NORTH CAROLINA REPORTS

VOLUME 311

SUPREME COURT OF NORTH CAROLINA

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THE SUPREME COURT
OF
NORTH CAROLINA

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1. Appointed Associate Justice by Governor James G. Martin and took office 4 September 1985.

2. Retired 31 July 1985.

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1. Appointed 12 April 1985 to replace Robert W. Long who resigned.
2. Appointed 15 February 1985.
3. Appointed 1 July 1985 to replace Karen G. Shields who resigned 1 July 1985.
4. Appointed 4 January 1985 to replace Joseph R. John who went on Superior Court bench.

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CONSTITUTION OF UNITED STATES CITED AND CONSTRUED

CONSTITUTION OF NORTH CAROLINA CITED AND CONSTRUED

RULES OF APPELLATE PROCEDURE CITED AND CONSTRUED

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AIDA FAYAR CONYERS DOSS ..... Raleigh
ROBERT E. DUNGAN ..... Athens, Georgia
KIMBERLY HAYES FLOYD ..... High Point
ANDREW SCOTT FOWLER ..... Scottsdale, Arizona
JOHN CHARLES WAYNE GARDNER, JR. ..... Mount Airy
PAMELA GERR ..... Durham
JAMES MCMAKIN GIBERT III ..... Davidson
SUE BALLARD GILLIAM ..... Hendersonville
JULIE BAILEY GLENN ..... Havelock
PATRICIA BLY HALL ..... Durham
MICHAEL S. HAMDEN ..... Galax, Virginia
JAMES EDWARD HARDIN, JR. ..... Durham
EDWARD PAUL HAUSLE ..... Charlotte
BARBARA ANNE HECK ..... Hendersonville
ROBERT LOUIS HOGAN ..... Hendersonville
TAMARA S. HOLDER ..... Leland
VERNICE BRITT HOWARD ..... Murfreesboro
CATHERINE ANNE HUBBARD ..... Raleigh
MARIA CLEMENZA IACOVAZZI ..... Durham
LAVEE HAMER JACKSON ..... Raleigh
CLAYTON LEE JONES ..... Durham
JEFFREY PERRY KEETER ..... Wilmington
ELEANOR BARRY KNOTH ..... Raleigh
ELLEN HENDRIX KOCH ..... Winston-Salem

ROBERT BENJAMIN LAWS	Durham
LEIGH LAURENS LEONARD	Chapel Hill
MICHAEL LINCOLN	Morehead City
DANIEL RAY LONG, JR.	Roxboro
MAX GERALD MAHAFFEE	Raleigh
THOMAS KIERAN MAHER	Durham
MARILYN ELIZABETH MASSEY	Winston-Salem
NANCY M. MCKENZIE	Chapel Hill
THOMAS EASTWOOD MEDLIN, JR.	Smithfield
LESLIE EDDY MILLER	Charlotte
ANN WARD MORGAN	Birmingham, Alabama
RISDEN THOMAS NICHOLS, JR.	Rockingham
WARREN THOMAS PORTWOOD, JR.	Hickory
ELIZABETH CAMERON RICHARDSON	Concord
WILLIAM JOSEPH RILEY	Chapel Hill
RICHARD ALEXANDER ROGERS, JR.	Raleigh
HEATHER MOULDS RORIES	Chapel Hill
STACY LAUREN ROSE	Durham
JOHN WALLIS RUSHER	Raleigh
MARGARET RIDDLE RUSS	St. Pauls
SCOTT MARTIN SAYLOR	Kernersville
CAROL ANN MASTERS SCHILLER	Raleigh
PHYLLIS JUDITH SCHULTZ	Charlotte
BRADLEY N. SCHULZ	Selma
JAMES PINKSTON SLEDGE	Charlotte
NEIL WAYNE STEPHENSON, JR.	Wake Forest
VILMA SUAREZ	San Juan, Puerto Rico
ANDREW PETER TENNENT	Greensboro
MICHAEL MAULDIN THOMPSON	Hendersonville
SALLY REID TICKLE	Wilson
CHARLES EDWARD TREFZGER, JR.	Lewisville
GEORGE L. WAINWRIGHT, JR.	Winston-Salem
CHRISTOPHER LEWIS WHITE	Pine Level
JUDITH CULP WILSON	High Point
LAWRENCE WITTENBERG	Durham

Given over my hand and Seal of the Board of Law Examiners this the 23rd day of April, 1985.

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

LICENSED ATTORNEYS

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

On April 11, 1985, the following individuals were admitted:

PATRICIA A. BAILEY ..... Goldsboro, applied from the State of Wisconsin
L. NEAL ELLIS, JR. ..... Raleigh, applied from the State of Virginia
MICHAEL CLAUDE FROHMAN ..... Raleigh, applied from the State of Wisconsin
MARK FLOYD REYNOLDS II .... Jamestown, applied from the State of Pennsylvania
ROBERT W. SEIFERT ..... Clemmons, applied from the State of Pennsylvania
BRIEN WILLIAM SHANAHAN ..... Durham, applied from the State of Ohio
RICHARD DENNIS SWANSON ..... Raleigh, applied from the State of Tennessee
CLYDE E. WILLIS ..... Raleigh, applied from the State of Tennessee

Given over my hand and Seal of the Board of Law Examiners this 23rd day of April, 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 named persons duly passed the examinations of the Board of Law Examiners as of the 12th day of April, 1985, and said persons have been issued certificates of this Board:

LYNDA SUSAN ABRAMOVITZ ..... Charlotte
MARY RUTHERFORD BLANTON ..... Salisbury
GLENN LAURENCE BORST ..... Raleigh
RICHARD DAVID BOWLIN ..... Raleigh
KATHRYN TAYLOR CURRAN ..... Greensboro
SANDRA K. DELZELL ..... Greensboro
JULIANNE GARNER DOUGLASS ..... Carrboro
PAUL L. DRIVER, JR. ..... Charlotte
JOEL DAVID FARREN ..... Raleigh
JUDITH MARIE HAUSER ..... Hillsborough
MATTHEW RIGHTS JOYNER ..... Chapel Hill
RODNEY STEPHEN MADDOX ..... Wake Forest

ELIZABETH PABST MANLEY	Raleigh
BRAD STEVEN MARKOFF	Raleigh
DAVID WILLIAM MCDONALD	Greensboro
BARBARA L. KUMM MORENO	High Point
BRUCE A. PETESCH	Raleigh
SAMUEL CHAPIN POST, JR.	Greensboro
DORIE BENESH REFLING	Jacksonville
JOHN LAWRENCE SAXON	Hillsborough
KATHLEEN M. WAYLETT	Raleigh
THOMAS AUGUSTINE WILL, JR.	Charlotte
DOUGLAS EDWARD WRIGHT	Greensboro

Given over my hand and Seal of the Board of Law Examiners this the 29th day of April, 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 individual was admitted to the practice of law in the State of North Carolina:

On April 24, 1985, the following individual was admitted:

GERALD STUART HARTMAN .. Winston-Salem, applied from the District of Columbia

Given over my hand and Seal of the Board of Law Examiners this 29th day of April, 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 June 7, 1985, the following individuals were admitted:

CELESTE A. BERON ..... Winston-Salem, applied from the State of Massachusetts
KENNETH J. GUMBINER ..... Greensboro, applied from the State of Massachusetts

Given over my hand and Seal of the Board of Law Examiners this 10th day of June, 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 June 7, 1985, the following individuals were admitted:

WILLIAM J. MCANDREWS ..... Sanford, applied from the State of New York 1st Department
LESTER H. BROUSSARD ..... Belmont, applied from the State of Illinois

Given over my hand and Seal of the Board of Law Examiners this 14th day of June, 1985.

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

LICENSED ATTORNEYS

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

On July 1, 1985, the following individuals were admitted:

WILLIAM JOHN LOWRY ..... Hendersonville, applied from the State of Ohio
DAVID A. STOLLER ..... New Bern, applied from the State of Iowa
HOWARD EDWIN HILL ..... Jacksonville, applied from the State of Virginia

Given over my hand and Seal of the Board of Law Examiners this 1st day of July, 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 July 31, 1985, the following individuals were admitted:

JAMES ROBERT BRUNER ..... Greenville, applied from the State of Kentucky
JAMES JAY KAUFMAN .... Newark, New York, applied from the State of New York 1st Department
GARY H. MARKET ..... Charlotte, applied from the State of Minnesota

Given over my hand and Seal of the Board of Law Examiners this 2nd day of August, 1985.

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 24th day of August, 1985, and said persons have been issued certificates of this Board:

G. NORMAN ACKER III ..... Chapel Hill
SHELBY DUFFY ALBERTSON ..... Faison
ROBERT WAYNE ALLEN ..... Gastonia
LEIGH ANN ALLRED ..... Aberdeen
D. BERNARD ALSTON ..... Henderson
JAMES BIGELOW ANGELL ..... Chapel Hill
BRIAN MICHAEL AUS ..... Chapel Hill
TALMAGE S. BAGGETT, JR. ..... Fayetteville
JEROME DENNIS BAILEY ..... Winston-Salem
ALTON DEEMS BAIN ..... Lillington
BARBARA JEAN BAKER ..... Hillsborough
LYNN EILEEN BARBER ..... Raleigh
TIMOTHY GILLAM BARBER ..... Winston-Salem
MARK DOUGLAS BARDILL ..... Richlands
VANESSA NEEDHAM BARLOW ..... Chapel Hill
DAVID MCKINLEY BARNES ..... Winston-Salem
RUSSELL WHITFIELD BARNES ..... Rocky Mount
WILLIAM THOMAS BARNETT, JR. ..... Henderson
CHARLES DANIEL BARRETT ..... Laurinburg
CLIFTON THOMAS BARRETT ..... Alexandria, Virginia
JAMES ALEXANDER SHERER BARRETT ..... Greensboro
TAMARA PATTERSON BARRINGER ..... Chapel Hill
LEE ELLEN BELK ..... Matthews
JANICE CAROL BELL ..... Winston-Salem
WILLIAM NAWROT BELL ..... Raleigh
DAVID E. BENNETT ..... Burlington
JOHN HOWARTH BENNETT ..... Goldsboro
LISA E. BENNETT ..... Chapel Hill
SETH MICHAEL BERNANKE ..... Durham
PAUL LOUIS BIDWELL ..... Winston-Salem
JANET WARD BLACK ..... Kannapolis
PETER TIMSON BLAETZ ..... Erie, Pennsylvania
DAVID JEFFREY LEONARD BLATT ..... New Haven, Connecticut
NANCY ELOISE BORDERS ..... Shelby
FREDA JEANETTE BOWMAN ..... Burlington
AARON EUGENE BRADSHAW ..... Iron Station
BARBARA DIANE BRADY ..... Fayetteville
HOWARD BRUCE BRANDON ..... Winston-Salem
MARGURETE ROSE BRITT ..... Lumberton
CHARLES B. BROOKS II ..... Wingate
ALLEN CURTIS BROTHERTON ..... Stanley
HERBERT HOWARD BROWNE III ..... Charlotte
DONALD R. BRYAN, JR. ..... Rocky Mount
BETH M. BRYANT ..... Nebo

JOHN DAVID BRYSON	Winston-Salem
VICKIE L. BURGE	Lumberton
CHARLES RUSSELL BURRELL	Hendersonville
GREGORY CLEMENT BUTLER	Roseboro
JOHN STEWART BUTLER III	Fayetteville
CHRISTOPHER BLAIR CAPEL	Thomasville
MARK EVAN CARPENTER	Charlotte
WALTER CLEMENT CARPENTER	Hendersonville
EUGENE MORRISON CARR III	Asheville
MELISSA J. CARRAWAY	Weldon
CARRIE VIRGINIA CARROLL	Fayetteville
KENNETH GRAY CARROLL	King
ROBERT CHARLES CARTER	Wilmington
THOMAS BLAKE CARTER	Raleigh
P. KEVIN CARWILE	Colonial Heights, Virginia
CLYDE RICHARD CASH	Winston-Salem
JOSEPH BARROW CHAMBLISS, JR.	Clinton
JOHN LOUIS CHARVAT, JR.	Durham
JOHN HARPER PLUMER CILLEY IV	Newton
ANDREW PAUL CIOFFI	New London, New Jersey
JOHN LLOYD COBLE	High Point
DONNA KAREN CODY	Robbinsville
CHARLES NEAL COKER	Pinetops
JEAN THORNWELL COLLETT	Morganton
GEORGE BRYAN COLLINS, JR.	North Wilkesboro
STEPHEN B. CONE	Greensboro
JOHN HEWLETTE CONNELL	Raleigh
BUXTON SAWYER COPELAND	Murfreesboro
ISAAC CORTES, JR.	Buies Creek
AMY ROGERS CUMMINGS	Raleigh
RAMONA JEAN CUNNINGHAM	Ripley, West Virginia
JENIFER DENNISON CUPP	Charlotte
TIMOTHY EARL CUPP	Charlotte
MICHEL CLAYTON DAISLEY	Greenville, South Carolina
DAVID WATSON DANIEL	Greenville
WILLIAM HAROLD DANIEL	Blanch
JOSEPHINE RAGLAND DARDEN	Raleigh
ROBERT D. DAVIDSON, JR.	High Point
JAMES ALLAN DAVIS	Ada, Ohio
ROY WALTON DAVIS III	Asheville
SHERRY ROSE DAWSON	Cana, Virginia
DOUGLAS RENE DEATON	Greensboro
CLARENCE JOE DELFORGE III	Cullowhee
DANIEL ALAN DEVAY	Winston-Salem
ALAN GREGORY DEXTER	Durham
ROBERT CARTER DIVINE	Nashville, Tennessee
STACY ROBBINS BLOUNT DIVINE	Washington
JERI K. D'LUGIN	Greensboro
JAMES ANTHONY DORAN	Winston-Salem
STUART BATTLE DORSETT	Raleigh

CHARLES THOMAS DOUGLAS	Winston-Salem
ELLIS B. DREW III	Anderson, South Carolina
JEFF DUNHAM	Linden
MARK REID EDMONDSON	Pinetops
PATRICIA BAILEY EDMONDSON	Davidson
JOHN MICHAEL EDNEY	Hendersonville
ANDREA DENISE EDWARDS	Newton
ARTHUR MICHAEL EDWARDS	Marion
JOSEPH TIMOTHY EDWARDS	Raleigh
JUDITH ELLEN EGAN	Carrboro
ROBERT CRAWFORD ERVIN	Morganton
CELIA BETH EREBEE	Newport News, Virginia
JUNE SELEY FERRELL	Wendell
ROBERT E. FIELDS III	Decatur, Georgia
DAVID JARVIS FILLIPPELI, JR.	Wilmington
R. ANDREW FINKLE	Bristol, Virginia
WILLIAM E. FITZGERALD	Durham
TIMOTHY EDWARD PATRICK FLEMMING	Uniontown, Pennsylvania
MARY ANN FLYNN	Winston-Salem
HENRY C. FORDHAM, JR.	Greensboro
RICHARD TILLMAN FOUNTAIN III	Rocky Mount
RICHARD LEE FRANCE	Cary
WILLIAM F. FRITTS	Lexington
VIRGINIA LORI FULLER	Oxford
PHILLIP ALAN FUSCO	Dracut, Massachusetts
GREGORY HENRY GACH	Bloomfield Hills, Michigan
CYNTHIA LOUISE GAFFNEY	Charlotte
STEPHEN PATE GAMBILL	Creston
WILLIAM JUSTIN GARRITY III	Winston-Salem
ELLEN RUTH GELBIN	Pfafftown
WILLIAM R. GILKESON, JR.	Chapel Hill
AMY GILLEN	Wilmington
SARA CLAIR GILLILAND	Clemson, South Carolina
NANCY KINGSTAD GINNIS	Raleigh
RICHARD EDWARD GLAZE, JR.	Winston-Salem
JOHN CALHOUN GRAHAM III	Elizabeth City
ALMA ELIZABETH GREEN	Winston-Salem
THOMAS CHRISTOPHER GRELLA	Winston-Salem
DAVID ELWIN GRIMES, JR.	Hope Mills
R. HOWARD GRUBBS	Columbia, South Carolina
NANCY GUYTON	Cary
WILLIAM ROBERT HAMILTON	Cedar Grove
ELLEN BUTLER HANCOX	Buies Creek
LISA BOUTELLE HARDIN	Rapid City, South Carolina
JAMES HAYDEN HARRELL	Arden
NORMAN BRIAN HARRIS	Gibsonville
DAVID LEE HARRISON	Winston-Salem
HELEN COOK HARRISON	Wake Forest
SHARON LEA HARTMAN	Winston-Salem
TINA FULFORD HEELAN	Lawrenceville, Georgia

