in which the petitioner has been examined or treated since transfer to inactive status and shall furnish to the Secretary written consent to each to divulge such information and records as requested by the Counsel or a Hearing Committee.

§ 26. Address of Record.

Except where otherwise specified, any provision herein for notice to an accused attorney or a defendant shall be deemed satisfied by appropriate correspondence addressed to that attorney by registered mail at the last address entered in the register of members provided for in Article II, § 1 of these rules.

§ 27. Disqualification Due to Interest.

No member of the Council or Hearing Commission shall participate in any disciplinary matter involving such member, any partner or associate in the practice of law of such members, or in which such member has a personal interest.

§ 28. Trust Accounts; audit.

(1) For reasonable cause, the Chairman of the Grievance Committee is impowered to issue an investigative subpoena to a member compelling the production of any records required to be kept relative to the handling of client funds and property by the Code of Professional Responsibility for inspection, copying, or audit by the Counsel or his staff. For the purposes of this rule, any of the following shall constitute reasonable cause:

(a) any sworn statement of grievance received by The North Carolina State Bar alleging facts which, if true, would constitute misconduct in the handling of a client's funds or property;

(b) any facts coming to the attention of The North Carolina State Bar, whether through random review as contemplated by subpart (2) of this rule or otherwise, which, if true, would constitute a probable violation of any provision of the Code of Professional Responsibility concerning the handling of client funds or property.

(c) any finding of probable cause, indictment, or conviction relative to a criminal charge involving moral turpitude.

The grounds supporting the issuance of any such subpoena shall be set forth upon the face of the subpoena.

(2) The Chairman of the Grievance Committee may randomly issue investigative subpoenas to members compelling the production of any records required to be kept relative to the handling of client funds or property by the Code of Professional Responsibility for inspection by the Counsel or his staff to determine compliance with the procedures and record-keeping requirements established by the Code of Professional Responsibility. Prior to the issuance of any such subpoena, procedures for random selection shall be adopted by the Council. Any such subpoena shall disclose upon its face its random character and contain a verification of the Secretary that it was issued in accordance with the procedures referred to above. No member shall be subject to random selection under this subsection more frequently than once in three years.

(3) No subpoena issued pursuant to this rule may compel production within five days of service.

(4) The Rules of Evidence applicable in the Superior Courts of the State shall govern the use of any material subpoenaed pursuant to this rule in any hearing before the Disciplinary Hearing Commission. Where practicable, notice of The North Carolina State Bar's intended use at hearing of any such material shall be given to any client involved, unless such client is already aware of such intended use, and, upon good cause shown by such client, the admission of the same shall be under such conditions as shall be reasonably calculated thereafter to protect the confidences of such client. Permissible means of protection shall not prejudice the subject attorney and may include, but are not limited to, excision, in camera production, retention in sealed envelopes, or similar devices.

(5) No assertion of attorney-client privilege or confidentiality shall operate to prevent an inspection or audit of a trust account as provided in this rule.[51]

§ 29. Confidentiality.

All proceedings involving allegations of misconduct by an attorney shall remain confidential until the complaint against an accused attorney has been filed with the Secretary of The North Carolina State Bar as a result of the Grievance Committee of The North Carolina State Bar having found that there is probable cause to believe that said accused attorney is guilty of misconduct justifying disciplinary action, or the accused attorney requests that the matter be public prior to the filing of the aforementioned complaint, or the investigation is predicated upon a conviction of the accused attorney of a crime, except the previous issuance of a private reprimand to an accused attorney may be revealed in any subsequent disciplinary proceeding. In matters involving alleged disability, all proceedings shall be kept confidential unless and until the Council or a Hearing Committee of the Disciplinary Hearing Commission enters an Order transferring the member to inactive status.

This provision shall not be construed to deny access to relevant information to authorized agencies investigating the qualifications of judicial candidates, or to other jurisdictions investigating qualifications for admission to practice or to law enforcement agencies investigating qualifications for government

51. Amended by the Council and approved by Supreme Court on 8/28/84, 310 NC 769.

employment. In addition, the Secretary shall transmit notice of all public discipline imposed, or transfer to inactive status due to disability, to the National Discipline Data Bank maintained by the American Bar Association.[52]

52. Amended by the Council and approved by Supreme Court on 3/6/84, 308 NC 819 (Amended previously: 11/3/78, 295 NC 745).

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

ACTIONS

§ 5. Where Plaintiff's Own Wrongful Act Constitutes Element of his Cause of Action

Where a minor child was killed in an accident caused solely by his mother's negligence in the operation of a family purpose automobile owned by the father, the active negligence of the mother will not be imputed to the father under the family purpose doctrine so as to bar the father from sharing in any recovery by the child's estate against the mother. *Carver v. Carver*, 669.

In a wrongful death action by the estate of a child against the child's mother in which the parents are the beneficiaries of the estate, only the father's losses as a result of the death of the child may be considered in assessing damages under G.S. 28-18-2(b)(4), the reasonable funeral expenses of the decedent need not be reduced because the mother is precluded from sharing in the recovery, and any damages awarded for decedent's pain and suffering should be reduced by half. *Ibid.*

ADMINISTRATIVE LAW

§ 8. Scope and Effect of Judicial Review

Civil cases are distinguishable from administrative proceedings in that there are no pleadings required in administrative proceedings, and the function of the superior court upon review is to ensure that the Commission, in an unemployment compensation case, properly construed and applied the applicable law in reaching its decision, as well as determining whether the evidence supported the findings of fact and deciding whether the facts found supported the conclusions of law and the Commission's decision. *In re Gorski v. N.C. Symphony Society*, 686.

APPEAL AND ERROR

§ 24. Necessity for Objections, Exceptions and Assignments of Error

Appellees' failure to except to and cross-assign as error the portion of the trial court's summary judgment order relating to the sufficiency of appellant's tender of the purchase price under an option precludes appellate review of the sufficiency of the tender. *Texaco, Inc. v. Creel*, 695.

§ 31.1. Necessity and Timeliness of Objections to Charge

Where, at the conclusion of all the evidence, the trial judge held a charge conference at which counsel for plaintiff objected to the giving of certain instructions, the rules did not require plaintiffs to repeat their objections to the jury instructions after the charge was given in order to preserve the objection for appellate review. *Wall v. Stout*, 184.

§ 68. Law of the Case

The Supreme Court's denial of defendant's petition for further review of a Court of Appeals decision did not make that decision the law of the case in the Supreme Court. *Carver v. Carver*, 669.

ASSAULT AND BATTERY

§ 16. Necessity for Submitting Lesser Offenses

The trial court properly failed to instruct on simple assault in a felonious assault case. *S. v. Boykin*, 118.

ASSOCIATIONS

AUTOMOBILES AND OTHER VEHICLES

BILLS OF DISCOVERY

§ 6. Compelling Discovery

Defendant was not entitled to discovery of the victim's statement for the purpose of cross-examination at a voir dire hearing during trial on a motion to suppress her identification testimony. *S. v. Jean*, 157.

Evidence of a homicide victim's fingerprints was not inadmissible because they appeared on a piece of acetate which had not been furnished to defendant during voluntary discovery. *S. v. Marlow*, 507.