FRANCES WRIGHT HENDERSON	Chapel Hill
CARROLL THOMAS HENDRICKSON	Raleigh
WILLIAM DAVENPORT HERLONG	Chicago, Illinois
TERRY DEWAYNE HORNE	Salisbury
VIRGINIA HOURIGAN	Winston-Salem
MARGARET ELLEN HOUSE	Marion
LUKE EDGAR HOWARD	Durham
JOHN THOMAS HUDSON	Salisbury
BRIAN GEOFFREY HULSE	Goldsboro
JAMES R. HUNDLEY	Winston-Salem
ROBERT ALLEN INGRAM, JR.	Greensboro
JOHN SALVATORE IORIO	Bowie, Maryland
BETHANN JAKOBOSKI	Winston-Salem
GEORGE WALTER JARECKE	Chapel Hill
KATHERINE ELIZABETH JEAN	Charlotte
DANIEL LOUIS JOHNSON, JR.	Gastonia
THOMAS HATCHER JOHNSON, JR.	Greenville
GEORGE FRANKLIN JONES	Wilmington
GREGORY LAWING JONES	Charlotte
KENNETH LYNN JONES	Chapel Hill
KIMBERLY ANN KELLY	Statesville
LISA THOMPSON KELLY	Winston-Salem
PATRICIA PURSELL KERNER	Durham
WILLIAM LEWIS KING	Raleigh
ANN HINES KIRBY	Durham
BRENT DRAKE KIZIAH	Hickory
LUCY KATHERINE KLUTTZ	Rockwell
ROGER WELDON KNIGHT	Morganton
DAVID THOMAS LAMBETH, JR.	Chapel Hill
ROBERT A. JAMISON LANG	Cary
VICKIE ELLEN LATHE	Charlotte
ANDREW WAYNE LAX	Winston-Salem
PEGGY S. LEVIN	Raleigh
JAMES E. LILLY	Durham
STEPHEN PAUL LINDSAY	Durham
CHARLES MOFFITT LINEBERRY, JR.	Buies Creek
BARRIE LEIGH LITTLE	Charlotte
HAROLD ANTHONY LLOYD	North Wilkesboro
LESLIE STUART LOCKE	Rocky Mount
JEAN ELIZABETH LOGAN	Chapel Hill
KENNETH SHELTON LUCAS, JR.	Winston-Salem
DICKSON MCCARTHY LUPO	Winston-Salem
ANTHONY LYNCH	Pittsboro
CHARLES EDWARD LYONS II	Lenoir
DANIEL DUPREE MAHN	Wilmington
SAMUEL AUSTIN MANN	Grifton
DONALD WILLIAM MARCARI	Winston-Salem
GEORGE WILSON MARTIN, JR.	Mocksville
JOHN DEARMAN MARTIN	Buies Creek
NANCY OLSZEWSKI MASON	Chapel Hill

ELIZABETH ELLEN MCCONNELL ..... Greenville
SUSAN IVY MCCRORY ..... Charlotte
MARY KATHERINE MCDONALD ..... Decatur, Illinois
VICTORIA JAYNE MCGEE ..... Lenoir
WILLIAM MORRIS MCLEAN ..... Winston-Salem
ROBERT BURNS MCNEILL ..... Raeford
CHARLES DIETRICH MEIER ..... Wilmington
KATHERINE C. MEYERS ..... Chapel Hill
ROBIN MIELE ..... Durham
ALAN JEFFREY MILES ..... Asheville
STEPHEN BISHOP MILLER ..... Swepsonville
BOBBY D. MILLS ..... Morganton
ELIZABETH JONES MITCHELL ..... Durham
ROBERT ALLEN MONATH ..... Chapel Hill
JAMES LLOYD MOORE, JR. ..... Red Oak
JOHN KEVIN MOORE ..... Durham
PAGE DOLLEY MORGAN ..... Shelby
BRUCE DANFORTH MORTON ..... Greensboro
ALICE NEECE MOSELEY ..... Raleigh
GAYLE LOUISE MOSES ..... Rich Square
J. ALLEN MURPHY ..... Durham
JANINE MCPETERS MURPHY ..... Durham
DEBORAH ANN NANCE ..... Charlotte
DAVID POWELL NANNEY, JR. ..... Gastonia
ROY DANIEL NEILL ..... Hendersonville
WARD WESKETT NELSON ..... Chapel Hill
ROBERT THOMAS NEWMAN, SR. ..... Buies Creek
RICHARD P. NORDAN ..... Smithfield
BLAIR CARTER OLT ..... Dayton, Ohio
MICHAEL ROBERT ORTIZ ..... Champaign, Illinois
BRUCE EDWARD OWEN ..... Greensboro
CHARLES DOWNING TAYLOR PACE ..... Greenville
DONNA LYNN PARKER ..... Winston-Salem
JAMES S. PARSONS, JR. ..... Winston-Salem
JANICE PERRIN PAUL ..... Durham
DIANE SANDERS PEAKE ..... Durham
DONALD DAVID PERGERSON ..... Henderson
KEVIN JOSEPH PETERS ..... Chapel Hill
STEVE MACON PHARR ..... Barboursville, Virginia
RICHARD ALBERT PHILLIPS ..... Statesville
SUSAN JACKSON PHILLIPS ..... Asheboro
NANCY KATHERINE PLANT ..... Chapel Hill
GARY RAY POOLE ..... Chapel Hill
HARRELL DAVID POWELL ..... Clemmons
JESSE COBURN POWELL ..... Whiteville
ALAN WILLIAM PRATT ..... Hillsborough
EMILY HARRIS PREYER ..... Greensboro
WILLIAM ROBERT PURCELL II ..... Laurinburg
MICHAEL IAN QUINN ..... Winston-Salem
HENRY VAUGHN RAMSEY ..... New York, New York

KARLEN J. REED ..... Cary
STEVEN I. REINHARD ..... Carrboro
GENE ARTHUR RIDDLE ..... Southern Pines
CHERYL SMITH RIEDLINGER ..... High Point
GEORGE WILBORN RIVES ..... Mount Airy
CYNTHIA HARRISON RUIZ ..... Arlington, Virginia
SHARON MARIE RUPPE ..... Fayetteville
MARY NASH KELLY RUSHER ..... Norfolk, Virginia
JOHN SPOTSWOOD RUSSELL ..... Raleigh
JAMES R. SAINTSING ..... Chapel Hill
MICHAEL GARY SANDMAN ..... Raleigh
THOMAS MICHAEL SATTERFIELD ..... Wilmington
RICHARD KNIGHT SCHELL ..... Carrboro
MICAJAH BERT SESSOMS ..... Rocky Mount
RICHARD L. SHAFFER, JR. ..... Shelby
CARLTON ALDRIDGE SHANNON, JR. ..... Chapel Hill
CURTIS RANDOLPH SHARPE, JR. ..... Newton
BEVERLY RENEE SHEPARD ..... Jacksonville
GRADY LEE SHIELDS ..... Greensboro
DONNA SUE SHORE ..... Yadkinville
RONALD JAY SHORT ..... Winston-Salem
KENNETH DOUGLAS SIBLEY ..... Durham
JOSEPH K. SILEK, JR. ..... Coats
LOWELL LESESNE SILER ..... Garner
JONATHAN SILVERMAN ..... Chapel Hill
DONNA KAYE SMITH ..... Carrboro
JOHN NEWTON SMITH III ..... Rocky Mount
KAREN CHRISTINE SORVARI ..... Buies Creek
RICHARD G. SOWERBY, JR. ..... Greensboro
SARAH FLINTOM SPARROW ..... Greensboro
RONALD EUGENE SPIVEY ..... Sanford
RICKY VAN SPOON ..... Bennett
PEGGY HARRIS SPRAGINS ..... Buies Creek
WILLIAM TURNER STEPHENSON III ..... Roanoke Rapids
JOHN BRUCE STERNLICHT ..... Chapel Hill
LAUREN CORLISS STEVENS ..... Chapel Hill
NOELLE VIVIENNE STEVENS ..... Raleigh
CONNIE J. STONE ..... Greensboro
KENNETH W. STONE ..... Jacksonville
ROSE MARIE HUNT STOUT ..... Buies Creek
ANN BLACK STRADER ..... Lexington
HENRY CAREY STRICKLAND III ..... Mobile, Alabama
MICHAEL WAYNE STRICKLAND ..... Stedman
STEPHANIE LEA STROMIE ..... Cocoa, Florida
CHARLES WILLIAM STUBER, JR. ..... Raleigh
GARY KENT SUE ..... Greensboro
JAMES RUSSELL SUGG, JR. ..... New Bern
JEFFREY NEILL SURLES ..... Linden
RONNIE NEAL SUTTON ..... Pembroke
JAMES KIRK TALCOTT ..... Pleasant Garden

THOMAS EUGENE TERRELL, JR.	High Point
S. PERRY THOMAS, JR.	Lexington, Virginia
AMY WINSTON CARR THULLEN	Raleigh
MARK RUSSELL TOWNSEND	Winston-Salem
RONALD C. TRUE	Cary
LESLIE CAMPBELL TUCKER III	Durham
ANDREW ALBERT VANORE III	Raleigh
GAY PAISLEY VINSON	Black Mountain
BARBARA VON EULER	Bethesda, Maryland
ANNA MILLS S. WAGONER	Salisbury
DANIEL STEPHEN WALLIN	Huntersville
DOUGLAS GWYNNE WARD	Chapel Hill
DEAN ANTHONY WARREN	Charlotte
MELISSA HAYDEN WEAVER	Williamsburg, Virginia
KELLY DANIEL WHEATON	Carrboro
KEVIN JOHN WHITE	Asheville
ELIZABETH GRAHAM WHITENER	Winston-Salem
MARGARET EMMA WHITESIDE	Dunn
HENRY MONROE WHITESIDES, JR.	Charlotte
RALPH DAVID WICKER, JR.	Durham
DAVID FRAZIER WILLIAMS	Durham
FRANKLIN MILLER WILLIAMS	Chapel Hill
KELLY GENE WILLIAMS	Wingate
KAREN MALETTE WILSON	Lenoir
PHYLLIS CRAIG WIMBERLY	Chapel Hill
JAMES R. WOODALL, JR.	Princeton
ROBERT CLAUDE YOUNCE, JR.	Raleigh
WALLACE REID YOUNG, JR.	Raleigh

Given over my hand and Seal of the Board of Law Examiners this the 5th day of September, 1985.

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

LICENSED ATTORNEYS

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

On September 13, 1985, the following individuals were admitted:

SIDNEY SOLOMON BARON .. Southfield, Michigan, applied from the State of Michigan
THOMAS HAROLD EAGEN ..... Durham, applied from the District of Columbia
RICHARD L. HATTENDORF ..... Newton, applied from the State of Illinois
DAVID F. HENSCHEL ..... Winston-Salem, applied from the State of Pennsylvania
JAMES FREDERICK VERDONIK ..... Raleigh, applied from the State of New York
SAMUEL BROWN WITT III ..... Winston-Salem, applied from the State of Virginia

Given over my hand and Seal of the Board of Law Examiners this 16th day of September, 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 named persons duly passed the examinations of the Board of Law Examiners as of the 24th day of August, 1985 and said persons have been issued certificates of this Board:

ROGER MOHR COOK ..... Raleigh
TIMOTHY JOSEPH EHLINGER ..... Oyster Bay, New York
LAWRENCE JENNINGS SCOTT ..... Charlotte

Given over my hand and Seal of the Board of Law Examiners this the 20th day of September, 1985.

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 13th day of September, 1985 and said persons have been issued certificates of this Board:

KENNETH F. ANTLEY ..... Macon, Georgia
JOHN ALLEN BANKS, JR. ..... Durham
GILL PAUL BECK ..... Lenoir
HARRY PHILIP BRODY ..... Durham
JOHN CONWAY BRYCE ..... Washington, District of Columbia
DANIEL JAMES CLIFTON ..... Elon College
CYNTHIA ANNE CLINE ..... Winston-Salem
ANDREW PATRICK GEORGE COGDELL ..... Asheville
DAVID DUANE DAGGETT ..... Winston-Salem
PATRICIA PHELAN DAVIS ..... Memphis, Tennessee
SARAH PAGE DICKSON ..... Winston-Salem
MARY ELIZABETH EGAN ..... Appleton, Wisconsin
JOHN FRANCIS EICHORN ..... Charlotte
MARK A. FERGUSON ..... Fayetteville, West Virginia
MARK ANDERSON FINKELSTEIN ..... Chapel Hill
GREGORY S. FOLLEY ..... Durham
NORMAN E. FRYE ..... Garner
JAMES EDWARD GATES ..... Durham
PAUL MACALLISTER GREEN ..... Durham
JEFFERSON DAVIS GRIFFITH ..... Saluda, South Carolina
THOMAS BEALL GRIFFITH ..... Charlottesville, Virginia
PHILLIP WARREN HEGG ..... Charlotte
MARK DOUGLAS HERING ..... Charlotte
CATHERINE DWIGHT HINKLE ..... Arlington, Virginia
ANN CLINTON HOLTON ..... Winston-Salem
JAMES RYAN HUBBARD ..... Miami, Florida
JOHN CHARLES HUNTER ..... Winston-Salem
PAUL MARSHALL JAMES III ..... Winston-Salem
HOLLY HENDRIX JIMISON ..... Greensboro
BRADFORD JOSEPH LINGG ..... Kill Devil Hills
CATHERINE BRYAN MABRY ..... Greensboro
MATT MAGGIO ..... Burlington
CLIFTON FRANKLIN MARLEY ..... Robbins
ROBERT JAMES MILLER II ..... Raleigh
DANIEL K. PRICHARD ..... Charlotte
SONIA MARIE PRIVETTE ..... Zebulon
SHERRI ZANN ROSENTHAL ..... Durham
MARJORIE ANNE ROWE ..... Bay City, Michigan
WILLIAM DAVID ROWE ..... Jamaica Plain, Massachusetts
DAVID ARNOLD SAWYER ..... Dearborn Heights, Michigan
LESLIE LYNN SCHLUTER ..... Denver, Colorado
KAREN J. SHANGRAW ..... Hillsborough
DENNARD LINDSEY TEAGUE ..... Atlanta, Georgia
ROBERT RAND TUCKER ..... Goldsboro

ROBERT JAMES WALTERS ..... Carrboro
BRIAN KEVIN WASHINGTON ..... Winston-Salem
JARALD NICHOLAS WILLIS ..... Tryon
GREGORY MILLS WILLIS ..... Cincinnati, Ohio
TERRY PARKER YOUNG ..... Asheville

Given over my hand and Seal of the Board of Law Examiners this the 20th day of September, 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. ANSON AVERY MAYNARD

No. 178A81

(Filed 5 June 1984)

1. **Constitutional Law § 63; Criminal Law § 135.3— exclusion of veniremen opposed to death penalty—proper**

The exclusion of two jurors from the jury panel was not in violation of *Witherspoon v. Illinois*, 391 U.S. 510 (1968) where, when pressed, they unequivocally responded that in good conscience they could not impose a sentence of death.