BURGLARY AND UNLAWFUL BREAKINGS

§ 4. Competency of Evidence

Where the jury found defendant not guilty of larceny but was unable to reach a verdict as to breaking or entering with the intent to commit larceny, the State was not precluded by collateral estoppel double jeopardy from reprosecuting defendant for breaking or entering with intent to commit larceny or from presenting evidence at defendant's retrial of his participation in the larceny. *S. v. Edwards*, 142.

§ 5.2. Insufficiency of Evidence of Time of Offense

The State's evidence was insufficient to show that the breaking and entering of the victim's home occurred during the nighttime so as to support conviction of defendant for first degree burglary. *S. v. Forney*, 126.

CONSPIRACY

§ 2.1. Civil Conspiracy; Sufficiency of Evidence

In a civil action involving claims for wrongful death and civil conspiracy against two physicians and a physician's assistant, if the trial court on remand allows the plaintiff's motion to amend his complaint to allege injury from the conspiracy, the trial court erred in granting defendants' motions to dismiss the claim for civil conspiracy. *Henry v. Deen*, 75.

CONSTITUTIONAL LAW

§ 17. Personal and Civil Rights Generally

State courts may exercise concurrent subject matter jurisdiction over claims arising under 42 U.S.C. § 1983. *Snuggs v. Stanly Co. Dept. of Public Health*, 739.

§ 30. Discovery; Access to Evidence

Statements made by defendant to two witnesses which were inculpatory were not discoverable under G.S. 15A-904(a) and were not required to be disclosed at trial under the rule of State v. Hardy, 293 N.C. 105. *S. v. Adcock*, 1.

The proper standard to determine whether on collateral attack unrequested evidence known but not disclosed by the prosecution is material so that due process requires that defendant be given a new trial is whether the evidence, had it been disclosed to the jury which convicted defendant, and in light of all other evidence which that jury heard, would likely have created in the jury's mind a reasonable doubt which did not otherwise exist as to defendant's guilt. *S. v. McDowell*, 61.

The trial court's order granting defendant a new trial because of the failure of the prosecution to reveal certain information to defendant was not supported by appropriate legal conclusions. *Ibid.*

CONSTITUTIONAL LAW — Continued

first degree murder and the death penalty failed where defendant failed to show that the district attorney based his decision to seek the death penalty in defendant's case upon unjustifiable standards like "race, religion or other arbitrary classifications." *S. v. Lawson*, 632.

CRIMINAL LAW

§ 5. Mental Capacity in General; Insanity

The trial court's charge on diminished capacity in a first degree murder case was error favorable to defendant, and the trial court adequately distinguished between insanity as a complete defense and insanity as a diminished capacity defense. *S. v. Adcock*, 1.

§ 15.1. Pretrial Publicity as Ground for Change of Venue

The trial court in a rape case did not err in denying defendant's motion for a change of venue because of pretrial publicity. *S. v. Horner*, 274.

The trial court in a first degree murder case did not err in the denial of defendant's motion for a change of venue or a special venire from another county because of pretrial newspaper and television publicity. *S. v. Watson*, 384.

§ 26.5. Double Jeopardy; Same Acts Violating Different Statutes

Defendant was not placed in double jeopardy when he was convicted for both the armed robbery of the victim by taking his wallet and keys and the felonious larceny of the victim's automobile. *S. v. Murray*, 541.

Where the jury found defendant not guilty of larceny but was unable to reach a verdict as to breaking or entering with the intent to commit larceny, the State was not precluded by collateral estoppel double jeopardy from reprosecuting defendant for breaking or entering, with intent to commit larceny or from presenting evidence at defendant's retrial of his participation in the larceny. *S. v. Edwards*, 142.

§ 34.5. Evidence of Defendant's Guilt of Other Offenses to Show Identity of Defendant

In a prosecution for a first-degree sexual offense in violation of G.S. 14-27.4, the trial court did not err in admitting the testimony of a witness which tended to show the defendant's commission of a separate offense. *S. v. Thomas*, 369.

§ 43. Photographs

A photograph of a homicide victim in the hospital emergency room was properly admitted to illustrate the victim's appearance during emergency room treatment, and a photograph of the victim behind a desk with his fishing pole was properly admitted to illustrate the victim when he was alive. *S. v. Watson*, 384.

In a prosecution for first degree rape, the trial court did not err in allowing into evidence photographs of the area where the victim's clothes were found and photographs of the clothes as a means of illustrating the testimony of a witness concerning the location of the scene and the search for the victim's missing clothes. *S. v. Robinson*, 530.

§ 50. Opinion Testimony in General

There was no error in the trial court's refusal to admit a witness's opinion as to whether her husband was "competent to stand trial." *S. v. Smith*, 108.

CRIMINAL LAW — Continued

§ 50.2. Opinion of Nonexpert

Defendant's sister was not competent to testify as to defendant's awareness or lack of awareness of the victim's death. *S. v. Adcock*, 1.

§ 53. Medical Expert Testimony in General

A physician's "speculative testimony concerning the possible cause" of a possible rape victim's injuries was properly admitted. *S. v. Robinson*, 530.

§ 57. Evidence in Regard to Firearms

The alleged murder weapon, a shotgun, was properly admitted although the mainspring was broken when the shotgun was recovered. *S. v. Hinson*, 245.

§ 66.4. Lineup Identification

Pretrial photographic and live lineup identification procedures were not impermissibly suggestive because defendant was the only person who appeared in both the photograph and live lineups or because the victim was hypnotized prior to the live lineup to see if she could recall why defendant's photograph had bothered her. *S. v. Jean*, 157.

§ 71. Shorthand Statements of Fact

An officer's testimony that a mark in the shoulder of the road behind the victim's truck "appeared to have been made by a car tire" was competent as a shorthand statement of fact. *S. v. Hinson*, 245.

An officer's testimony that occupants moved from a house "several months after the murder" was competent as a shorthand statement of fact. *S. v. Marlow*, 507.

§ 73. Hearsay Testimony in General

Cross-examination of a six-year-old rape victim as to whether her mother did not want defendant to come back called for hearsay testimony and was properly excluded. *S. v. Stanley*, 353.

§ 73.2. Statements Not within Hearsay Rule

A witness's testimony concerning defendant's statements to her about the offenses for which he was being tried were admissible under the party admission exception to the hearsay rule. *S. v. Lawson*, 632.

§ 75.2. Confession; Effect of Promises, Threats, or Other Statements of Officers

In a prosecution for first degree murder, the trial court correctly denied defendant's motion to suppress his inculpatory statements where the totality of the circumstances clearly compelled the trial court's determination that the defendant's statements were not induced by any hope or fear arising from the conduct of the officers and, therefore, were voluntary. *S. v. Corley*, 40.

The evidence supported the trial court's determination that statements given by defendant to law officers with her attorney's acquiescence were not fruits of an illegal arrest and were not the result of psychological coercion or improper inducements. *S. v. Hinson*, 245.

The trial court did not err in finding defendant's statement to be voluntary and admissible rather than having been induced by the suggestion of hope or fear. *S. v. Thomas*, 369.

CRIMINAL LAW — Continued

§ 75.7. Confession; Requirement that Defendant Be Warned of Constitutional Rights; What Constitutes Custodial Interrogation

The sheriff's question to defendant as to whether he knew "these two fellows" did not constitute "interrogation" of defendant, and defendant's incriminating response that they were the two persons with him during a break-in was admissible in evidence. *S. v. Forney*, 126.