2. **Constitutional Law § 63; Criminal Law § 135.3— exclusion of jurors opposed to death penalty—basic understanding of death penalty process not necessary**

The purpose of the jury selection process in first-degree murder cases is to ascertain whether the beliefs a particular juror holds with respect to the imposition of the death penalty are such that he or she cannot, under any circumstances, vote to impose a sentence of death, and an understanding of the *process* under which this ultimate conclusion is reached should not affect one's *beliefs* as to whether he or she can, under any circumstances, vote to impose the death penalty.

3. **Criminal Law § 88.2— no abuse of discretion in ruling limiting cross-examination**

There was no abuse of discretion in a trial court's limiting defendant's cross-examination of a State's witness concerning whether the witness was living alone after her husband had left the marital home.

4. **Criminal Law § 169.7— exclusion of evidence—no error**

Defendant failed to show prejudice by the exclusion of a witness's answers relating to the disposition of criminal charges pending against defendant where the defendant failed to include in the record what the witness's answers would have been, and where the witness had already indicated that no agreement was ever reached.

5. **Constitutional Law § 74— witness invoking Fifth Amendment privilege—failure of defense counsel to object or request voir dire—waiver of right to object on appeal**

Where defense counsel neither objected to its own witness's assertion of his Fifth Amendment claim nor moved the court to conduct an inquiry into whether there was a valid basis for the claim, the Court declined to place upon the trial court the duty to conduct a *voir dire* on its own motion to determine if there was a valid basis for the defense witness's Fifth Amendment claim.

6. **Criminal Law § 102— argument to jury—no gross impropriety**

The prosecuting attorney's closing arguments in a first degree murder case were not grossly improper and thus did not deprive the defendant of a fair and impartial trial.

7. **Criminal Law § 73.3— statements not within hearsay rule—offered to explain subsequent conduct**

There was no error in the admission of a detective's statements that a complaint was filed with his department on 10 February 1981 which alleged that 50 sheets of plywood were stolen from a building site and that on 7 January 1981 another person reported that a jewelry box had been taken since the testimony was not offered to prove the truth of the matters asserted, but was offered to show that a report had been filed of complaints concerning stolen property and to explain the detective's subsequent conduct.

8. **Criminal Law § 73.1— hearsay testimony—admission not prejudicial error**

Testimony by an assistant district attorney that a detective told her that the information provided by a State's witness concerning property that had been stolen while the State's witness was engaged in the theft ring "could only have been obtained by someone who actually participated in the break in or who was in a position to know about the break in" was erroneously admitted because it was hearsay and did not fall within any exception to the hearsay rule; however, the error was not prejudicial since the testimony was merely cumulative and corroborative of facts already in evidence. G.S. 15A-1443(a).

9. **Criminal Law § 73— admission of hearsay testimony concerning statement made by victim—proper**

The trial court correctly admitted an assistant district attorney's testimony that the victim stated to her "that he would give truthful testimony in cases involving criminal charges against" defendant where the victim/declarant's statement that he intended to testify as a witness against the defendant and to cooperate with the State was made contemporaneously with the execution of the document guaranteeing him probation in exchange for such cooperation and truthful testimony; the document was executed in the assistant district attorney's presence after she had discussed the matter with the victim and his father, with another witness, and with investigating officers; and where, under these circumstances, there was a reasonable possibility that the victim's statement to the assistant district attorney was truthful, *i.e.*, that the victim, in fact, intended to testify against the defendant and this fact supplied the defendant with the motive to murder the victim.

10. Criminal Law § 73— statement of co-conspirator—exception to hearsay rule

Testimony by a witness concerning a statement of a co-conspirator of defendant's were admissible against defendant as an exception to the hearsay rule where the statements were made in the course of the conspiracy and in furtherance thereof.

11. Criminal Law § 135.6— sentencing hearing—admission of judgment in unrelated criminal cases—proper—rebutting evidence of no significant criminal history

Where defendant sought to prove the mitigating circumstance that he had no significant history of prior criminal activity, G.S. 15A-2000(f)(1), at his sentencing hearing, the trial court properly permitted a deputy clerk of superior court to read to the jury the contents of a judgment in two unrelated criminal cases involving the defendant and the two bills of indictment returned against him in those cases where the original charge in the bill of indictment formed the basis of a subsequent plea, and where, as a practical matter, the court's judgment would have reflected information from the bill of indictment to set forth the nature of the charge to which the defendant entered his plea, including the date of the offense, the circumstances of the crime charged, and other pertinent information common to both *the crime charged* and the crime upon which judgment was entered. G.S. 15A-1221(b).

12. Criminal Law § 135.6— sentencing phase—evidence of details of prior crimes—properly admitted to rebut defendant's testimony of no significant history of prior criminal activity

At the sentencing phase of a prosecution for first-degree murder, the trial court properly allowed the State, in rebuttal of defendant's evidence which tended to show a lack of *significant* history of prior criminal *activity*, to introduce evidence of the details of the crimes. G.S. 15A-2000(f)(1) refers to "criminal activity," not to criminal convictions, and any evidence of criminal *activity*, particularly activity connected to a judgment of conviction, would be relevant as relating to both defendant's involvement in criminal activity and to the important issue of whether that involvement was *significant*.

13. Criminal Law § 135.6— sentencing hearing—misrepresentations in prior case—rebuttal of character evidence

An officer's testimony concerning defendant's misrepresentations to the court in a prior case that he possessed no weapons at his home was competent and relevant in rebuttal as bearing on defendant's good character.

14. Criminal Law § 102.6— jury argument—no gross impropriety

The prosecutor's jury argument during the sentencing phase of a first-degree murder case was not so grossly improper as to require the trial judge to act *ex mero motu*.

15. Criminal Law § 135.7— first-degree murder—sentencing hearing—instructions—burden of proof—duty to return death penalty

The trial court did not err 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 sufficiently

to justify imposition of the death penalty or in instructing the jury that it must return a verdict of death if it found the aggravating circumstances outweighed the mitigating circumstances.

16. Criminal Law § 135.7— sentencing phase—instructions on unanimity requirement for mitigating circumstances

Although the trial court erred in failing to inform the jury that they were required to reach a unanimous decision in their determination of mitigating factors, the error was not prejudicial because it was error favorable to defendant.

17. Criminal Law § 135.4— constitutionality of death penalty statutes

The North Carolina capital murder scheme does not unconstitutionally permit subjective discretion and discrimination in imposing the death penalty.

18. Homicide § 14— presumptions from intentional use of deadly weapon

Previous holdings that the law implies that a killing was done with malice and unlawfully when the defendant intentionally inflicted a wound upon a victim with a deadly weapon resulting in death are reaffirmed.

19. Criminal Law § 135.9— mitigating circumstances—burden of proof

A defendant in a sentencing hearing for first-degree murder was not denied due process because the trial court placed the burden on him to prove the mitigating circumstances by a preponderance of the evidence.

20. Criminal Law § 135.9— grant of immunity to co-defendant not mitigating circumstance

Defendant was not entitled to have the jury consider the grant of immunity by the State to a co-defendant as a mitigating circumstance in a sentencing hearing in a first-degree murder case.

21. Criminal Law § 135.4— constitutionality of death penalty statutes

The North Carolina death penalty statute, G.S. 15A-2000, is constitutional.

22. Criminal Law § 135.8— constitutionality of heinous, atrocious or cruel aggravating circumstance

The "especially heinous, atrocious, or cruel" aggravating circumstance of G.S. 15A-2000(e)(9) was not rendered unconstitutionally vague and overbroad by the Supreme Court's interpretation of that statute in *State v. Oliver*, 302 N.C. 28.

23. Criminal Law § 135.10— proportionality of death sentence

Based upon compelling policies which encourage witnesses to testify in criminal trials without fear and based upon the court's decision in *State v. Barfield*, 298 N.C. 306, and *State v. Oliver*, 309 N.C. 326, defendant's sentence of death for the murder of a potential witness who had agreed to testify against him in another crime which was committed solely for the purpose of preventing this testimony, was neither disproportionate nor excessive considering both the crime and the defendant. G.S. 15A-2000(d)(2).

Justice FRYE concurring as to result in guilt phase and dissenting as to sentencing phase.

Justice EXUM joins in this dissenting opinion.

APPEAL by defendant from *Braswell, Judge,* at the 30 November 1981 Criminal Session of Superior Court, CUMBERLAND County.

In a bill of indictment, proper in form, defendant was charged with the first-degree murder of Stephen G. Henry. A jury convicted defendant of first-degree murder and recommended a sentence of death. From his conviction and the imposition of the sentence of death, the defendant appeals directly to this Court as a matter of right pursuant to G.S. § 7A-27(a).

Defendant brings forward numerous assignments of error relating to both the guilt-innocence phase and the sentencing phase of his trial. For the reasons stated below, we uphold his conviction of first-degree murder, and the sentence imposed thereon.

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

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

MEYER, Justice.

On 15 June 1981 a fisherman discovered the body of Stephen G. Henry in the Cape Fear River near Erwin, North Carolina. The body had been weighted down with cinder blocks tied to the body by ropes. An autopsy revealed gunshot wounds and blunt force wounds to the head and eight stab wounds in the abdomen. The gunshot wounds were the cause of death. The blunt force wounds to the head were inflicted before death and the stab wounds had been inflicted after death.

The defendant and Gary Bullard were arrested and charged with first-degree murder. Within a week of his arrest, Mr. Bullard agreed to testify for the State in exchange for immunity from all charges arising out of Stephen Henry's death.

The State's evidence at trial tended to show that the defendant was the leader in a breaking and entering and larceny ring. Defendant, together with Jerry Scott and Stephen Henry, had stolen building supplies, jewelry, guns, a boat and a heavy equipment trailer. The stolen property was eventually sold. One evening defendant's girlfriend called him and said that the police were at his home. Defendant sent Scott and Stephen Henry to verify this information. Scott and Henry were arrested. An agreement was reached with the prosecutors that if Scott would assist the police in recovering the stolen property, he would be granted immunity on all charges arising out of the theft ring. An additional agreement was reached with the victim, Stephen Henry, whereby in exchange for his testimony against defendant and his plea of guilty to all criminal charges against him, the State would recommend that he receive a probationary sentence.

Jerry Scott testified that when defendant heard of Stephen Henry's plea bargain agreement with the State, defendant notified Henry through Scott that defendant would give Henry money and a bus ticket if Henry would leave town and not testify. When Henry refused, defendant began the first of several plans to kill Henry.

Bullard testified that the defendant, on several occasions, asked him to arrange for Henry to come to Bullard's trailer to facilitate Henry's murder. On one occasion, Henry came to the trailer but was accompanied by his girlfriend which thwarted the defendant's plan. On another occasion, Bullard was to bring the victim to a pond near the Black & Decker Plant where the defendant was waiting to kill him. Bullard went to visit Henry but, due to his own reservations, failed to carry out the plan. Instead, he left Henry at his trailer home and told defendant that Henry would not come. In short, there were several plans, none of which materialized.

Bullard further testified that on 12 June 1981, defendant spent the night at Bullard's home. On Saturday morning, 13 June 1981, Bullard left his home to help Henry move. It was planned that Bullard would find Henry alone and take him to the Bullard residence where defendant would be waiting. Henry and Bullard arrived at Bullard's home at about 8:30 p.m. When they arrived, Bullard's wife was there but Bullard did not see the defendant.

Bullard and Henry then went out behind the house at which point they decided to walk to a local store to buy beer. As they walked through the woods, defendant attacked them from behind, knocking both men to the ground. Bullard heard sounds of blows being dealt to Henry and saw defendant on top of him. Bullard sat up and said, "[w]hat in the goddamn hell are you doing?" Defendant pointed the gun at him and told him to "shut my . . . mouth or he was going to blow my brains away." Bullard testified that defendant made him tape Henry's hands behind his back and that he [Bullard] thereafter ran back to his apartment. Before he left, Bullard saw the defendant hit Henry several times with a pistol and heard Henry beg "No man. Don't man. Stop man." When he returned to his apartment, Bullard told his wife that defendant had jumped Henry in the woods. He then disabled defendant's truck in an effort to prevent defendant from using it to take the body away. Defendant, however, took Bullard's Moped, drove off, and returned a few minutes later with a light blue pickup truck. Defendant ordered Bullard to accompany him and Bullard replied that he wasn't going anywhere. Defendant responded that Bullard was "in it" and ordered him to drive. Bullard drove the blue pickup truck to where Henry's body was lying. They carried some blankets in which they wrapped the body and then they put it into the back of the truck. Defendant drove to Dunn to a gravel pit and into the woods. The two men were unsuccessful in their attempt to dig a grave and decided to throw the body into the river. Defendant drove to a nearby building and got some cinder blocks and a rope. They tied cinder blocks around the body and inflicted six or more stab wounds into it to insure that it would sink. The body was then thrown into the water. Defendant also threw the gun into the water.

Defendant contended that Gary Bullard had a problem with Henry arising out of Henry's selling marijuana; that Bullard attempted to involve defendant in a plan to isolate Henry so that Bullard could beat him; and that defendant refused Bullard's repeated requests to assist in the plan.

Defendant further contended that he had nothing to do with Stephen Henry's murder, but that he was at a bar on Gillespie Street in Fayetteville when Henry was murdered. In support of his alibi, defendant offered the testimony of two people who saw him at Ruby's Bar on the night of 13 June 1981. One woman testi-

fied that she arrived there at approximately 6:30 or 7:00 p.m. that evening and saw defendant off and on throughout the night, and that there was never more than a period of thirty minutes when she did not see the defendant. When she left at closing time, about 1:00 a.m., the defendant was standing outside. The second witness also testified that the defendant could not have been out of his sight for more than twenty or thirty minutes. In addition, defendant presented the testimony of a number of witnesses who said they heard Gary Bullard admit that he was the one that killed Stephen Henry and that at one point he discussed how he and Scott could place the blame for the killing on the defendant.

GUILT PHASE

I.

Defendant first contends that he was denied a fair trial because several jurors were improperly excluded from the jury panel due to their beliefs concerning the death penalty. Specifically, defendant claims: (a) that two jurors were excused in violation of the standard set out in *Witherspoon v. Illinois*, 391 U.S. 510, 20 L.Ed. 2d 776 (1968); (b) that the process of death qualifying a jury prior to the guilt phase is such as to render all of the jurors selected predisposed to return a verdict of guilty during the guilt phase of the trial; and, (c) that six other jurors were improperly excluded because they were not given detailed instructions on the death penalty process before stating unequivocally that they could not impose the death penalty in any case.

A.

[1] Defendant contends that two jurors were excluded from the jury panel in violation of the rule in *Witherspoon*. We have examined the voir dire conducted to ascertain the expressed personal beliefs of jurors McKoy and McMillan regarding the death penalty. Although both jurors' initial responses indicated that they were less than certain about their beliefs concerning the death penalty, nevertheless, when pressed, they unequivocally responded that in good conscience they could not impose a sentence of death. Specifically, juror McMillan stated that North Carolina's Death Penalty Statute "conflict[s] with my own moral judgments" and indicated that in resolving this conflict he would make a decision based upon his own conscience and not the law of

this State. Juror McKoy responded in a similar fashion. Thus, these two jurors were properly excused under the rule enunciated in *Witherspoon*, to wit: that jurors who state that their personal beliefs would not allow them to impose a sentence of death may properly be excluded. *Witherspoon v. Illinois*, 391 U.S. 510. Defendant's assignment of error is overruled.