§ 75.8. Confession; Warning Defendant of Constitutional Rights Before Resumption of Interrogation

In a prosecution for murder, there was nothing in the record which supported a finding that a statement to an officer who administered a polygraph test either tainted or bore any relation to two subsequent statements made to two other officers. *S. v. Bauguss*, 259.

§ 75.11. Confession; Sufficiency of Waiver of Constitutional Rights

An attorney could not validly assert the defendant's Fifth and Sixth Amendment rights with regard to charges on which he did not represent the defendant, and defendant could validly waive the services of an attorney on the charges even though his attorney for the other charges told the sheriff that he did not want anyone talking to the defendant unless he, the attorney, was notified. *S. v. Bauguss*, 259.

A remark by an officer that defendant should be sure to tell his attorney he had a chance to help himself and did not do so, did not amount to interrogation of defendant making defendant's subsequent confession in violation of his constitutional rights. *S. v. Thomas*, 369.

§ 76.1. Admissibility of Confession; Voir Dire Hearing

The trial court properly refused to give defendant's requested instructions which raised issues concerning the admissibility (*i.e.*, voluntariness) of defendant's confession. *S. v. Hinson*, 245.

§ 79.1. Acts or Declarations of Coconspirators Subsequent to Commission of Crime

The trial court in a murder case did not err in permitting the prosecutor to ask a State's witness on redirect if she had pled guilty to the offense of accessory after the fact of murder where the question was propounded for the purpose of eliciting evidence of prior consistent statements. *S. v. Marlow*, 507.

§ 85. Character Evidence Relating to Defendant

The trial court did not err in limiting defendant to four character witnesses. *S. v. Marlow*, 507.

§ 86.2. Impeachment of Defendant; Prior Convictions Generally

The prosecutor was properly permitted to cross-examine defendant about prior convictions by asking whether defendant had been convicted on certain dates of particular crimes involving specified conduct against named persons. *S. v. Murray*, 541.

§ 86.5. Impeachment of Defendant; Particular Questions and Evidence as to Specific Acts

If it was error for the court to permit cross-examination of defendant about his viewing a pornographic movie in a motel room with a female companion five days after the crimes charged which depicted the same kind of sex acts with which defendant was charged, such error was harmless. *S. v. Jean*, 157.

CRIMINAL LAW — Continued

§ 86.9. Credibility of Accomplice; Impeachment

Even if cross-examination of a State's witness about his indictment on an unrelated armed robbery charge should have been permitted to show bias or prejudice by the witness, defendant was not prejudiced by the exclusion of such evidence. *S. v. Howie*, 613.

§ 87.1. Leading Questions

The trial court did not improperly permit the prosecutor to ask a six-year-old rape victim leading questions to establish the essential elements of the rape. *S. v. Stanley*, 353.

§ 89.2. Corroboration

The trial court did not err in refusing to permit advance corroboration of defendant by pre-arrest statements she had made to an SBI agent. *S. v. Hinson*, 245.

A South Carolina license plate discovered in a garbage can behind the house of defendant's lover was admissible to corroborate defendant's statement concerning use of a South Carolina license tag during the murder of her husband, although there was no showing that the license plate was the same one used on the night of the murder. *S. v. Hinson*, 245.

The trial court did not express an opinion in instructing the jury that testimony was "offered and admitted for the sole purpose of corroborating or strengthening the testimony of [the victim] if you find that it does or tends to do so." *S. v. Stanley*, 353.

In a prosecution for first-degree rape, kidnapping and armed robbery, the trial court's exclusion of testimony relating to the circumstances under which defendant's alibi witnesses refused to retract their statement which supported defendant's alibi was not prejudicial error. *S. v. Wood*, 460.

It was proper for officers to testify regarding a witness's prior statements which were consistent with her in-court testimony and which corroborated that testimony. *S. v. Lawson*, 632.

§ 89.3. Corroboration; Prior Statements of Witness

The trial court committed prejudicial error in permitting certain corroborative witnesses to testify as to thirdhand statements of other corroborative witnesses for the purpose of corroborating the other corroborative witnesses where portions of the statements conflicted with substantive trial testimony. *S. v. Stills*, 410.

§ 89.5. Slight Variances in Corroborating Testimony

Even if a reference in a witness's prior written statement to defendant's having shot at the decedent the day before she was killed amounted to more than a slight variation from the witness's testimony, its admissibility was not prejudicial error. *S. v. Adcock*, 1.

§ 91. Nature and Time of Trial; Speedy Trial

A criminal defendant's request for voluntary discovery tolls the running of the statutory speedy trial period until the completion of the requested discovery or the date upon which the court has determined that discovery should be completed. *S. v. Marlow*, 507.

A period of delay caused by the co-defendant's physical incapacity could not properly be excluded from defendant's statutory speedy trial period where defendant and the co-defendant were not formally joined for trial before the State made an oral motion for joinder on the date of trial. *Ibid.*

CRIMINAL LAW – Continued

The trial court did not err in excluding from the statutory speedy trial period delays resulting from continuances granted to the State on grounds of the illness of one of the two investigating officers, the unavailability of the rape victim's mother because she had recently given birth to a son, and the unavailability of the victim's mother because she was being uncooperative. *S. v. Jones*, 716.

§ 91.6. Continuance on Ground that Defendant Needs Additional Time to Obtain Evidence

Defendant failed to show that the trial court's denial of his motion for a continuance was an abuse of discretion. *S. v. Smith*, 108.

The trial court did not err in denying defendant's motion for a continuance made on the ground that defense counsel needed additional time in which to review discovery materials. *S. v. Horner*, 274.

§ 92. Consolidation

The district attorney's motion to join two defendants' cases for trial, made at the beginning of trial, was not required to be in writing. *S. v. Marlow*, 507.

The statute requiring the court to deny a joinder for trial "if it is found necessary to protect a defendant's right to a speedy trial" refers to defendant's constitutional rather than statutory right to a speedy trial. *Ibid.*

§ 92.1. Consolidation Held Proper; Same Offense

A joint trial on a murder charge did not deny defendant a fair trial on the ground that he and the codefendant presented antagonistic defenses where defendant claimed self-defense and the codefendant's defense related to duress and coercion by defendant. *S. v. Marlow*, 507.

§ 98.2. Sequestration of Witnesses

The trial judge did not abuse his discretion when he permitted a social services worker and a juvenile officer who testified for the State to remain in the courtroom during a six-year-old rape victim's testimony while ordering that all other persons, including defense witnesses, remain outside the courtroom. *S. v. Stanley*, 353.

§ 99.2. Court's Expression of Opinion; Remarks During Trial

In a prosecution for armed robbery of a service station attendant, the trial court did not express an opinion in cautioning a witness to speak more slowly, clarifying the name of the oil company for which the witness worked, clarifying the testimony of the witness with respect to the dimensions of the service station, and determining whether statements made by defendant were made in the presence of a codefendant. *S. v. Howie*, 613.

§ 99.4. Court's Expression of Opinion; Remarks in Connection with Objections

When the prosecutor requested that defendant be instructed to watch him and not her lawyer during questioning, the trial court did not express an opinion in stating that this was "part of her makeup on the stand, to be judged by the jury as she testifies." *S. v. Hinson*, 245.

The trial judge did not commit prejudicial error in stating that a prosecuting witness did not "have the benefit of the transcript in front of her to help her refresh her recollection" during the cross-examination of the witness concerning certain inconsistencies between the testimony she gave in district court in an earlier hearing and her testimony given at trial on direct examination. *S. v. Hobson*, 555.

The trial judge's comments which explained the purpose of a voir dire did not prejudicially emphasize a witness's testimony. *S. v. Lawson*, 632.

§ 99.11. Court's Expression of Opinion; Remarks in Connection with Jury Argument

The trial court did not express an opinion in interrupting defense counsel's jury argument that defendant would not be guilty of murder if he had just cause or excuse and in stating that there was no evidence of justification or excuse. *S. v. Marlow*, 507.

§ 100. Permitting Counsel to Assist Prosecutor

In a prosecution for first degree murder, there was no merit to defendant's contention that he was denied a fair trial because of the participation of a private prosecutor employed by the family of the deceased. *S. v. Moose*, 482.

§ 101.4. Conduct or Misconduct During or Affecting Jury Deliberations

The trial court did not abuse its discretion in denying defendant's motion to sequester the jury because of publicity. *S. v. Adcock*, 1.

§ 102. Who Is Entitled to Conclude Jury Argument

Where defendant offered evidence, the prosecution had the right to make the opening and closing arguments to the jury. *S. v. Hinson*, 245.

§ 102.3. Objection to and Cure of Impropriety in Jury Argument

The impropriety of the prosecutor's jury argument that "the fact that this defendant is up here being judged in this Court indicates that he has acted improperly" was cured by the trial court's actions. *S. v. Adcock*, 1.

§ 102.4. Conduct of Prosecutor as Affecting Jury

Any impropriety in the prosecutor's remark, "I like these jurors, Your Honor," was cured by the court's admonishments to the prosecutor. *S. v. Hinson*, 245.

§ 102.6. Particular Comments in Jury Argument

The district attorney's argument of facts not in the record was so grossly improper as to have called for corrective action by the trial court *ex mero motu* where the State offered virtually no evidence as to what happened on the day that the victim met her death but the district attorney argued a full and detailed account of what happened. *S. v. Forney*, 126.

In a prosecution for first degree murder, the prosecutor was properly allowed to allege a racial motive for the murder in his argument to the jury. *S. v. Moose*, 482.

In a prosecution for first degree murder, a prosecutor's argument that there was no evidence to support defense counsel's insinuation of an "underhanded deal" involving a sentence reduction for one of the witnesses in return for his testimony against the defendant was not improper. *Ibid.*

§ 102.10. Jury Argument Concerning Prior Convictions

The prosecutor's jury argument concerning defendant's prior convictions and release from prison and his subsequent killing of the victim did not improperly imply that defendant's prior convictions should be considered as substantive evidence. *S. v. Murray*, 541.

CRIMINAL LAW — Continued

§ 103. Function of Court in General

It is not error for the trial judge to change his ruling on the admissibility of evidence during the course of the trial. *S. v. Adcock*, 1.

§ 106. Sufficiency of Evidence to Overrule Nonsuit

In determining whether there is sufficient evidence to support a criminal conviction, the standard to be applied is whether there is substantial evidence of each element of the offense charged, and it is unnecessary also to apply the federal standard that there must be sufficient evidence to justify a rational trier of fact to find guilt beyond a reasonable doubt. *S. v. Brown*, 563.

§ 112.4. Instruction on Degree of Proof Required of Circumstantial Evidence

An instruction that a conviction may not be based upon circumstantial evidence unless the circumstances point to guilt and exclude to a moral certainty every reasonable hypothesis except that of guilt is unnecessary when a correct instruction on reasonable doubt is given. *S. v. Adcock*, 1.

§ 112.6. Instructions on Affirmative Defense of Insanity

The trial court's use of the word "may" rather than "shall" in setting out the procedure for commitment hearings when a defendant is found not guilty by reason of insanity complied with the applicable statute and could not have misled the jury. *S. v. Adcock*, 1.

The trial court's instruction that "if you are in doubt as to the insanity of the defendant, the defendant is presumed under the law to be sane, and so you would find the defendant guilty if he is otherwise guilty" did not change defendant's burden of "satisfying" the jury of his insanity to that of "beyond a reasonable doubt." *Ibid.*

The trial court properly failed to instruct on the defense of insanity in a first degree murder prosecution. *S. v. Corley*, 40.

§ 114.2. No Expression of Opinion in Statement of Evidence or Contentions

There was no expression of opinion in the trial court's summary of the evidence concerning witnesses' testimony as to where they had seen defendant. *S. v. Roberts*, 428.

§ 117.4. Charge on Credibility of Accomplice

Error, if any, in the trial court's instruction prior to an accomplice's testimony that the jury should examine such testimony with great care and caution if it found that the accomplice testified for the State in exchange for a charge reduction did not constitute "plain error." *S. v. Murray*, 541.

§ 131.1. Competency of Evidence at Hearing on Motion for New Trial for Newly Discovered Evidence

An affidavit offered by defendant was hearsay and insufficient to support a motion for appropriate relief on the ground of newly discovered evidence. *S. v. Adcock*, 1.

§ 134.4. Sentence of Youthful Offender

In prosecutions for attempted robbery with a firearm and second degree murder, the trial judge erred by failing to either sentence the defendant as a committed youthful offender or make a "no benefit" finding. *S. v. Lattimore*, 295.

CRIMINAL LAW — Continued

§ 135.3. Exclusion of Veniremen Opposed to Death Penalty

The trial court properly denied defendant's motion to prohibit death qualification of jurors in a first degree murder case. *S. v. Adcock*, 1.

A bifurcated trial in capital cases requiring the jury to be death qualified does not result in a guilt prone jury so as to deny defendant the right to trial by an impartial jury. *S. v. Hinson*, 245; *S. v. Murray*, 541.

§ 135.4. Sentence in Cases Decided Under G.S. 15A-2000

In a prosecution for murder in the first degree in which defendant received a death sentence, the trial court erred in permitting the jury to consider whether the murder committed by defendant was "especially heinous, atrocious, or cruel." *S. v. Stanley*, 332.

Procedure whereby the trial court determined prior to trial of a first degree murder case that the aggravating circumstance relied on by the State was not supported by sufficient evidence and that the case should be tried as a non-capital first degree murder case is commended for its judicial economy and administrative efficiency. *S. v. Watson*, 384.

In the sentencing hearing for a prosecution for first degree murder, there was no impropriety in the prosecutor's reference to the victim's rights and the suffering of the victim in his jury argument. *S. v. Moose*, 482.

In a prosecution for first degree murder, the State inappropriately cited passages from the Bible and argued in effect that the powers of public officials, including the police, prosecutors and judges, are ordained by God as his representatives on earth and that to resist these powers is to resist God in its argument to the jury at the sentencing hearing. *Ibid.*

§ 135.8. Aggravating Circumstances

At the sentencing phase of a prosecution for first degree murder, the trial court incorrectly submitted as an aggravating factor that the murder was especially heinous, atrocious, or cruel where the evidence indicated that the defendant pursued the victim's car without explanation, and there was no evidence that either the victim or his companion believed that the ultimate result of the pursuit of their car would be death at least until defendant pulled up alongside the victim's car and a shotgun appeared through the window. *S. v. Moose*, 482.