B.

With respect to defendant's contention that the process used in death qualifying a jury prior to the guilt phase is such as to render the jury selected "guilt prone," defendant acknowledges that this Court has already determined that the current jury selection process in this State in first-degree murder cases is constitutional. *State v. Avery*, 299 N.C. 126, 261 S.E. 2d 803 (1980). *See also State v. Pinch*, 306 N.C. 1, 292 S.E. 2d 203, *cert. denied*, 74 L.Ed. 2d 622 (1982), *reh. denied*, 74 L.Ed. 2d 1031 (1983); *State v. Taylor*, 304 N.C. 249, 283 S.E. 2d 761 (1981), *cert. denied*, 77 L.Ed. 2d 1398, *reh. denied*, 77 L.Ed. 2d 1456 (1983). We decline to reconsider our decision on this issue.

C.

[2] Defendant recognizes that the answers which six other jurors gave in response to questions asked about their beliefs regarding the death penalty constituted a proper basis for excusal in conformance with the standard set out in *Witherspoon*. The six jurors, in essence, stated that they could not impose the death penalty in any case, answers upon which the trial court could support its decision to excuse them under *Witherspoon*. However, defendant contends that "jurors cannot properly be struck for cause unless they give this type of unequivocal response *after* they have first been given a basic understanding of the death penalty process mandated by the current statute." We do not agree. The purpose of the jury selection process in first-degree murder cases is to ascertain whether the beliefs a particular juror holds with respect to the imposition of the death penalty are such that he or she cannot, under any circumstances, vote to impose the sentence of death. An understanding of the *process* under which this ultimate conclusion is reached should not affect one's *beliefs* as to whether he or she can, under any circumstances, vote to impose the death penalty. Therefore, we overrule defendant's assignment of error on this issue.

II.

[3] Defendant next contends that the trial court deprived him of his right to confrontation when it limited his cross-examination of a State's witness concerning whether the witness was living alone after her husband had left the marital home. Defendant suggests that his right to confrontation was denied because he was not allowed the "means of putting the witness in the context of [her] environment so that the jury may evaluate the quality of [her] testimony." We do not agree.

It is a well settled rule of law that the scope of cross-examination rests largely in the discretion of the trial court. *See State v. Ziglar*, 308 N.C. 747, 304 S.E. 2d 206 (1983). Absent a showing of an abuse of discretion or that prejudicial error has resulted, the trial court's ruling will not be disturbed on review. *Id.* The proffered testimony had tenuous impeachment value, and we do not believe that the trial judge abused his discretion in ruling as he did.

III.

[4] Defendant also contends that the trial court erred by refusing to admit testimony concerning discussions between defendant and his attorney, Edward Brady, relating to the disposition of criminal charges pending against defendant because of his involvement with Scott and Henry in the theft ring activities for which Henry was to testify against defendant. Specifically, defendant contends that the trial court erred in sustaining objections to the following series of questions asked of Edward Brady:

Q. Did you have any agreement concerning punishment?

A. We never—I didn't reach any agreement with Jean Powell. Jean Powell made a plea offer to me.

Q. Did you convey the agreement you had concerning the disposition of the cases to Mr. Maynard?

A. I did.

Q. Was he in agreement with that—

Mr. Stephens: —objection.

Court: Sustained.

Q. Now, as a result of that, was there any cases to be tried before a jury or judge in Hoke or Cumberland County arising from those nine and four cases that you discussed?

Mr. Stephens: Objection.

Court: Sustained.

A. No.

Q. What was the agreement to dismiss all of those cases between you and the District Attorney's staff?

Mr. Stephens: He has answered that.

Court: Sustained.

Q. Were those cases disposed of in accordance with your agreement with the District Attorney's office?

A. No.

Q. Why?

Mr. Stephens: Objection.

Court: Sustained.

Defendant has failed to include in the record what Mr. Brady's answers would have been to these questions and thereby has failed to show prejudice by their exclusion. *State v. Cheek*, 307 N.C. 552, 299 S.E. 2d 633 (1983); *State v. Wilson*, 304 N.C. 689, 285 S.E. 2d 804 (1982). Furthermore, inasmuch as the witness indicated that no agreement was ever reached, the remaining questions appear to be irrelevant. We therefore overrule this assignment of error.

IV.

[5] Defendant next contends that he was deprived of his constitutional right to compel the production of evidence when the trial court permitted a defense witness "to be excused upon his blanket assertion of a fifth amendment privilege without any inquiry into whether the witness had a legitimate claim to that privilege." In so doing, defendant cites *Hoffman v. United States*, 341 U.S. 479, 95 L.Ed. 1118 (1951), which held that it is for the trial court to determine whether a witness's fifth amendment

claim is justified and to require him to answer if it clearly appears to the court that he is mistaken. *Id.*

The question here is not the standard under which the trial court is to determine if there is a basis to the claim, as was the case in *Hoffman.* Rather, the question is whether the trial judge, on his or her own motion, is required to conduct a voir dire to determine if there is a basis for a witness's fifth amendment claim when (1) that witness was presented by the defense and (2) the defendant fails to object at trial to the witness's assertion of the fifth amendment right. In the instant case, the witness, Grady Epps, was asked a series of questions concerning statements Gary Bullard supposedly made while in jail with Epps. The exchange between defense counsel and the defendant's own witness, Epps, was as follows:

Q. Did you know Gary Bullard while you were in there?

A. Yes, sir.

Q. How long were you in there with him?

A. Up to the time that I was sent to prison.

Q. Did you ever have any conversation with Mr. Bullard?

A. Sir, I'd rather not say nothing about that. I will take the fifth amendment.

Q. Well, just did you have a conversation[?]

A. I'd rather take the fifth amendment.

Q. You have already been tried with all cases pending against you, sir, in Cumberland County?

A. Your Honor, I would like to take the fifth on that.

Court: Very well.

Q. Do you know Gary Bullard?

Mr. Stephens: Objection, your Honor, he has answered that.

Court: Sustained in view of his prior answer.

Q. Did you make any statement concerning Gary Bullard recently, within the last few minutes?

Mr. Stephens: Objection.

Court: Sustained.

Q. When is the last time you saw Mr. Bullard?

A. (Pause)

Q. If you remember?

A. (Pause, long pause, no answer)

Q. Or do you decline to answer that question?

A. (Long pause, witness not answering question)

Q. I submit he should answer, your Honor.

Court: Let the record show the witness has been remaining silent. The witness claims the privilege of the fifth amendment of the Constitution of the United States. Go to your next question?

Q. You know Scott, Jerry Scott?

A. (No response)

Court: What is your answer, sir?

A. Your Honor, I take the fifth amendment.

Q. Have you been back in Cumberland County since your trial in August until today?

A. (No response)

Court: What is your answer, sir?

A. Fifth amendment.

Q. Do I understand you that you are not planning to answer any questions anymore?

A. Right.

Q. You are refusing to answer anything that I might ask you?

A. Right.

Q. Your Honor, in view of that, I don't know of anything further I can ask him.

Court: Any cross examination?

Mr. Stephens: Your Honor, I have no questions. Motion to strike his testimony.

Court: The witness may step down. The motion to strike his testimony is allowed.

As the record reflects, defense counsel failed to object to Epps's assertion of the fifth amendment privilege or to make any motion that the trial court conduct a voir dire to determine if there was a valid basis for Epps's fifth amendment claim. Given that this was defendant's own witness and that he did not challenge the witness's assertion of his fifth amendment right, we decline to place upon the trial court the duty to conduct a voir dire on its own motion to determine if there was a valid basis for the defense witness's fifth amendment claim. Defendant's reliance on *United States v. Goodwin*, 625 F. 2d 693 (5th Cir. 1980), is misplaced. In *Goodwin*, defense counsel objected to each witness's assertion of his fifth amendment right against self-incrimination. Here, however, defense counsel neither objected to Epps's assertion of his fifth amendment claim nor moved the court to conduct an inquiry into whether there was a valid basis for the claim. This assignment of error is overruled.

V.

[6] Defendant also contends that during closing arguments in the guilt phase of the trial, the prosecutor argued facts not supported by the record, misstated the law and attempted to add the prestige of the State to the credibility of its principal witness, all of which served to deprive the defendant of his right to a fair and impartial trial. We note that defendant did not object at trial to the prosecutor's argument. We must therefore determine whether the prosecutor's remarks amounted to such gross impropriety as to require the trial judge to act *ex mero motu*. *See State v. Oliver*, 309 N.C. 326, 307 S.E. 2d 304 (1983).

A prosecutor in a criminal case is entitled to argue vigorously all of the facts in evidence, any reasonable inference that can be drawn from those facts and the law that is relevant to the is-

sues raised by the testimony. *Id.* "Even so, counsel may not place before the jury incompetent and prejudicial matters by injecting his own knowledge, beliefs, and personal opinions not supported by the evidence." *State v. Johnson*, 298 N.C. 355, 368, 259 S.E. 2d 752, 761 (1979).

After carefully examining the prosecuting attorney's closing argument in this case, we have concluded that the argument was not grossly improper and thus did not deprive the defendant of a fair and impartial trial. Accordingly, the trial court did not err by failing to act *ex mero motu* with respect to the prosecutor's argument. *See State v. Oliver*, 309 N.C. 326, 307 S.E. 2d 304; *State v. Craig*, 308 N.C. 446, 302 S.E. 2d 740 (1983). This assignment of error is overruled.

VI.

Defendant contends that the trial court committed prejudicial error when it allowed four hearsay statements into evidence. We will discuss seriatim each of the four alleged errors and the reasons why the admission of these statements does not constitute prejudicial error.

A.

[7] Defendant first contends that the trial court erroneously admitted Detective Hart's statements that a complaint was filed with his department on 10 February 1981 which alleged that fifty sheets of plywood were stolen from a building site and that on 7 January 1981 another person reported that a jewelry box had been taken. Defendant's objections to the admission of this testimony were overruled by the trial court. After the trial judge had overruled one of defendant's objections to Detective Hart's testimony, the judge instructed the jury that what the person (the individual that made the complaint) said, if anything, was not substantive evidence. "It [the statements of the complaining person] is received only for the limited purpose of showing what report, if any, this witness received and what course of conduct and state of mind he was in upon receipt of the information but it is not substantive evidence."

As has been stated by this Court on numerous occasions that, whenever an extrajudicial statement is offered for a purpose other than proving the truth of the matter asserted, it is not hear-

say. *State v. Irick*, 291 N.C. 480, 231 S.E. 2d 833 (1977); *State v. White*, 298 N.C. 430, 259 S.E. 2d 281 (1979). Additionally, this Court has held that the statements of one person to another are admissible to explain the subsequent conduct of the person to whom the statement was made. *State v. Tate*, 307 N.C. 242, 297 S.E. 2d 581 (1982).

In the instant case, immediately prior to the defendant's objections to the aforementioned testimony, Detective Hart testified concerning the events which led to the arrest of Stephen Henry and Jerry Scott. Hart's subsequent testimony concerning the alleged filing of the complaints with his department was not offered to prove the truth of the matter asserted, but it was offered to show that a report had been filed of complaints concerning stolen property. This testimony was admissible to explain his subsequent conduct; that is why, following Scott's arrest, Hart had engaged in conversations with Scott about property reported missing from different locations and also why he had taken Scott to various places which Scott identified as the scenes of crimes in which he had participated. Hart's statements were also admissible to show why the police negotiated an agreement with Scott for his cooperation and assistance in retrieving the stolen property. Since Hart's testimony was not offered to prove the truth of the matter asserted, and therefore was not hearsay, it was not objectionable on that basis. Defendant's assignment of error is overruled.

B.

[8] Defendant's second contention is that the trial court erred in admitting hearsay testimony of Assistant District Attorney Jean Powell (who did not participate in the trial) concerning a statement made by Detective Hart. Specifically, Ms. Powell testified that Detective Hart told her that the information provided by Scott concerning property that had been stolen while Scott was engaged in this theft ring "could only have been obtained by someone who actually participated in the break in or who was in a position to know about the break in." We agree with defendant that this testimony was erroneously admitted because it was hearsay and does not fall within any exception to the hearsay rule. However, the error was not prejudicial.

Scott's testimony at trial included details concerning all of the events which led to Detective Hart's conclusion to Ms. Powell that Scott had, in fact, participated in the break-ins. Scott was thereafter subjected to an in-depth and thorough cross-examination by counsel for defendant concerning each of those events. Hart's conclusory statement to Ms. Powell, which she was erroneously permitted to repeat at trial, was merely cumulative and corroborative of facts already in evidence.

In light of the foregoing, we find no prejudicial error; that is, there is no "reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial." G.S. § 15A-1443(a). In short, we cannot conclude that the jury would have found defendant not guilty of first-degree murder had they not heard this erroneously admitted testimony concerning the reliability of information on a collateral matter. This assignment of error is therefore overruled.

C.

[9] Third, defendant contends that the trial court erred in admitting the hearsay testimony of Assistant District Attorney Powell concerning a statement made by the victim, Stephen Henry. Specifically, defendant complains that the trial court erroneously admitted Ms. Powell's testimony that Henry stated to her "that he would give truthful testimony in cases involving criminal charges against Anson Maynard. . . ." Defendant initially made a general objection to the admission of this testimony, but during a subsequent hearing before the judge, outside the presence of the jury, defendant stated as grounds for his objection that Ms. Powell's testimony was inadmissible hearsay. For the purposes of this appeal, we will treat defendant's objection as a specific objection, thereby requiring defendant to show only that the testimony was inadmissible on the grounds advanced by him. *See generally* 1 Brandis on North Carolina Evidence § 27 (1982).

In *State v. Vestal*, 278 N.C. 561, 180 S.E. 2d 755 (1971), *cert. denied*, 414 U.S. 874 (1973), and most recently in *State v. Alston*, 307 N.C. 321, 298 S.E. 2d 631 (1983), we held that hearsay testimony is admissible when two factors are shown to exist: (1) necessity, and (2) a reasonable probability of truthfulness. As in *Vestal* and *Alston*, the death of Stephen Henry, the victim/declarant in the present case, satisfies the necessity require-

ment. In *Vestal* we held that the victim's statements to his wife concerning the destination of his business trip were part of routine arrangement of domestic and business affairs and therefore presented a sufficient probability of truthfulness. In *Alston* we held there was a sufficient probability that the victim's statement was truthful in that it was made to a law enforcement officer shortly before the victim's death concerning alleged criminal activity and resulting ill-will between the victim and the defendant. In *Alston* the testimony was relevant to show intent, motive, or malice on the part of the defendant.

In the present case, the victim/declarant's statement that he intended to testify as a witness against the defendant and to cooperate with the State was made contemporaneously with the execution of a document guaranteeing him probation in exchange for such cooperation and truthful testimony. The document was executed in Ms. Powell's presence after she had discussed the matter with Stephen Henry and his father, with Scott, and with investigating officers. Under these circumstances, we believe that there is a reasonable probability that Henry's statement to Ms. Powell was truthful, i.e., that Stephen Henry, in fact, intended to testify against the defendant. It was this fact that supplied the defendant with the motive to murder Henry. The relevancy of the evidence is thereby established. The trial judge did not err in permitting Ms. Powell to testify concerning Stephen Henry's statement to her. Furthermore, as noted above, the jury had been fully apprised of the plea agreement between Henry and the State. Any error in the admission of substantially the same information in the form of this hearsay statement could not have been prejudicial.

D.

[10] Finally, defendant contends that the trial court erred in admitting the testimony of Elaine Rousseau concerning a statement made by defendant's girlfriend, Joyce Baggett. Mrs. Rousseau testified that Joyce Baggett was present on one occasion when the defendant, Anson Maynard, talked to her about "doing something" to the victim, Stephen Henry. Rousseau then testified that she had asked Ms. Baggett if she was involved and she said, "yes."