In a prosecution for first degree murder, the evidence supported the submission of the aggravating circumstance that "[t]he defendant knowingly created a great risk of death to more than one person by means of a weapon or device which would normally be hazardous to the lives of more than one person." *Ibid.*

§ 135.9. Mitigating Circumstances

The trial judge in a prosecution for first degree murder properly failed to consider as a mitigating factor that the defendant was under the influence of mental or emotional disturbance at the time of the offense. *S. v. Moose*, 482.

§ 135.10. Review of Sentence

In a prosecution for first degree murder, there was nothing in the record which suggested that the sentence of death was influenced by "passion, prejudice, or any other arbitrary factor," and the sentence of death was not excessive or disproportionate to the penalty imposed in similar cases. *S. v. Lawson*, 632.

CRIMINAL LAW — Continued

§ 138. Severity of Sentence

The trial court erred in finding as an aggravating factor that a larceny was committed for pecuniary gain where there was no evidence that defendant was hired or paid to commit the offense. *S. v. Edwards*, 142; *S. v. Corley*, 40.

The trial court erred in finding as a mitigating factor that defendant did not testify and relate to the court any perjured testimony. *S. v. Edwards*, 142.

The evidence in a prosecution for second degree murder and robbery with a firearm amply supported the aggravating factor that defendant induced another to participate in the attempted armed robbery or that defendant occupied a position of leadership. *S. v. Lattimore*, 295.

In a prosecution for robbery with a firearm and second degree murder, the trial court erred in finding in aggravation that the offenses were committed for pecuniary gain. *Ibid.*

In a prosecution for attempted robbery with a firearm and second degree murder, the trial court erred in considering as an aggravating factor for the attempted robbery with a firearm conviction that the victim of the armed robbery was killed. *Ibid.*

Upon request, the trial judge erred in failing to find as a factor in mitigation that prior to his arrest or at an early stage of the criminal process, defendant voluntarily acknowledged wrongdoing in connection with the offense to a law enforcement officer. *Ibid.*

In sentencing upon a conviction for second degree murder, the trial judge erred in finding as an aggravating factor that the defendant used a deadly weapon at the time of the crime. *Ibid.*

The trial judge erred in finding as an aggravating factor, upon conviction of second degree murder, that the presumptive sentence "does not do substantial justice to the seriousness of the crime." *Ibid.*

Perceived perjury by defendant may be used as an aggravating factor in determining the sentence to be imposed upon a defendant, but such factor should only be found in the most extreme cases. *S. v. Thompson*, 209.

The trial court did not err in finding that the aggravating factor that defendant had committed perjury during the trial had been proven by a preponderance of the evidence. *Ibid.*

In prosecutions for second degree murder and assault with a deadly weapon with intent to kill inflicting serious injury, the trial court erred in considering as an aggravating factor at the sentencing phase that the offenses were especially heinous, atrocious, or cruel. *S. v. Higson*, 418.

The trial court's findings in aggravation that (1) the defendant was an extremely dangerous mentally abnormal person, and (2) the defendant's conduct during the crimes indicated a serious threat of violence were predicated upon the same fact that the defendant is mentally ill, and therefore violated the prohibition that "the same item of evidence may not be used to prove more than one factor in aggravation." *Ibid.*

In prosecutions for second degree murder and assault with a deadly weapon with intent to kill, the trial court improperly considered as an aggravating factor that "defendant's conduct during the crimes indicate[d] a serious threat of violence." *Ibid.*

In prosecutions for second degree murder and assault with a deadly weapon with intent to kill, the trial court erred in finding as factors in aggravation that (1)

CRIMINAL LAW – Continued

neither the deceased nor the assault victim contributed "to the situation wherein the deceased's life was taken or the victim was wounded" and (2) the defendant attacked the victims without warning whereby the victims had no ability to defend themselves. *Ibid.*

In prosecutions for second degree murder and assault with a deadly weapon with intent to kill, the trial court erred in considering as an aggravating factor that there was no suitable or reliable supervision available for defendant's mental condition. *Ibid.*

In prosecutions for second degree murder and assault with a deadly weapon with intent to kill, the trial court erred in failing to make separate findings in aggravation and mitigation as to each offense. *Ibid.*

The trial court erred in finding as an aggravating circumstance that a larceny was committed for pecuniary gain. *S. v. Murray*, 541.

There was no error in a trial judge finding as aggravating circumstances both that defendant had a prior conviction punishable by more than 60 days' confinement and that the period of time for which the sentence for that conviction was suspended had not yet expired. *S. v. Stinson*, 737.

The trial court erred in finding as an aggravating circumstance that "The sentence pronounced by the court is necessary to deter others from the commission of a similar offense" and "a lesser offense than that pronounced by the court would unduly depreciate the seriousness of the defendant's crime." *Ibid.*

§ 162. Necessity for Objection to Evidence

Cross-examination of defendant regarding his lack of employment and income prior to a robbery and murder was not "plain error." *S. v. Murray*, 541.

Defendant's failure to object to a four-year-old witness being allowed to testify without being sworn as a witness was fatal to defendant's argument citing error by the trial court. *S. v. Robinson*, 530.

§ 163. Exceptions and Assignments of Error to Charge

Although the trial court's summary of the evidence approached the minimum for application of the law to the evidence, the "plain error" rule will not be applied to the court's summary. *S. v. Horner*, 274.

Defendant could not properly bring forward assignments of error concerning jury instructions, to which no objection was taken at trial, by inserting the term "exception" throughout the record and trial transcript. *S. v. Price*, 596.

The trial court's summary of the evidence and statement of defendant's contentions did not constitute "plain error." *Ibid.*

§ 169.6. Error in Exclusion of Evidence

There was no error in the exclusion of evidence on re-direct examination of a defense witness which detailed a purported "deal" offered to the witness to enter into plea negotiations. *S. v. Moose*, 482.

§ 173. Invited Error

In a prosecution for the rape of defendant's stepdaughter, the trial judge's remark that he was excluding evidence concerning defendant's relationship with a certain female "except as it relates to his relationship with his wife, which, of course, also is not on trial in this particular case" constituted invited error. *S. v. Stanley*, 353.

EMINENT DOMAIN

§ 6.9. Evidence of Value; Cross-examination of Witness

In an action to condemn a pipeline easement, cross-examination of the landowner as to the purchase price he paid his former business partner for a one-half undivided interest in the property eight years earlier upon dissolution of their development corporation was not competent as substantive evidence, and the impeachment purpose of the cross-examination was satisfied when the landowner on two occasions testified that he did not recall the prior purchase price. *Colonial Pipeline Co. v. Weaver*, 93.

While cross-examination of respondents' expert value witness concerning his knowledge of previously existing rights-of-way on respondents' property was relevant to a determination of the market value of the property prior to the taking, petitioner was not prejudiced by the trial judge's remark during such cross-examination that he didn't "believe that is relevant." *Ibid.*

§ 7.8. Instructions in Condemnation Proceedings

In an action to condemn a permanent pipeline easement and temporary construction easements, the trial court erred in failing properly to instruct the jury as to the nature of the temporary construction easements and what consideration should be given to them in determining the issue of damages. *Colonial Pipeline Co. v. Weaver*, 93.