Subsequently, Mrs. Rousseau was asked the following question:

> Q. Let me ask you whether or not—state whether or not Joyce Baggett made any statements to you about what Anson Maynard intended to do in his presence?

She answered as follows:

> A. All she said was that if anything goes wrong that she would point the finger at Gary Bullard.

Defendant objected to Mrs. Rousseau's response. The trial court conducted a voir dire and then ruled that Mrs. Rousseau's response was admissible "under the rules of evidence." We agree. The evidence indicates that Ms. Baggett was a co-conspirator with the defendant. As a co-conspirator, her statements, made in the course of the conspiracy and in the furtherance thereof, are admissible against defendant as an exception to the hearsay rule. *State v. Polk*, 309 N.C. 559, 308 S.E. 2d 296 (1983). *See generally*, 2 Brandis on North Carolina Evidence § 173 (1982). Thus, we overrule defendant's final assignment of error pertaining to the guilt phase of his trial.

SENTENCING PHASE

I.

Defendant contends that he is entitled to a new sentencing hearing because the trial court erroneously permitted Mrs. Linda Kerik, a Deputy Clerk of Superior Court, Cumberland County, to read to the jury the contents of a judgment in two unrelated criminal cases involving the defendant and the two bills of indictment returned against him in those cases.

At the sentencing hearing defendant sought to prove the mitigating circumstance that he had no significant history of prior criminal activity. N.C. Gen. Stat. § 15A-2000(f)(1). To do so, he introduced the following testimony: Bobby Maynard, a Dunn police officer, testified:

> Q. Do you know of any criminal record that Anson Maynard has in Harnett County?

A. As far as I know, there is no record in Harnett County concerning Anson Maynard.

Mrs. Martha Maynard, mother of defendant, testified:

Q. Have any of those children ever given you any problems up until this year?

A. Never.

. . . .

Q. Do you know of any problems he had with the law or any trouble he got into with the law prior to these occurrences we are here about?

A. No, I do not.

. . . .

A. I was thinking about this incident where it came up where he shot somebody in the head. That was the very first time I have ever heard that in my life and I believe that if that had been so, we would have known it.

Reverend Brackett, a minister, testified:

Q. Have you heard anything bad about Anson Maynard?

A. No, sir.

. . . .

Q. Any member of the family that you are aware of ever caused any problem or had any criminal record?

A. No, sir.

Q. Are they just good solid people, is that what you are saying?

A. Yes, sir.

Mrs. Charles Brewington, an in-law of defendant, testified:

Q. Do you know of anything criminal that Anson Maynard has been involved in or either rumored that he has been involved in in Harnett County?

A. No, sir, I don't know of anything.

. . . .

Q. Do you know of anything prior to these matters before the Court that Anson Maynard was involved in?

A. No, sir, I do not.

The thrust of defendant's evidence was that he had never been in any trouble with the law, had no criminal record in Harnett County; that he had never caused any problem, had never been involved in any illegal activity; that his mother had never heard of his shooting anyone in the head and if it was true, she would have heard of it.

Based on this evidence, counsel for the defendant represented to the court that the jury could infer and could find the following mitigating factors:

1. The defendant has no significant history of prior criminal activity.
2. The defendant has no criminal record in his home county of Harnett.
3. The defendant has a good character.
4. The defendant has never served any time in prison.
5. The defendant has three minor children whose mother has abandoned them, and that the defendant is an excellent parent, and is fully responsible for his children.
6. The defendant was a good neighbor and contributed his services to his church and his community.
7. The defendant held a responsible job prior to his arrest and indictment, in civil service as a food inspector.
8. The defendant was raised in a good family, and was a normal young man and adult.
9. The defendant served honorably in the United States Navy for four years.
10. Any other circumstance arising from the evidence which the jury deems to have mitigating value.

In rebuttal of defendant's evidence which tended to show his good character and lack of a "significant history of prior criminal activity," the State presented Mrs. Linda Kerik, Deputy Clerk of Superior Court, Cumberland County, who testified concerning defendant's prior criminal activity in Cumberland County and the subsequent disposition of his cases. At the point in question the judgment was introduced by the prosecutor as follows:

Q. At this time, the State would move the introduction into evidence State's Exhibits No. 88 and 89.

Mr. Stewart: We object to that, your Honor.

Court: Overruled. Let each be received.

Over the objections of defendant, the trial court permitted Mrs. Kerik to testify as follows:

Q. Now, Mrs. Kerik, will you read the judgment of the Court in State's Exhibit marked 89.

A. Yes, sir.

Mr. Stewart: Objection.

Court: Overruled.

A. State of North Carolina, County of Cumberland. In the General Court of Justice, Superior Court Division. File No. 75-CR-9347 and File No. 75-CR-0925. State of North Carolina versus Anson A. Maynard, 32, Indian male. Judgment suspended in sentence. In open court, the Defendant appeared for trial upon the charge or charges of—

Mr. Stewart: —objection at this time, your Honor, for what he was tried for.

Court: Overruled.

A. —of assault with a deadly weapon with intent to kill inflicting serious injury in 75-CR-9347 and felonious larceny in 75-CR-0925 and was represented by his attorney, Joe Chandler, and thereupon entered a plea of not guilty and tenders to the Court a plea of guilty to misdemeanor to assault with a deadly weapon in 75-CR-9347 and a plea of guilty to misdemeanor larceny in 75-CR-0925. The Court ex-

amined the Defendant as to the voluntary nature of his plea and finds as a fact that the Defendant's pleas are voluntary. Said examinations and findings are recorded on a separate sheet of paper and is part of the permanent records of 75-CR-9347. Having pleaded guilty to the offense of misdemeanor assault with a deadly weapon and misdemeanor larceny, which is a violation of the law and of the grade of misdemeanor. As to 75-CR-9347, misdemeanor assault with a deadly weapon, it is adjudged that the Defendant be imprisoned for the term of two years in the County Jail of Cumberland County assigned to work under the supervision of North Carolina Department of Corrections. The Court recommends the Defendant for the work release program.

As to 75-CR-0925, misdemeanor larceny, it is adjudged that the Defendant be imprisoned for the term of two years in the County Jail of Cumberland County assigned to work under the supervision of the North Carolina Department of Corrections. This sentence is to begin at the exporation [sic] of the sentence imposed in 75-CR-9347. The execution of these sentences is suspended, however, for five years upon compliance with the following conditions, to which the Defendant gave assent: One, that the Defendant be placed on probation for a period of five years under the usual terms and conditions of probation. Two, that he pay into the office of the Clerk of Superior Court the sum of one thousand five hundred dollars as restitution to Eugene Jacobs in 75-CR-9347. Three, that during probation he not own or have in his possession any kind of deadly weapon per se whatsoever. Four, that he immediately on August 14, 1975, consent to a search of his premises by a representative of the Cumberland County Sheriff's Department and any firearms found on his premises be turned over to and titled to Detective Bob Connerly [sic] with the consent of the Defendant for whatever use or disposition Detective Connerly [sic] desires to make of said weapon. Five, that he not have in his possession or consume any amount of intoxicating beverages whatsoever. Six, that during probation he not associate or communicate in any way directly or indirectly with Eugene Jacobs or any member of his family and that he not harass or intimidate Eugene Jacobs or any member of his family in any way.

> Seven, that he pay the cost of court. All monies are due under the supervision of his probation officer and out of his personal earnings with restitution to be paid into the office of the Clerk of Superior Court at the rate of seventy-five dollars per month for a period of twenty months, and restitution to be dispersed [sic] to Eugene Jacobs as received by the Clerk of Superior Court. Eight, in the event Defendant violates any terms of probation, the Court recommends the suspended sentence be immediately activated.
>
> This the fourteenth day of August, 1975. Signed Judge presiding, Donald L. Smith, Attorney for the Defendant, Joe Chandler, Attorney for the State, Wade E. Byrd.

The trial court then permitted Mrs. Kerik to read to the jury the indictments in these two cases. Mrs. Kerik further testified that in June 1971 the defendant was convicted on his plea of guilty of carrying a concealed weapon, given a suspended sentence, and fined $150.00.

Also in rebuttal, the State offered the testimony of Cumberland County Sheriff Bob Conerly. He testified that he investigated the 1975 assault charge against the defendant and that he visited the victim of the assault, Eugene Jacobs, at the Cape Fear Valley Hospital where Jacobs was recovering from three or four head wounds. Conerly also testified as to an incident that transpired in court at the time the defendant entered his plea to the 1975 charges. At that time, according to Conerly, the defendant told the trial judge that he had no weapons or ammunition at his house, but that when Conerly went to the house, he found and brought back to the presiding judge a shotgun, a .38 caliber pistol, a 7.5 millimeter pistol, and some ammunition. No charges were filed against the defendant as a result of the search and the trial judge did not alter the sentence that had been imposed.

In answer to defendant's multifaceted objection to the State's rebuttal evidence, we begin with two basic rules of law. The first concerns the State's right, under our capital sentencing scheme, G.S. § 15A-2000, to present rebuttal evidence. With respect to this issue, we have enunciated the following principles of law:

> Our capital sentencing statute not only permits but requires juries to determine the sentence guided "by a careful-

ly defined set of statutory criteria that allow them to take into account the nature of the crime and the character of the accused." *State v. Johnson, supra,* 298 N.C. at 63, 257 S.E. 2d at 610. This statute, however, limits the State in its case in chief to proving only those aggravating circumstances listed in section (e). Bad reputation or bad character is not listed as an aggravating circumstance. Therefore the State may not in its case in chief offer evidence of defendant's bad character. A defendant, however, may offer evidence of whatever circumstances may reasonably be deemed to have mitigating value, whether or not they are listed in section (f) of the statute. *State v. Johnson, supra,* 298 N.C. at 72-74, 257 S.E. 2d at 616-617. Often this may be evidence of his good character. *Id.* The State should be able to, and we hold it may, offer evidence tending to rebut the truth of any mitigating circumstance upon which defendant relies and which is supported by the evidence, including defendant's good character. Here, despite defendant's contentions to the contrary, he did offer evidence of his good character. It is true that the evidence was not cast in terms of defendant's reputation in his community. Nevertheless it was evidence tending to show defendant to be, generally, a good person by those most intimately acquainted with him. In face of this evidence, the State was entitled to show *in rebuttal* that defendant's reputation among others familiar with it was not good. Both the State and defendant are entitled to a fair sentencing hearing, and the jury is entitled to have as full a picture of a defendant's character as our capital sentencing statute and constitutional limitations will permit.

State v. Silhan, 302 N.C. 223, 273, 275 S.E. 2d 450, 484 (1981). *See State v. Taylor,* 304 N.C. 249, 283 S.E. 2d 761; *see also* G.S. § 15A-2000(a)(3).[1] Thus, any evidence, otherwise competent, that is relevant to rebut a defendant's representation of any mitigating

1. (3) In the proceeding there shall not be any requirement to resubmit evidence presented during the guilt determination phase of the case, unless a new jury is impaneled, but all such evidence is competent for the jury's consideration in passing on punishment. Evidence may be presented as to any matter that the court deems relevant to sentence, and may include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (e) and (f). *Any evidence which the court deems to have probative value may be received.* (Emphasis added.)

factor is admissible during the sentencing phase of a capital case. It bears repeating that "the jury is entitled to have *as full a picture* of a defendant's character as our capital sentencing statute and constitutional limitations will permit." *State v. Silhan*, 302 N.C. at 273, 275 S.E. 2d at 484.

A second rule of law pertinent to the resolution of defendant's objections is that a valid, properly authenticated judgment is admissible under North Carolina law. *See* G.S. § 1-229, 1-236.1, 8-35, 15A-1340.4(e). Indeed, the preferred method for proving a prior conviction includes the introduction of the judgment itself into evidence. *See State v. Silhan*, 302 N.C. 223, 275 S.E. 2d 450.

With these principles in mind, we address defendant's specific objections to the State's rebuttal evidence concerning defendant's lack of significant history of prior criminal activity and defendant's good character.

1. *Judgments*

[11] Defendant concedes that the trial court was correct in permitting Mrs. Kerik to read to the jury that portion of the judgment which included defendant's pleas of guilty and the sentences imposed thereon. Defendant, however, objects to the admission into evidence of the formal parts of the judgment of conviction, containing the original charges against him.

We agree that as a general rule it is improper to read a bill of indictment to the jury. *See* G.S. § 15A-1221(b). However, when the original charge forms the basis of a subsequent plea, as a practical matter the court's judgment will reflect information from the bill of indictment to set forth the nature of the charge to which the defendant entered his plea, including the date of the offense, the circumstances of the crime charged, and other pertinent information common to both *the crime charged* and the crime upon which judgment was entered. This information forms an integral part of the final judgment which, as noted earlier, is admissible at both the guilt phase and during the sentencing phase of a capital trial. We therefore hold that a properly authenticated judgment, otherwise relevant, may be introduced as rebuttal evidence and read in its entirety to the jury.

2. *Indictments*

Defendant argues that the trial court erred in permitting Mrs. Kerik to read the indictments which formed the basis of his pleas to misdemeanor assault and misdemeanor larceny. Assuming arguendo that this was error, defendant has failed to show prejudice thereby. Information concerning the nature of the original charges was properly before the jury by way of the judgment which, as we have held, was admissible in its entirety. The reading of the indictments was merely duplicative.

3. *Additional Testimony*

[12] The issue here is whether the State, in rebuttal of defendant's evidence which tends to show a lack of *significant* history of prior criminal *activity,* may introduce not only judgments of conviction, but also evidence of the details of those crimes. This issue becomes particularly important when, as here, the evidence tends to prove that the crimes were considerably more serious than the judgment on the pleas would reflect.

We first note that G.S. § 15A-2000(f)(1) refers to "criminal activity," not to criminal convictions. Thus, prior criminal activity is not limited to prior convictions. *Barfield v. Harris,* 540 F. Supp. 451 (E.D.N.C. 1982), *aff'd,* 719 F. 2d 58 (4th Cir. 1983).

It would seem, then, that any evidence of criminal *activity,* particularly activity connected to a judgment of conviction, would be relevant as relating to both defendant's involvement in criminal activity and to the important issue of whether that involvement was *significant.* Whether a defendant's history of prior criminal activity has been *significant* clearly encompasses not only a quantitative but also a qualitative analysis. It is more than just a numerical totaling of convictions or the mere reading of judgments of convictions on pleas. To preclude the State from introducing evidence relating to the specific details of a defendant's convictions would too often result in a distorted, unrealistic, and erroneous view of facts upon which the jury must rely in determining whether a defendant has no significant history of prior criminal activity. This is particularly true where convictions were the result of pleas.

Where a defendant introduces evidence of a fact, the State may offer evidence in rebuttal which otherwise would not have

been competent. "Evidence which might not otherwise be admissible against a defendant may become admissible to explain or rebut other evidence put in by the defendant himself." *State v. Small*, 301 N.C. 407, 436, 272 S.E. 2d 128, 145-46 (1980). *See State v. Black*, 230 N.C. 448, 53 S.E. 2d 443 (1949). *See also State v. Patterson*, 284 N.C. 190, 200 S.E. 2d 16 (1973). Here, defendant's evidence had created the false impression that he had never been in "trouble with the law" in order to support the mitigating circumstance that he had no significant history of prior criminal activity. On this issue it is relevant to include the following testimony of the defendant:

> Q. Mr. Maynard, let me ask you if you did on the 12th day of March, 1975, shoot Eugene Jacobs with a deadly weapon, a pistol, four times in the head?
>
> . . . .
>
> A. No, sir.
>
> Q. You did not?
>
> A. I did not.
>
> Q. What have you been charged, tried and convicted of?
>
> A. I believe in '71 to '75, assault—(Pause).
>
> Q. What type of assault, sir?
>
> A. I really don't know how they had it to tell you the truth.
>
> Q. What were you convicted of, assault with what?
>
> A. With a gun, I guess, I don't know to tell you the truth.
>
> Q. Who did you assault?
>
> . . . .
>
> A. I don't know.
>
> Q. Sir?
>
> A. I don't know, I don't remember.

Q. You did not shoot Eugene Jacobs in the head four times with a pistol?

. . . .

A. I have already answered that.

Q. You don't recall who you assaulted with a pistol?

. . . .

A. I don't.

Q. Were you convicted for that offense?

A. For what?

Q. The assault you just told us you were convicted of?

A. That was a plea bargain worked out on the assault; yes, sir. I got probation.

Q. Did you serve any time in jail?

A. No, sir.

Q. And the same time of the plea bargain, were you charged with larceny. Did you plead to that too?

A. I believe I had been found guilty once, according to my record, it was larceny; yes, sir.

Q. Did you serve time in jail for that?

A. No, sir. I ain't never served no time in jail up until now.

Q. And you can't remember now who it was you assaulted with a pistol?

. . . .

Q. You are not telling this jury that you have never carried this pistol here, State's Exhibit No. 23 on your person before, have you? You are not telling the jury that, are you?

A. I have carried it in my truck; yes, sir.

Q. Have you ever carried it concealed on your person?

A. The night they got it, I had it in my back pocket.

Q. Is that the only time you have carried it concealed on your person?

A. Yes, sir.

Q. Never carried this pistol any other time on your person?

A. No, sir.

Q. You always keep it in your truck?

A. Yes, sir.

Q. Did you have it in your truck on the occasion in which you just testified to that you were convicted for assaulting somebody with a pistol?

A. No, sir. I didn't have that one at that time.

Q. Well, what pistol did you use on that occasion?

. . . .

A. I don't remember.

Q. Sir?

A. I don't remember.

Q. And you had twenty-two caliber long rifle bullets in this pistol, did you not?

Court: When you say "this" pistol, which one are you referring to?

Q. State's Exhibit marked 23.

A. To tell you the truth, I don't remember what was in it.

Arguably, a jury, without more, could be misled by this testimony, along with the other testimony set out above and the bare convictions of the misdemeanors of assault with a deadly weapon, larceny, and carrying a concealed weapon, into believing that defendant did not have a *significant* criminal history. In rebuttal, the State properly produced evidence to show what the defendant actually did in order to prove the acts were significant. For that purpose, Officer Conerly testified in part:

Q. Directing your attention to these exhibits marked State's Exhibit No. 88 and the charge set forth, assault with a deadly weapon, against Anson Maynard, did you have occasion to investigate that charge?

A. Yes, sir, I did.

Q. Tell us whether or not you had an opportunity to see Eugene Jacobs?

. . . .

A. Yes, sir, I did.

Q. Do you recall when it was that you saw Mr. Jacobs?

A. It was about midnight or shortly thereafter at Cape Fear Valley Hospital.

. . . .

Q. If you will just tell us what you saw?

A. I saw several wounds about his head. Wounds were very visible because the areas around them had been shaved by personnel at the hospital.

Q. Do you recall how many wounds there were?

. . . .

A. There were three or four, I don't recall right now.

Officer Conerly's testimony concerning the condition of the assault victim was competent to show the nature of the assault to which defendant pled guilty. Contrary to defendant's position, its admissibility is *not* dependent upon the bill of indictment. The testimony was highly relevant on the issue of whether defendant had any *significant* history of prior criminal *activity.* Defendant, by first injecting that he had never been in trouble with the law, invited the very evidence of which he now complains. *State v. Small,* 301 N.C. 407, 272 S.E. 2d 128. "Both the state and defendant are entitled to a fair trial." *Id.* at 436, 272 S.E. 2d at 146.

This rule allowing such evidence is analogous to and in accord with our rule allowing the State to produce evidence of the facts of prior convictions in support of the aggravating circum-

stance of prior felony convictions involving violence or threat of violence to a person. The defendant cannot by stipulation or otherwise foreclose the State's proof by limiting the State to the bare record of the conviction. *State v. McDougall*, 308 N.C. 1, 301 S.E. 2d 308, *cert. denied*, 78 L.Ed. 2d 173 (1983); *State v. Taylor*, 304 N.C. 249, 283 S.E. 2d 761; *State v. Silhan*, 302 N.C. 223, 275 S.E. 2d 450.

[13] Likewise, Officer Conerly's testimony concerning the defendant's misrepresentation to the court in a prior case that he possessed no weapons at his home was competent and relevant in rebuttal as bearing on defendant's good character. This assignment of error is overruled.

II.

[14] Defendant next contends that he was denied a fair trial because of improper statements the prosecutor made during closing argument. Defendant failed to object at any point during the prosecutor's closing arguments to the jury during the sentencing phase of his trial. The transcript reveals no argument advanced by the prosecutor so grossly improper as to require the trial judge to act *ex mero motu*. *See State v. Oliver*, 309 N.C. 326, 307 S.E. 2d 304; *State v. Craig*, 308 N.C. 446, 302 S.E. 2d 740.

III.

[15] In his next assignment of error, defendant contends that the trial 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 sufficiently to justify imposition of the death penalty. Alternatively, defendant contends that the trial court erred in instructing the jury that it *must* return a verdict of death if it found that the aggravating circumstances outweighed the mitigating circumstances, which defendant argues effectively lowered the State's burden of proof.

We have recently readdressed this issue in *State v. McDougall*, 308 N.C. 1, 301 S.E. 2d 308. We find that the challenged jury instructions were free from constitutional and prejudicial error.

IV.

[16] Defendant's next contention is that the trial court erred by not informing the jury that they were required to reach a unanimous decision in their determination of mitigating factors. We note at the outset, that since the trial court did not preclude a less than unanimous recommendation by the jury as to the mitigating factors, any ambiguity in the court's instruction only benefited the defendant. In *State v. Kirkley*, 308 N.C. 196, 302 S.E. 2d 144 (1983), we held that "a jury [must] unanimously find that a mitigating circumstance exists before it may be considered for the purpose of sentencing." *Id.* at 218, 302 S.E. 2d at 157. Although the trial judge's failure to instruct the jury concerning the unanimity requirement was error, we hold that it was not prejudicial because it was error favorable to defendant.

V.

[17] Defendant contends that the North Carolina capital murder scheme is unconstitutional under *Furman v. Georgia*, 408 U.S. 238, 33 L.Ed. 2d 346 (1972), in that it permits subjective discretion and discrimination in imposing the death penalty. We have consistently rejected this argument and do so here. *See State v. Oliver*, 309 N.C. 326, 307 S.E. 2d 304.

VI.

[18] Defendant requests this Court to re-examine our holdings in *State v. Pinch*, 306 N.C. 1, 292 S.E. 2d 203, and *State v. Reynolds*, 307 N.C. 184, 297 S.E. 2d 532 (1982), that the law implies that a killing was done with malice and unlawfully when the defendant intentionally inflicts a wound upon a victim with a deadly weapon resulting in death. We reaffirm our holdings in the above cases and, thus, overrule defendant's assignment of error on this issue.

VII.

[19] Defendant contends that he was denied due process because the trial court placed the burden on him to prove the mitigating circumstances by a preponderance of the evidence. The jury instruction was correct in all respects and has been approved by this Court in *State v. Barfield*, 298 N.C. 306, 259 S.E. 2d 510 (1979), *cert. denied*, 448 U.S. 907, *reh. denied*, 448 U.S. 918 (1980),

and *State v. Johnson I*, 298 N.C. 47, 257 S.E. 2d 597 (1979). We overrule this assignment of error.

VIII.

[20] Defendant also contends that the jury should have been entitled to consider the grant of immunity by the State to a codefendant in determining whether he should live or die. This issue was decided adversely to the defendant's position by this Court in *State v. Williams II*, 305 N.C. 656, 292 S.E. 2d 243, *cert. denied*, 74 L.Ed. 2d 622 (1982), *reh'g denied*, 74 L.Ed. 2d 1031 (1983), and *State v. Irwin*, 304 N.C. 93, 282 S.E. 2d 439 (1981). We overrule this assignment of error.

IX.

[21] Defendant argues that the North Carolina death penalty statute G.S. § 15A-2000 is unconstitutional, and, therefore, the imposition of the death penalty in this case was unconstitutional. This Court on numerous occasions has upheld the constitutionality of the death penalty statute in North Carolina. *State v. Williams I*, 304 N.C. 394, 284 S.E. 2d 437 (1981), *cert. denied*, 456 U.S. 932 (1982); *State v. Barfield*, 298 N.C. 306, 259 S.E. 2d 510. This assignment of error is overruled.

X.

[22] Defendant contends that this Court's interpretation of G.S. § 15A-2000(e)(9), which allows the jury to find as an aggravating factor that the murder was "especially heinous, atrocious, or cruel" has been rendered unconstitutionally vague and overbroad by this Court's interpretation of that statute in *State v. Oliver I*, 302 N.C. 28, 274 S.E. 2d 183 (1981). We have reviewed our interpretation of G.S. § 15A-2000(e)(9) in *Oliver I* and we have concluded that our interpretation is entirely consistent with the mandate of *Furman v. Georgia*, 408 U.S. 238, and *Godfrey v. Georgia*, 446 U.S. 420, 64 L.Ed. 2d 398 (1980). This assignment of error is overruled.

PROPORTIONALITY

[23] In affirming defendant's sentence of death, it is necessary for us to review the record, pursuant to G.S. § 15A-2000(d)(2), to determine whether the record supports the jury's finding of any

aggravating circumstance; whether the sentence imposed was under the influence of passion, prejudice or any other arbitrary factor; and whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

After a careful and thorough review of the transcript, record on appeal, and the briefs of the parties, we find that the record fully supports the jury's written findings in aggravation. We further find that the death sentence was not imposed under the influence of passion, prejudice, or any other arbitrary factor and that the record is devoid of any indication that such impermissible influences were a factor in the sentence. The defendant, throughout the course of his trial and on appeal, was ably represented by counsel. His case was argued vigorously and thoroughly. Our review of the transcript, record and briefs reveals no error at either phase of his trial which warrants a new trial or sentencing hearing.

Finally, we must determine whether the sentence of death in this case is excessive or disproportionate to the penalty imposed in similar cases considering both the crime and the defendant. *See State v. Williams*, 308 N.C. 47, 301 S.E. 2d 335, *cert. denied*, 78 L.Ed. 2d 177, *reh. denied*, 78 L.Ed. 2d 704 (1983).

In conducting a proportionality review in this case, it is significant to note that both Congress and our State legislature have recently recognized the serious consequences to the effective administration of our criminal justice system in the continuing efforts of those charged with crimes to threaten or intimidate witnesses.[2] The present case represents the first in North

2. HB 922, An Act to Make Witness Intimidation a Felony, would amend G.S. § 14-226 to delete the phrase "misdemeanor" and substitute the phrase "Class [H-H] [H-I] (sic) Felony."

The Victim and Witness Protection Act of 1982 amended Sec. 4.(a) Chapter 73 of title 18 of the United States Code by adding §§ 1512-1515 which provides for substantial fines (not more than $250,000), imprisonment (up to ten years), or both, as well as authority to issue protective orders.

See G.S. § 15A-2000(e)(8): "The capital felony was committed against a law-enforcement officer, employee of the Department of Correction, jailer, fireman, judge or justice, former judge or justice, prosecutor or former prosecutor, juror or former juror, or witness or former witness against the defendant, while engaged in

Carolina in which a potential witness, pursuant to a plea arrangement, had agreed to testify against the defendant at trial and was murdered solely for the purpose of preventing his testimony. Based upon compelling policies which encourage witnesses to testify in criminal trials without fear and based upon our decisions in *State v. Barfield*, 298 N.C. 306, 259 S.E. 2d 510, and *State v. Oliver*, 309 N.C. 326, 307 S.E. 2d 304,[3] we hold that defendant's sentence of death is neither disproportionate nor excessive considering both the crime and this defendant.

No error.

Justice FRYE concurring as to result in Guilt Phase and dissenting as to Sentencing Phase.

While I agree with the majority that the defendant has shown no prejudice by the admission of the testimony of Assistant District Attorney Jean Powell that the decedent, Stephen Henry, told her "that he would give truthful testimony . . . against Anson Maynard," I find it unnecessary to further extend the rule enunciated in *State v. Vestal*, 278 N.C. 561, 180 S.E. 2d 755 (1971), *cert. denied*, 414 U.S. 874 (1973), to the circumstances of this case. In my judgment, the circumstances under which Henry made this statement were not such as to give it a sufficient probability of truthfulness to justify its admission as an exception to the hearsay rule. Henry had been indicted by the grand jury for a serious offense and he was trying to get the best deal he could get from the State. The circumstances favored saying whatever Henry thought the State wanted him to say in exchange for guaranteed probation. These circumstances, in my opinion, tend to cast doubt rather than add credibility to Henry's statement. Therefore, I would hold that the admission of the statement was error, but non-prejudicial since the jury had been fully apprised of the plea agreement.

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the performance of his official duties or because of the exercise of his official duty." This factor, although seemingly appropriate for this case, was not submitted.

3. In both *Barfield* and *Oliver*, the motivation for the murders was to avoid detection or arrest for other crimes. We upheld the death penalty in those cases.

I concur in the result reached by the majority, nevertheless, which finds no error in the Guilt Phase of defendant's trial. I dissent from the majority holding that there was no prejudicial error in the Sentencing Phase.

The majority holds that defendant is not entitled to a new sentencing hearing even though the trial court permitted a Deputy Clerk of Superior Court to read to the jury the complete contents of two judgments and two bills of indictment returned against defendant in earlier, unrelated cases. In so doing, the majority holds that where a judgment includes portions of an indictment for a felony, the entire judgment may be read to the jury even though the defendant only entered a plea of guilty to a lesser included misdemeanor. Having so held, the majority then holds that since the nature of the original felony charges are properly before the sentencing jury by way of the judgment, there is no prejudice to the defendant in reading the indictment to the jury. I disagree as to both of these rulings by the majority.

In the instant case, the State did not initially introduce any evidence at the sentencing hearing, instead choosing to rely upon the evidence which it had presented to the jury during the guilt-innocence phase of defendant's trial. The evidence presented by the State during the guilt-innocence phase was sufficient to prove not only murder in the first degree, but also at least one of the statutory aggravating circumstances, which is a necessary finding before the death penalty can be imposed. If the State's evidence was believed, the defendant committed a deliberate murder to prevent a witness from testifying against him in pending criminal cases, a circumstance which satisfies the aggravating factor specified in either G.S. § 15A-2000(e)(7) or G.S. § 15A-2000(e)(8). The State's evidence at the guilt-innocence phase of the trial would also have permitted the State to argue that the murder was "especially heinous, atrocious or cruel," a circumstance which satisfies the aggravating factor specified in G.S. § 15A-2000(e)(9). Thus it was unnecessary for the State to put on additional evidence at the sentencing phase in order for the District Attorney to argue for imposition of the death penalty.

In rebuttal of defendant's evidence which tended to show his good character and lack of a "significant history of prior criminal activity," the State presented Mrs. Linda Kerik, Deputy Clerk of

Superior Court, Cumberland County, who testified concerning defendant's prior criminal activity in Cumberland County and the subsequent disposition of his cases.[1] Over the objections of defendant, the trial court permitted Mrs. Kerik to read to the jury not only that portion of the judgment which included defendant's plea of guilty and the sentence imposed thereon, but also permitted her to read those portions of the judgment containing the original charges against him. Since these charges were based on *ex parte* statements, I believe that their admission against defendant was error.