EVIDENCE

§ 23.1. Competency of Allegations in Adversary's Pleadings

Defendant was not bound by allegations of his intestate's negligence in plaintiff's complaint which defendant introduced into evidence where the complaint was admitted only for impeachment purposes, and where the allegations in the complaint were contradicted by other evidence at trial. *Murdock v. Ratliff*, 652.

§ 49.1. Expert Testimony; Basis of Hypothetical Questions Generally

A hypothetical question put to an economics expert concerning the present monetary value of decedent to his wife and his daughter for the loss of the reasonably expected net income and services of decedent was entirely proper. *Hairston v. Alexander Tank & Equipment Co.*, 227.

HOMICIDE

§ 4. First Degree Murder Generally

The trial court properly denied defendant's motion that a charge of first degree murder be tried as a non-capital felony. *S. v. Hinson*, 245.

§ 6.1. Involuntary Manslaughter Defined

The "year and a day" rule does not apply to involuntary manslaughter cases. *S. v. Hefler*, 135.

§ 12. Indictment Generally

An indictment in the form authorized by G.S. 15-144 was sufficient to charge defendant with first degree murder. *S. v. Hinson*, 245.

The trial court did not err in allowing the State to change a murder indictment to allege the date of the offense rather than the date of the victim's death. *S. v. Price*, 596.

HOMICIDE — Continued

§ 20.1. Photographs

Photographs of a homicide victim's body were not inadmissible for illustrative purposes because they showed only a deteriorated body and a witness had already testified that the body was in an advanced state of decomposition when found. *S. v. Marlow*, 507.

§ 21.6. Sufficiency of Evidence of First Degree Murder; Felony Murder

Where defendant was tried for first degree murder under the felony murder rule, and the evidence was insufficient to sustain a conviction of the underlying felony, the judgment of conviction of first degree murder must also be reversed. *S. v. Forney*, 126.

§ 24.3. Instructions on Burden of Proof

The trial court's instructions to the jury correctly placed the burden of proof on the State to satisfy the jury beyond a reasonable doubt that defendant did not act in the heat of passion upon adequate provocation when he killed decedent. *S. v. Boykin*, 118.

§ 28. Instructions on Self-Defense Generally

In a murder prosecution, the trial court properly failed to instruct on the law of perfect and imperfect self-defense. *S. v. Boykin*, 118.

§ 28.1. Duty of Court to Instruct on Self-Defense Generally

The trial court in a second degree murder case did not err in failing to instruct on self-defense and defense of others. *S. v. Marlow*, 507.

§ 28.7. Instructions on Defense of Insanity

The trial court's charge on diminished capacity in a first degree murder case was error favorable to defendant, and the trial court adequately distinguished between insanity as a complete defense and insanity as a diminished capacity defense. *S. v. Adcock*, 1.

§ 30.2. Submission of Lesser Offense of Manslaughter Generally

The trial court in a second degree murder case did not err in failing to instruct on manslaughter. *S. v. Marlow*, 507.

§ 30.3. Submission of Lesser Offense of Involuntary Manslaughter

The trial court in a first degree murder case did not err in failing to submit involuntary manslaughter as a possible verdict. *S. v. Watson*, 384.

The trial court in a second degree murder case erred in failing to submit involuntary manslaughter as a possible verdict on the theory that the killing was the result of defendant's reckless but unintentional use of a butcher knife. *S. v. Buck*, 602.

§ 31.3. Constitutionality of Death Penalty

Defendant's argument that our death penalty statute violates the equal protection of the laws clause of the Fourteenth Amendment because it affords the district attorney "unbridled" discretion in deciding against whom he will seek verdicts of first degree murder and the death penalty failed where defendant failed to show that the district attorney based his decision to seek the death penalty in defendant's case upon unjustifiable standards like "race, religion or other arbitrary classifications." *S. v. Lawson*, 632.

JURY — Continued

§ 6.3. Propriety and Scope of Voir Dire Examination Generally

The prosecutor's statement in a question to a prospective juror that if defendant failed to show to the satisfaction of the jury that he was insane at the time of the alleged act "and the jury does find that he committed the alleged act beyond a reasonable doubt, then the jury must return a verdict of guilty" did not constitute prejudicial error. *S. v. Adcock*, 1.

§ 6.4. Voir Dire; Questions as to Belief in Capital Punishment

The trial court did not err in failing to sustain defendant's objection to the prosecutor's inquiry as to whether a juror had the "backbone" to impose the death penalty. *S. v. Hinson*, 245.

Defendant was not prejudiced by the prosecutor's questions to a prospective juror concerning the details of a paper which she had written on capital punishment. *Ibid.*

§ 7.2. Challenges to the Array; Burden of Proof

Evidence of an absolute disparity of 7.8% of underrepresentation of black citizens on the jury panel in the county was insufficient to establish a prima facie showing of a violation of the fair cross section principle. *S. v. Adcock*, 1.

§ 7.3. Opportunity to Investigate and Produce Evidence of Discrimination

The trial court did not err in the denial of defendant's motion that the State be required to pay a fee for an expert to conduct an update analysis of the county master jury list. *S. v. Adcock*, 1.

§ 7.7. Waiver of Right to Challenge

Defendant failed to preserve for appellate review his objection to a challenge for cause and failed to show prejudice caused by the court's denial of his motion for additional peremptory challenges. *S. v. Watson*, 384.

§ 7.11. Challenge for Scruples Against Capital Punishment

The trial court properly denied defendant's motion to prohibit death qualification of jurors in a first degree murder case. *S. v. Adcock*, 1.

The trial court did not err in denying defendant's request that each individual juror be instructed prior to his voir dire examination that, in the event defendant was found guilty of first degree murder, his duty as a juror would require him to subordinate his personal feelings about the death penalty and to consider whether a sentence of death should be imposed. *Ibid.*

A bifurcated trial in capital cases requiring the jury to be death qualified does not result in a guilt prone jury so as to deny defendant the right to trial by an impartial jury. *S. v. Hinson*, 245.

KIDNAPPING

§ 1.2. Sufficiency of Evidence

The evidence in a prosecution for first degree kidnapping was insufficient to withstand defendant's motion to dismiss at the close of the evidence. *S. v. Alston*, 399.

§ 1.3. Instructions

Where defendant was charged in the bill of indictment alleging all the essential elements of kidnapping in the first degree set forth in G.S. 14-39 but where the

trial court erred in its charge to the jury by failing to include as an element of the offense of kidnapping in the first degree that the victim "either was not released in a safe place or had been seriously injured or sexually assaulted," and where the jury returned a verdict of kidnapping in the first degree, the jury necessarily found facts establishing the offense of kidnapping in the second degree, and the jury verdict will be considered as a verdict of kidnapping in the second degree. *S. v. Corley*, 40.

LARCENY

§ 7.6. Sufficiency of Evidence of Misdemeanor Larceny

The State's evidence was sufficient to support conviction of defendant for misdemeanor larceny of meat from an A&P store and misdemeanor larceny of personal property from an Eckerd's drugstore. *S. v. Green*, 466.