A valid, properly authenticated judgment is generally admissible under North Carolina statutory law. *See* G.S. §§ 1-229, 1-236.1, 8-35, 15A-1340.4(e). However, where an otherwise admissible document contains irrelevant, incompetent and highly prejudicial material, the incompetent part of the document should be deleted and not read to the jury. *See State v. Jackson*, 287 N.C. 470, 481-82, 215 S.E. 2d 123, 130-31 (1975); *See also State v. Spillars*, 280 N.C. 341, 185 S.E. 2d 881 (1972) (which held that a search warrant and the affidavit filed in support of it are hearsay and their introduction into evidence deprived the defendant of his constitutional right to confrontation).

I note that the State was not required to introduce either of the judgments into evidence at the sentencing hearing because the defendant had already admitted his convictions of the misdemeanors during the guilt-innocence phase of the trial. Had the State been content to stop with the introduction into evidence of that portion of the judgments containing the guilty pleas, their acceptance by the court and the sentences entered thereon, there would have been no basis for an assignment of error based on the reading of the judgments. However, the trial court not only overruled defendant's objections to the reading of the felony charges to the jury but then compounded the error by permitting the in-

1. This evidence would not have been admissible as a part of the State's case-in-chief to show an aggravating factor, since the defendant was not convicted of a felony. G.S. § 15A-2000(e)(3) lists as one of the aggravating circumstances the following: "(3) The defendant had been previously convicted of a felony involving the use or threat of violence to the person." Assault with a deadly weapon is a misdemeanor, G.S. § 14-33. Assault with a deadly weapon with intent to kill and assault with a deadly weapon inflicting serious injury are both felonies. G.S. § 14-32.

dictments in their entirety to be read to the jury! These indictments concerned past accusations of crimes against defendant which were not even remotely related to the charges for which defendant was standing trial. The indictments were not relevant to sentencing in this case. The reading of the indictments by Mrs. Kerik did not have any probative value, i.e., the indictments did not tend to prove or disprove any fact or factor relevant to a determination of the appropriate sentence (life imprisonment or death) to be imposed upon defendant. Furthermore, the indictments were not probative of a mitigating or aggravating factor, and, to the extent that they may have been considered probative, their probative value was outweighed by their potentially prejudicial effect. Therefore, the reading of the indictments to the jury was error.

I also note that the indictment in file No. 75-CR-9347 is factually inaccurate. It alleges that:

> Anson A. Maynard, unlawfully and willfully did feloniously assault with intent to kill, Eugene Jacobs, with a deadly weapon, to wit: *a small caliber pistol, inflicting serious bodily injury to wit: shotgun wounds to the head of the said Eugene Jacobs.* . . . (Emphasis added.)

The indictment is factually inaccurate because it alleges that the defendant shot the victim with a small caliber pistol thereby inflicting shotgun wounds to the head of the victim. Shotgun wounds do not result from being shot with a small caliber pistol. This inaccurate statement in the indictment further illustrates why indictments, which are unreliable, *ex parte* hearsay statements should not be read to the jury.

Furthermore, this indictment alleged that the defendant intended to kill the victim and that defendant inflicted serious bodily injury to the victim. Were either of these allegations true, the defendant would have been guilty of a felony, G.S. § 14-32. However, defendant denied his guilt of the felony charged against him and entered a plea of guilty to a misdemeanor, G.S. § 14-33. This plea was accepted by the trial court. That court having accepted the guilty plea to misdemeanor assault with a deadly weapon (without intent to kill and without inflicting serious bodily injury), and having sentenced the defendant accordingly, it would be highly improper, reversible error and a violation of defendant's

privilege against double jeopardy for a later court or jury to reconsider whether the defendant was in fact guilty of the felony of assault with a deadly weapon with intent to kill, inflicting serious bodily injury growing out of the same set of facts. *Cf. Silhan*, 302 N.C. at 266-72, 275 S.E. 2d at 480-83 (applying double jeopardy principles to capital sentencing proceedings); *State v. Frazier*, 280 N.C. 181, 185 S.E. 2d 652, *vacated*, 409 U.S. 1004, 93 S.Ct. 453, 34 L.Ed. 2d 295 (1972), *on remand*, 283 N.C. 99, 195 S.E. 2d 33, *aff'd per curiam*, 284 N.C. 120, 199 S.E. 2d 283 (1973) (actions of prosecutor as barring further prosecution); *State v. Birckhead*, 256 N.C. 494, 124 S.E. 2d 838 (1962) (conviction or acquittal of assault to commit rape bars subsequent prosecution for rape based on same act or transaction). Accordingly, there was no legally justifiable reason for reading the indictment charging felonious assault to the jury. Likewise, the indictment in the larceny case alleged the value of the stolen property to be $250 (making the crime a felony) whereas the plea accepted by the court was to a misdemeanor, indicating that the value of the property was not more than $200. *See* G.S. § 14-72.[2] Again, there was no legally justifiable reason for reading this indictment to the jury.

For all of the foregoing reasons, I would hold that the trial court erred in allowing the deputy clerk at the sentencing hearing to read to the jury: (1) the formal parts of the judgment containing felony charges against the defendant to which the defendant had entered pleas of not guilty, and (2) grand jury indictments against the defendant for alleged offenses to which he had entered pleas of not guilty.

The next question is whether the trial court's error was prejudicial. Under the facts of this case, I believe that it was. As noted, the trial court improperly admitted testimony concerning a bill of indictment in which defendant was charged with feloniously shooting Eugene Jacobs in the head. Following the erroneous admission of the above testimony, Officer Conerly, the witness who appeared before the grand jury, was permitted to testify at

2. Pursuant to G.S. § 14-72 (1975), which was in effect at the time defendant entered his plea of guilty, the difference between felonious larceny and misdemeanor larceny was the taking of goods valued at no more than $200 (presently $400).

the sentencing hearing that he had visited Eugene Jacobs in the hospital and had seen Jacobs' bandaged head. The relevancy of this officer's testimony was based on the improperly admitted bill of indictment which stated that Eugene Jacobs was the victim of the felonious assault with which defendant was charged. Further, the purpose of introducing the officer's testimony was to corroborate the improperly admitted bill of indictment. Finally, the indictment and the officer's testimony served as a convenient basis for the prosecutor's use in making an improper closing argument to the jury on the question of sentence.

In seeking the death penalty, the prosecutor suggested to the jury that the earlier assault committed by defendant was, like the murder for which defendant was on trial, an attempt to eliminate a witness prepared to testify against defendant. The prosecutor argued, "[y]ou know the fact that he has previously pled guilty to shooting someone in the head that he had committed a larceny with. Doesn't it sound very familiar?" I find nothing in the record to support such an argument. In fact, the defendant had denied this allegation, both by his misdemeanor plea to the original charge, and by his testimony at the guilt-innocence phase of the present trial. There is no evidence regarding defendant's motive for the prior assault. Indeed, had defendant in the earlier assault been attempting to eliminate a witness, it is unlikely that he would have been permitted to plead guilty to a misdemeanor and receive a suspended sentence.

Thus, through the use of improperly admitted testimony concerning a bill of indictment against defendant, the State was allowed to introduce a corroborating witness and to suggest to the jury in closing arguments that this was the second time defendant had been convicted of a similar crime. The erroneous admission of the indictment thus served as a basis for the admission of other damaging evidence and provided a means for the prosecutor to make improper and potentially harmful arguments to the jury. Accordingly, I am not prepared to say that the combined effect of the erroneously admitted testimony and the prosecutor's improper argument based thereon were not sufficient to tip the scales in the minds of the jurors between life imprisonment and death for this defendant. Thus, I would hold that the error was prejudicial.

For all of the above reasons I vote to uphold defendant's conviction of first degree murder, vacate the sentence of death and remand the case for a new sentencing hearing to be conducted pursuant to G.S. §§ 15A-2000 through 15A-2003.

Justice EXUM joins in this dissenting opinion.

TERRY FAULKNER v. NEW BERN-CRAVEN COUNTY BOARD OF EDUCATION

No. 24PA84

(Filed 5 June 1984)

1. **Schools § 13.2— teacher dismissal—judicial review—whole record test**

The standard of judicial review of a board of education's dismissal of a career teacher is the "whole record" test set forth in G.S. 150A-51(5).

2. **Schools § 13.2— dismissal of career teacher for excessive use of alcohol**

Defendant board of education did not err in concluding that a course of conduct involving the use of alcohol by a career teacher on school property during school hours, the same being obvious to the teacher's students, to parents and to other school personnel and repeated after continued warnings, was "excessive" within the meaning of G.S. 115C-325(e)(1)f, and the board acted lawfully in dismissing the teacher for the excessive use of alcohol.

Justice EXUM dissenting.

Justice FRYE joins in the dissenting opinion.

ON discretionary review, pursuant to N.C.G.S. 7A-31, of the decision of the Court of Appeals, 65 N.C. App. 483, 309 S.E. 2d 548 (1983), setting aside the judgment entered in favor of the defendant by *Reid, J.*, said judgment being filed out of term on 16 August 1982 in Superior Court, CRAVEN County. Heard in the Supreme Court 8 May 1984.

On 17 September 1981, Terry Faulkner was suspended from a tenured teaching position by the New Bern-Craven County Board of Education. The grounds for the dismissal listed by Ben D. Quinn, Board of Education Superintendent, were: (1) habitual or excessive use of alcohol, N.C.G.S. 115C-325(e)(1)(f); (2) failure to fulfill the duties and responsibilities imposed upon teachers by

the General Statutes of this state, N.C.G.S. 115C-325(e)(1)(i); (3) neglect of duty, N.C.G.S. 115C-325(e)(1)(d); (4) immorality, N.C.G.S. 115C-325(e)(1)(b); and (5) insubordination, N.C.G.S. 115C-325(e)(1)(c).

Pursuant to N.C.G.S. 115C-325(h)(3), the plaintiff promptly requested a hearing before a panel of the Professional Review Committee. A hearing was held on 3 November 1981. The five-member panel communicated its findings to Dr. Quinn and to the plaintiff in a letter which set out the purpose of the hearing, the names of those in attendance, and the charges against Terry Faulkner, and concluded with the following:

> The factual circumstances alleged to have been grounds for dismissal were based on two sets of evidence. The first was that the teacher "consumed some form of alcoholic beverages upon school grounds at H. J. McDonald [sic] School and during class room teaching hours". The second was that Mr. Faulkner "has repeatedly and frequently and without just cause or excuse absented himself from his class of students during class teaching periods for extended lengths of time."
>
> Based on the evidence presented, the Panel unanimously finds that the charges as presented are not true and substantiated.

On 9 November 1981, Superintendent Quinn proceeded nevertheless to recommend Faulkner's dismissal on the original grounds listed above, whereupon the plaintiff sought a hearing before the defendant board of education.

On 3 December 1981, nine out of twelve members of the Board went into executive session to hear evidence presented by Superintendent Quinn and Terry Faulkner. Based upon hearing testimony by witnesses for each side and having considered the aforementioned report of the Professional Review Committee panel, the Board made the following findings of fact:

> 1. The said Terry M. Faulkner was employed as a teacher by the New Bern School System in 1969; and has taught Language Arts and other subjects in the Seventh (7th) Grade since 1969; and since 1971 has been employed continuously as a teacher in the H.J. MacDonald Middle School

until his suspension by the Board in September, 1981 pursuant to G.S. 115C-325(f).

2. That for the three (3) years next preceeding [sic] 1981 he had received satisfactory or better evaluation reports.

3. That for the 1981-1982 school year, he was employed as a career teacher in Language Arts for the Seventh (7th) Grade at H.J. MacDonald Middle School.

4. That at some time during the 1980-1981 school year, while employed as a career teacher at the H.J. MacDonald Middle School and during regular instructional hours, the Principal of said school, Mr. Albert U. Hardison, did detect the odor of alcohol on the breath of said teacher, Terry M. Faulkner; and said Principal did remonstrate with and did informally reprimand said teacher for said conduct and did informally warn him against any further conduct of this kind, specifically, having the odor of alcohol on his breath at school, although no formal complaint was filed in his personnel file.

5. That following the reprimand by the Principal hereinabove set out in Paragraph 4, the Principal directed one Marie Satz, a counselor employed at the H.J. MacDonald Middle School and a friend of Faulkner, to talk with Faulkner regarding this problem; that she did talk with Faulkner at the request of the Principal.

6. That on several occasions during the early part of the 1981-1982 school year, the odor of alcohol was detected on the breath of Mr. Faulkner by another teacher, a Mrs. Margie Rice.

7. That on or about Thursday, September 3, 1981, a Mrs. Frances Motley, a parent, who had gone to Faulkner's classroom to obtain assignments for her child who was a student of Faulkner, detected the odor of alcohol on Faulkner's breath at approximately 2:30 o'clock P.M. on Thursday, September 3, 1981; and reported the same to the Superintendent.

8. That other complaints were received verbally and in writing by the said Principal and the Superintendent regard-

ing the odor of alcohol on Faulkner's breath during the early part of the 1981-1982 school year.

9. That on or about Friday, September 4, 1981, the said Principal issued a directive to Faulkner advising of the complaints received by the Principal of drinking and/or having the odor of alcohol on Faulkner's breath and directing him to consult with the said Principal that afternoon, ie: September 4, 1981.

10. That the said Faulkner ignored or otherwise refused or failed to respond to the said directive of the Principal; and did not respond to the Principal until he was again summoned by the Principal for his response to these complaints on Tuesday, September 8, 1981.

11. That during the 1980-1981 school year, the said Principal summoned Faulkner to his office and reprimanded him with regard to his extended absences from his classroom which he had a duty to instruct and supervise; whereupon the said Faulkner admitted the fact of being absent for inordinate periods of time from his classroom and promised to correct this inadequacy.

12. That the said Principal assumed that this problem regarding absences for inordinate lengths of time from the classroom had been corrected; however, during the early part of the 1981-1982 school year, because of complaints received by the Principal regarding extended absences from his classroom Faulkner was again reprimanded and warned by the Principal for the same, to which the said Faulkner admitted his absence from his classroom for inordinate lengths of time without just cause or excuse.

Based upon the foregoing findings, the Board concluded that the grounds upon which the superintendent had recommended dismissal were true and substantial, and ordered plaintiff to be dismissed.

On 31 December 1981, plaintiff filed notice of appeal to superior court pursuant to N.C.G.S. 115C-325(n) and also filed a petition for judicial review pursuant to N.C.G.S. 150A-43. The case was heard without a jury by consent of the parties on 19

March 1982. Judge Reid affirmed the Board's order of dismissal. His judgment, in significant portion, follows:

> The Court has now reviewed the entire record as submitted, including the transcript of hearing before the New Bern-Craven County Board of Education. The Court has further taken into account the finding of the Professional Review Committee that concluded unanimously that the charges against the plaintiff-appellant were neither true nor substantiated.
>
> The Court upon review of the entire record finds that the findings of fact set forth in the Board Order denominated: 1, 2 and 3 are not in dispute and are, in fact, for the most part, favorable to the plaintiff-appellant.
>
> The Court further finds that findings of fact Numbers 4, 5, 6, 7 and 8 are supported by the entire record.
>
> The Court further finds that finding of fact Number 9 is partially supported by the entire record except that the Court concludes that a fair interpretation of the communication from Mr. Hardison, the school principal, to Mr. Faulkner on September 4, 1981, was not a directive requiring a consultation with Mr. Hardison that afternoon; but rather a notice that complaints had been lodged concerning drinking and extended absence from class followed by an invitation to discuss the situation further if Mr. Faulkner so desired. (Tr. Page 22)
>
> The Court finds that the entire record does not support the Board's finding of fact Number 10 except that it is clear the principal, Mr. Hardison, and Mr. Faulkner met on September 8, 1981, concerning the complaints that had been received and that the meeting was at the direction of Mr. Hardison. (Tr. Page 29)
>
> That as to finding of fact Number 11, the Court finds ample support for the conclusion that Mr. Faulkner admitted being absent from class for inordinate periods of time during the 1980-1981 school year but nowhere does the record reflect that the principal, Mr. Hardison, reprimanded him for such conduct. A fair interpretation of the whole record on this point would indicate that the matter was treated as a

Principal-Teacher conference for the purpose of correcting teacher's short comings. (Tr. Page 30)

In view of the whole record test, it appears to the Court that finding of fact Number 12 is supported by the evidence. (Tr. Pages 29, 30, 31, 206, 210)

This Court has considered the entire record in light of the decisions of *Thompson v. Wake County Board of Education*, 292 N.C. 406, 233 SE 2d 538 (1977) and *Overton v. Board of Education*, 304 N.C. 312, 283 SE 2d 495 (1981). From that vantage, it appears to this Court that while the evidence in support of the Board's decision must be substantial, it is not the function of a reviewing court to substitute its judgment for that of the Board's.