LIBEL AND SLANDER

§ 14.1. Pleadings; Words Actionable Per Se

An editorial published by defendants expressing the opinion that the latest charges from Washington of discrimination against blacks by the University of North Carolina were based on a 1978 newspaper article written by plaintiff was not libelous *per se*. *Renwick v. News and Observer and Renwick v. Greensboro News*, 312.

MASTER AND SERVANT

§ 108.2. Right to Unemployment Compensation; Availability for Work

In an action involving the unemployment compensation claim of professional musicians who were members of the N.C. Symphony Orchestra the superior court judge properly concluded that claimants were on a "group temporary layoff" and were entitled to compensation. *In re Gorski v. N.C. Symphony Society*, 686.

§ 111. Appeal and Review of Proceedings Before Employment Security Commission

Civil cases are distinguishable from administrative proceedings in that there are no pleadings required in administrative proceedings, and the function of the superior court upon review is to ensure that the Commission, in an unemployment compensation case, properly construed and applied the applicable law in reaching its decision, as well as determining whether the evidence supported the findings of fact and deciding whether the facts found supported the conclusions of law and the Commission's decision. *In re Gorski v. N.C. Symphony Society*, 686.

MORTGAGES AND DEEDS OF TRUST

§ 27. Conduct of Foreclosure Sale

In an action by plaintiff seeking to have a foreclosure sale set aside, the Court of Appeals erred in finding that the foreclosure sale should not be set aside and in finding plaintiffs' action for conversion of crops should not lie since the *en masse* sale of two tracts of land constituted a material and prejudicial irregularity. *Swindell v. Overton*, 707.

MUNICIPAL CORPORATIONS

§ 2. Territorial Extent and Annexation

In cases where one municipality institutes valid annexation proceedings first, that municipality should be given priority under the prior jurisdiction rule, and subsequent annexation proceedings, of whatever nature, are of no force and effect. *City of Burlington v. Town of Elon College*, 723.

NARCOTICS

§ 1.3. Elements of Statutory Offenses

The offense of manufacturing a controlled substance does not require an intent to distribute unless the activity constituting manufacture is preparation or compounding. *S. v. Brown*, 563.

§ 4.3. Sufficiency of Evidence of Constructive Possession

There was substantial evidence that defendant was in constructive possession of cocaine and other drug packaging paraphernalia so as to support his conviction of manufacturing a controlled substance by packaging and repackaging cocaine. *S. v. Brown*, 563.

§ 4.6. Instructions as to Possession

The trial court erred in instructing the jury that defendant could be found guilty of possessing marijuana if he had reason to know that what he possessed was marijuana. *S. v. Boone*, 284.

§ 4.7. Instructions as to Lesser Offenses

In a prosecution for trafficking in cocaine by possessing at least 28 but not more than 200 grams of cocaine, testimony by defendant concerning his knowledge of only a small amount of cocaine in a plastic bag required the court to charge on the lesser offense of possession under G.S. 90-95(d)(2), and the court's instruction that the jury should consider whether defendant was guilty of simple possession if they should find that defendant possessed less than 28 grams was sufficient since there was no evidence as to the amount of cocaine in the plastic bag. *S. v. Siler*, 731.

NEGLIGENCE

§ 9. Proximate Cause; Foreseeability

A jury could find that a reasonably prudent person should have foreseen that a car company's negligence in failing to tighten the lug on the wheel of a new automobile could cause the car to be disabled on the highway and struck by another vehicle, causing harm to the driver. *Hairston v. Alexander Tank & Equipment Co.*, 227.

§ 10. Intervening Causes

The negligence of the defendant car dealer in failing to tighten the lug bolts on the left rear wheel of a car sold to the intestate and in failing to check the car before delivery to the intestate was not insulated by the negligence of a truck driver in striking the car while it was sitting in the highway after the left rear wheel came off. *Hairston v. Alexander Tank & Equipment Co.*, 227.

§ 35.4. Nonsuit for Contributory Negligence in Accidents Involving Motor Vehicles

It was error *as a matter of law* for the trial court to deny plaintiff's motion for judgment n.o.v. on the issue of whether plaintiff contributed to her own injuries in

PLEADINGS

§ 37.1. Issues Raised by the Pleadings; Necessity for Proof

Defendant was not bound by allegations of his intestate's negligence in plaintiff's complaint which defendant introduced into evidence where the complaint was admitted only for impeachment purposes, and where the allegations in the complaint were contradicted by other evidence at trial. *Murdock v. Ratliff*, 652.

PRIVACY

§ 1. Generally

A separate tort of false light invasion of privacy will not be recognized in this jurisdiction. *Renwick v. News and Observer and Renwick v. Greensboro News*, 312.

RAPE AND ALLIED OFFENSES

§ 3. Indictment

The indictment charging defendant with the crime of first degree rape fully satisfied defendant's right to be indicted by a grand jury. *S. v. Roberts*, 428.

An indictment was sufficient to charge defendant with a first degree sexual offense with a child of the age of twelve years or less without specifying the sexual act which defendant allegedly committed with the child. *S. v. Stills*, 410.

There was no merit to defendant's argument that he was placed in jeopardy twice for the same offense where he was indicted, tried and convicted on two separate counts of first degree rape, involving two separate incidents; defendant was convicted under the first count as a principal; and he was convicted under the second count as an aider and abettor and was therefore guilty as a principal. *S. v. Whitfield*, 608.

§ 4. Relevancy and Competency of Evidence

Testimony by a rape victim's schoolteacher that the victim did not do well in the beginning of the 1982 school year but noticeably began to improve by the middle of October was competent with respect to the condition of the child during the period of time she was physically examined and questioned after defendant's arrest. *S. v. Stanley*, 353.

In a prosecution of defendant for the rape of his stepdaughter, the trial court did not commit prejudicial error in excluding defendant's testimony regarding prior warrants taken out against him by his stepdaughter's mother. *Ibid.*

The trial court did not abuse its discretion in ruling that a seven-year-old rape victim was competent to testify. *S. v. Jones*, 716.

§ 4.1. Relevancy of Evidence of Other Acts and Crimes

In a prosecution for rape, sexual offense, and incest involving defendant's sixteen-year-old daughter, the trial court properly allowed the State to introduce evidence tending to show that the defendant had raped his daughter about two years before when she was fourteen years of age. *S. v. Hobson*, 555.

§ 4.2. Physical Condition of Prosecutrix

In a prosecution for the rape of a six-year-old child, an expert in pediatrics was properly permitted to testify that the child's unusually large vaginal opening was compatible with penetration of the vagina, and an expert in obstetrics was properly permitted to testify regarding the size of the victim's vagina and the generally ac-

RAPE AND ALLIED OFFENSES — Continued

cepted means whereby venereal warts such as those he observed on the victim are transmitted. *S. v. Stanley*, 353.

§ 5. Sufficiency of Evidence

While the evidence established that defendant was present during a sexual assault by others, the evidence was insufficient to establish that defendant participated in any sexual assault or that he aided or abetted or was acting in concert with the others in committing the assault so as to support defendant's conviction of rape. *S. v. Forney*, 126.

The evidence in a prosecution for first degree rape and first degree sexual offenses was sufficient for the jury to find that defendant employed a pair of vise grips as a deadly weapon and that defendant inflicted serious personal injury on the victim. *S. v. Jean*, 157.

In a prosecution for second degree rape, the evidence was insufficient to allow the trial court to submit the issue to the jury. *S. v. Alston*, 399.

Testimonial evidence by the victim that defendant had a knife stuck in the ground beside him while he was engaged in intercourse with the victim was sufficient to support a finding of the element of first degree rape that the defendant employed or displayed a dangerous weapon during the course of the rape. *S. v. Roberts*, 428.

There was sufficient evidence of penetration to require submission to the jury of a charge of first degree rape of a six-year-old child. *S. v. Stanley*, 353.

The State's evidence was sufficient to support defendant's conviction of the first degree rape of his six-year-old daughter. *S. v. Jones*, 716.

§ 6. Instructions

There was no error in a trial court's instructions in a prosecution for first degree rape that the jury could use evidence of a prior rape to determine defendant's intent in this case. *S. v. Hobson*, 555.

In a prosecution for first degree rape, a trial judge's summary of the evidence in his instructions which excluded testimony of witnesses to the effect that tests of material collected during a pelvic examination of a victim shortly after the crime were negative for either sperm or pubic hair was not erroneous. *Ibid.*

§ 6.1. Lesser Degrees of Crime

The trial court in a first degree rape prosecution did not err in refusing to submit the lesser included offense of an attempt to commit first degree rape. *S. v. Horner*, 274.

§ 7. Verdict

The trial court properly failed to consider assault inflicting serious injury as a lesser included offense of first degree rape. *S. v. Roberts*, 428.

§ 10. Carnal Knowledge of Female Under Twelve; Competency of Evidence

Where the record of a first degree rape trial disclosed that the court inquired into a four-year-old child's intelligence and understanding and admitted her testimony upon evidence which supported his conclusion of competency, the conclusion will not be disturbed on appeal. *S. v. Robinson*, 530.

§ 11. Carnal Knowledge of Female Under Twelve; Insufficiency of Evidence

The evidence was insufficient for the jury in a prosecution for rape in the first degree of a female child under twelve years of age, defendant being over the age of twelve and more than four years older than the child. *S. v. Robinson*, 530.

RAPE AND ALLIED OFFENSES — Continued

§ 17. Assault with Intent to Commit Rape Generally

By its verdict of guilty of rape in the first degree, the jury necessarily found beyond a reasonable doubt all the elements of the lesser offense of attempt to commit rape, and where the evidence was insufficient to support the jury's verdict of rape in the first degree, the case is remanded for sentencing on the offense of attempt to commit rape in the first degree. *S. v. Robinson*, 530.

REGISTRATION

§ 3.1. Persons Affected with Notice

Grantees take title to land subject to duly recorded easements imposed by their predecessors in title. *Waters v. Phosphate Corp.*, 438.

ROBBERY

§ 4.6. Cases Involving Multiple Perpetrators in which Evidence Was Sufficient

In a prosecution for armed robbery, the evidence was sufficient to withstand defendant's motion to dismiss. *S. v. Johnson*, 574.

§ 5.6. Instructions on Aiding and Abetting, Accessories and Accomplices

The Court of Appeals erred in reversing defendant's conviction in an armed robbery case on the basis that the trial court failed to instruct on mere presence at the scene of a robbery where a review of all the evidence demonstrated that defendant actually participated in the commission of the robberies. *S. v. Johnson*, 574.

RULES OF CIVIL PROCEDURE

§ 15.1. Discretion of Court to Grant Amendment of Pleadings

The trial court did not abuse its discretion in denying a plaintiff's motion to amend his original complaint to allege a claim for wrongful death against one of the defendants. *Henry v. Deen*, 75.

§ 50.2. Directed Verdict Against Party with Burden of Proof

Plaintiffs' evidence was not manifestly credible so as to permit the entry of directed verdicts against defendant where there were significant contradictions in the evidence at trial, and where the evidence supported three possible inferences on the negligence issue. *Murdock v. Ratliff*, 652.

SEARCHES AND SEIZURES

§ 10. Search and Seizure on Probable Cause

The evidence and findings did not support the conclusion of the Court of Appeals that there was an unjustified delay or failure to obtain a search warrant after the existence of probable cause to believe that two fugitives were at defendant's house so that an officer's warrantless entry into the house while in pursuit of a person he believed might be one of the fugitives and his seizure of heroin in plain view was not justified by exigent circumstances. *S. v. Johnson*, 581.

§ 21. Application for Warrant; Requisites of Affidavit; Hearsay

An officer's affidavit based on information reported to him by another officer was sufficient to support issuance of a warrant to search defendant's car for a rug allegedly used during a rape. *S. v. Horner*, 274.

SEARCHES AND SEIZURES — Continued

§ 43. Motions to Suppress Evidence

An order denying defendant's pretrial motion to suppress seized evidence was a nullity where it was signed after the close of the session at which the motion was heard, was signed outside the county and district in which defendant was being tried, and was entered out of session. Therefore, when the defendant renewed his motion to suppress, it was incumbent upon the new judge to consider the motion anew and conduct a hearing thereon. *S. v. Boone*, 284.

The trial court's order denying defendant's motion to suppress several items of physical evidence was not improperly entered out of session and out of district where the court passed on each part of the motion to suppress in open court as it was argued and later reduced its rulings to writings. *S. v. Horner*, 274.

SHERIFFS AND CONSTABLES

§ 4.1. Return of Execution

In an action in which the clerk of superior court issued a writ of possession commanding the Sheriff of Guilford County to take possession of furniture from defendant and deliver it to plaintiff, the trial court improperly entered judgment *nisi* in the sum of $100.00 against the Sheriff of Guilford County for failure to execute or make return upon the writ of possession since, through his reliance on the law of this state prohibiting forcible entry to execute a writ of possession for personal property, the sheriff showed a valid and complete defense as to why the judgment of amercement should not have been made absolute. *Red House Furniture Co. v. Smith*, 617.

VENDOR AND PURCHASER

§ 1.3. Construction of Options

Where a lease contained a $50,000 fixed price option to purchase and a "right of first refusal" option and provided that the failure of the lessee to exercise an option in any one case should not affect the lessee's right to exercise such option in other cases thereafter arising during the term of the lease, the fixed price option continued to bind the lessors or their successors in interest even though the lessee failed to meet a bona fide third-party offer. *Texaco, Inc. v. Creel*, 695.

§ 4. Title and Restrictions

The rule of conveyances of land with visible physical burdens was inapplicable to a power company easement created by a judgment in a condemnation action. *Waters v. Phosphate Corp.*, 438.

Under a contract to convey land which required the land to be conveyed subject to no encumbrances not satisfactory to the buyer, the buyer had a right to reject the tendered deed because of the existence of a power company's recorded judgment granting it an easement across the property for a high voltage transmission line. *Ibid.*

§ 5. Specific Performance

Plaintiff was entitled to specific performance of a contract to convey pursuant to a fixed price option even though the property may have been worth significantly more than the price fixed by the contract and plaintiff may have negotiated for a resale of the property. *Texaco, Inc. v. Creel*, 695.

WITNESSES

§ 1.2. Children as Competent Witnesses

The trial court did not abuse its discretion in ruling that a seven-year-old rape victim was competent to testify. *S. v. Jones*, 716.

WORD AND PHRASE INDEX

Printed By
COMMERCIAL PRINTING COMPANY, INC.
Raleigh, North Carolina