The decision of the Board reflected in its Order appears harsh to this Court, perhaps unduly so in view of Mr. Faulkner's record as an above-average teacher for eleven years. However, where the Board's decision has a rational basis in the evidence, the reviewing court may not intrude.

The Board's conclusion that the teacher has made "habitual and/or excessive use of alcohol" during the 1980-81 and 1981-82 school years is supported by the testimony of three competent adults who at separate times detected the odor of alcohol on his breath. Repeated occasions where the odor of alcohol is detected on one's breath by responsible witness at separate times and at separate places would seem to form a rational basis for the conclusion reached by the Board that the teacher has made habitual or excessive use of alcohol.

The second conclusion relating to the teacher's failure to fulfill the duties and responsibilities imposed upon teachers seems to cause less difficulty. By the teacher's own admission, he had absented himself from class at various times during both the 1980-81 and 1981-82 school years and for excessive periods of time.

. . . .

The Board did make certain findings of fact that were not supported by the evidence. However, those findings main-

ly concerned the nature and interpretation of communications and conferences between Mr. Hardison, the principal, and Mr. Faulkner. None of these findings were essential to sustain the conclusion reached by the Board.

The Court of Appeals reversed the judgment of the superior court and ordered reinstatement of plaintiff with back pay. We granted discretionary review on 6 March 1984.

Chambers, Ferguson, Watt, Wallace & Adkins, P.A., by Yvonne Mims Evans, and Thorp, Fuller and Slifkin, P.A., by James C. Fuller, Jr., for plaintiff.

Henderson & Baxter, P.A., by David S. Henderson and Benjamin G. Alford, for defendant.

MARTIN, Justice.

The New Bern-Craven County Board of Education based its final decision to dismiss Terry M. Faulkner on two of the five statutory grounds specified in the recommendation of Superintendent Quinn. We have granted discretionary review in this case to consider the first of these grounds as articulated in the Board's report:

> 1. That the teacher, Terry M. Faulkner, has made habitual and/or excessive use of alcohol (G.S. 115C-325(e)(1)(f)) in that on an occasion or occasions during the 1980-1981 school year, Faulkner has consumed some form of alcoholic beverages at school, or, at least, has had the odor of alcohol on his breath at school during instructional hours, and has, during the school day, on occasions during the 1981-1982 school year, and after reprimand and warning against the same, consumed alcoholic beverages, or at least, has had the odor of alcohol on his breath.

In particular, we examine the following significant portion of the Court of Appeals opinion in this case:

> After considering the whole record, we are obliged to conclude that the Board's conclusion that plaintiff is an "habitual and/or excessive user of alcohol" is not adequately supported by evidence and must be set aside. If the charge was drinking during school duty hours the decision would be other-

wise; but, of course, the Legislature has not seen fit to make that a ground for discharging career teachers.

65 N.C. App. at 491, 309 S.E. 2d at 552.

We cannot concur in this assessment of the intent of our legislature regarding acceptable standards of conduct for career teachers in North Carolina and therefore reverse the decision of the Court of Appeals.

We look first to the evidence in this case as it relates to the conduct of plaintiff, the Board's findings based thereon, and the proper standard for review.

This Court has held:

> We find no standards for judicial review for an appeal of a school board decision to the courts set forth in Chapter 115 of our General Statutes. Moreover, we note that G.S. 150A-2(1) expressly excepts county and city boards of education from the coverage of the Administrative Procedure Act (APA), Chapter 150A, N.C. General Statutes. However, this Court held in *Thompson v. Wake County Board of Education*, 292 N.C. 406, 233 S.E. 2d 538 (1977), that the standards for judicial review set forth in G.S. 150A-51 are applicable to appeals from school boards to the courts. Since no other statute provides guidance for judicial review of school board decisions and in the interest of uniformity in reviewing administrative board decisions, we reiterate that holding and apply the standards of review set forth in G.S. 150A-51 (1978).

Overton v. Board of Education, 304 N.C. 312, 316-17, 283 S.E. 2d 495, 498 (1981).

N.C.G.S. 150A-51, the governing statute, provides in part:

> The court may affirm the decision of the agency or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the petitioners may have been prejudiced because the agency findings, inferences, conclusions, or decisions are:
>
> . . . .

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

[1] Judge Reid was entirely correct in applying the "whole record" test, as set forth above in N.C.G.S. 150A-51(5), to the Board's findings. As explained by Justice Copeland:

> The "whole record" test does not allow the reviewing court to replace the Board's judgment as between two reasonably conflicting views, even though the court could justifiably have reached a different result had the matter been before it *de novo* . . . . On the other hand, the "whole record" rule requires the court, in determining the substantiality of evidence supporting the Board's decision, to take into account whatever in the record fairly detracts from the weight of the Board's evidence.

Thompson v. Board of Education, 292 N.C. 406, 410, 233 S.E. 2d 538, 541 (1977). *See also Universal Camera Corp. v. Labor Bd.*, 340 U.S. 474, 95 L.Ed. 456 (1951).

Under the "whole record" test, therefore, the reviewing judge must consider the complete testimony of all the witnesses. *In re Appeal from Environmental Management Comm.*, 53 N.C. App. 135, 280 S.E. 2d 520 (1981). We note, furthermore, the following statutory provision regarding board hearings such as this: "(4) Rules of evidence shall not apply to a hearing conducted pursuant to this act and boards and panels of the Professional Review Committee may give probative effect to evidence that is of a kind commonly relied on by reasonably prudent persons in the conduct of serious affairs." N.C. Gen. Stat. § 115C-325(j)(4) (1983).

N.C.G.S. 115C-325(*l*) governs board hearing procedures in cases where, as here, the panel of the Professional Review Committee does not find that the grounds for the superintendent's recommendations are true and substantiated. It mandates that the report of the panel shall be deemed to be competent evidence. It further requires that the decision of the board be based on a preponderance of the evidence. *See* N.C. Gen. Stat. §§ 115C-325(*l*) (2), (4) (1983).

Having established the parameters for a proper review by the superior court and the Court of Appeals, we now consider all

the evidence—both that which supports the decision of the Board and that which in fairness detracts from it. We are to determine whether the Board's findings of fact four through ten and resulting conclusion concerning plaintiff's use of alcohol are supported by substantial evidence in view of the entire record as submitted. *See Overton v. Board of Education, supra*, 304 N.C. 312, 283 S.E. 2d 495.

In support of the above findings and conclusion of the Board, there is the following:

Firsthand testimony:

(1) Albert U. Hardison, principal, supervises a staff of almost eighty, with forty-one teaching positions. He testified that one morning near the beginning of the 1980-81 school year, as he was talking to plaintiff in the corridor outside his office, he detected what he "believed to be the smell of alcohol" on Faulkner's breath. He continued: "I talked with Mister Faulkner about it, expressed to him that I believed that I had smelled alcohol on his breath, and that I knew that he must know and understand, and recognize, the seriousness of this, and the consequences of it." Regarding this encounter with plaintiff, Hardison later testified: "[I]f anyone had made the statement to me that I made to Mister Faulkner, that I would have considered it a warning. . . . I intended my message to him to be that, 'I smelled alcohol on your breath'; that 'This is going to cause a great deal of problems if this sort of thing persists.' " Hardison said that just after this incident, he asked Mrs. Marie Satz, a counsellor at the school, to talk with plaintiff about this conduct.

(2) Frances M. Motley, mother of a student of Mr. Faulkner's, testified that on the Thursday before Labor Day 1981, at 2:30 p.m., the end of the school day, she went to see plaintiff to pick up her son's assignments. "Right from the beginning" of their three or four minute meeting, she thought she recognized the odor of alcohol on Mr. Faulkner's breath. She was concerned and discussed it at home that night with her husband. They did not mention the incident to their son Phillip.

(3) Margie Crawley Rice, a faculty member, testified that at the beginning of the 1981-82 school year at a teachers' workday, prior to the students coming to school, she came in contact with

plaintiff and smelled liquor on his breath. Then, "once or twice, at least—maybe twice; not any more," she recognized the odor of alcohol on his breath in the morning, prior to the tardy bell, after the students arrived to begin classes.

Hearsay testimony:

(1) Robert W. Brinson, parent of a child in plaintiff's class, testified: "It was reported to me by my son on several occasions that he smelled alcohol on Mister Faulkner's breath, and that Mister Faulkner had left the classroom unattended for long lengths of time during the first week of school." Mr. Brinson further stated that after the third such report from his son—in which his son related that "he did not smell alcohol on his breath in his morning class that he had with Mister Faulkner, but that the class had gone into Mister Faulkner's class that afternoon to see a film, and he smelled it on him then"—he wrote a letter to the school principal. When questioned whether his twelve-year-old son ever had any experience that would enable him to recognize the odor of alcohol, Mr. Brinson stated: "Yes, sir. One of his grandfathers is an alcoholic."

(2) Mr. Hardison, the principal, corroborated the testimony above of school parents Brinson and Motley. The latter had complained to a school counsellor who in turn spoke with Mr. Hardison. When asked how he followed up on these complaints, Mr. Hardison testified that he sent Faulkner the following memo:

> It's dated 9/4/81; and it says, "Terry, I have received complaints from parents this week in two specific areas; (a), a strong alcohol breath, and; (b), frequent, extended absences from the classroom. I have an obligation to pass these complaints on to you. I'll be available after school if you'd like to discuss the situation further."

After Terry Faulkner was placed on suspension, Mr. Hardison asked the remaining teachers in the pod "to give me the names of six children in the pod they considered to be the most mature, the dependable, kids in the pod." He proceeded to question each child about Mr. Faulkner: "I had to make an effort to at least let a part of the truth be cast . . . by what some of the children had to say about the situation." Mr. Hardison related the results of these interviews as follows:

> Okay. Student Number One said, "A nice man; a good teacher"; there was talk of drinking a lot, among students, at which point, I asked, "What do you mean by 'a lot'?" and the answer was, "Two or three times a week"; the students said, "Out of room quite a bit during first and sixth periods" and that the student had smelled alcohol a couple times, on the breath. Student Number Two said, "The breath smelled like he had been drinking; a fairly good teacher; out of the room quite a bit during homeroom and social studies" but that there was talk, almost every day at the desk, about alcohol on the breath. Student Number Three said that he seemed to leave the class more than other teachers; that often, he would come out and pass out papers and leave the room; that kids did talk a lot about his drinking; that he was, ". . . as far as I'm concerned, an 'all right' teacher; that I have smelled it on his breath." Student Number Four said he "was nice; I liked him; he was out of the room more than my other teachers; I have smelled alcohol and heard other kids say they smelled it; most kids like him". Student Number Five said, "I was not in his room"—this would have been one that was in the pod, but by scheduling, was not in his room for anything—that he had heard friends say, "Did not stay in the room as much as he ought to," and that they had smelled alcohol on the breath when they walked by him. Student Number Six said, "Not very much homework; majority cut him down, poked fun at him at his back; he was a good teacher; I liked him a lot sometimes" and then, "in and out"; "I never smelled alcohol on his breath. The majority of those that didn't want to work cut him down at his back." She had heard—correction; this student had heard kids say that they had smelled alcohol, but had not—this student—had not smelled it.

The students he questioned were "boys, girls, black and white."

Mr. Hardison also testified that he had received complaints from parents at the beginning of the previous school year regarding plaintiff's absence from class; that he had discussed the matter with plaintiff who "acknowledged they were valid complaints" and assured Hardison the situation would be corrected.

(3) Parent Frances Motley testified that the next night after her own encounter with plaintiff, her son—to whom no mention had been made of the earlier incident—came home from school "and he just told us that that day Mister Faulkner had stayed out of the room for a while, and when he came back that he smelled, like alcohol, to him; and at that point, we put the two together and—you know—it concerned us even more." It was then that Mrs. Motley decided to speak with Superintendent Quinn and she also put her complaint in writing; she then contacted the school guidance counsellor.

(4) Mrs. Marie Satz, teacher and counsellor at the school, testified that she was a personal friend of plaintiff's; she had been asked by Mr. Hardison to speak with Faulkner about the reports "that some people had smelled alcohol on his breath"; and, finally, that "there had been a student who had come down to see me, and had a concern about smelling liquor on Mister Faulkner's breath."

(5) Superintendent Ben Quinn testified that he had spoken about the matter with parents Brinson and Motley; that he "received one or two other telephone calls from parents; I had maybe one or two calls from board members who were referring the calls to me that they had received from parents"; and that he "received two other letters regarding Mister Faulkner." Superintendent Quinn met with Principal Hardison at the school on the Tuesday following Labor Day. About this meeting, he stated: "I inquired from Mister Hardison if he thought these complaints were legitimate, and he assured me that he thought they were, based on the fact that he had had a similar situation a year before . . . ."

Plaintiff's testimony:

Plaintiff testified that he had no reason to believe that any of the above witnesses—students or parents—would not be telling the truth. He stated that he remembered one occasion when Mrs. Satz spoke to him about a complaint concerning his having the odor of alcohol on his breath. He acknowledged receipt of the above-mentioned memo from Mr. Hardison on the Friday before Labor Day, the same afternoon Phillip Motley had reported to his parents that he smelled the odor of alcohol on Faulkner's breath.

He interpreted the memo to mean that "more than one parent" had complained, and sought advice over the weekend rather than go immediately to see Hardison because "we had spoken about this before." He did not see Mr. Hardison until the latter came to his classroom the Tuesday after Labor Day after conferring with Superintendent Quinn. Faulkner revealed that he had already spoken with Mr. Hardison earlier in the week, prior to receiving the memo, concerning complaints about his absences from class and the possible odor of alcohol on his breath. Concerning his absences from class, plaintiff testified "[p]erhaps it was not all right, but I didn't know anyone was suffering from it at the time. . . . I don't think the children were suffering." Mr. Faulkner acknowledged he had three to four drinks every night.

The record as a whole reveals the following evidence which may fairly detract from the weight of the Board's evidence:

(1) The report of the Professional Review Committee panel concluded that the charges as presented were not true and substantiated.

(2) No witness testified that Terry Faulkner had been seen under the influence of alcohol or consuming alcohol on school premises during school hours.

(3) Faulkner was evaluated by Mr. Hardison as doing "a very satisfactory job" as a teacher, "and even better than that in some areas," particularly language arts where he was seen to be "talented and well-prepared and well-trained and gifted."

(4) Five teachers testified in behalf of Mr. Faulkner. Two had taught in the same pod with plaintiff in 1981-82 before his suspension, and four had known plaintiff for many years. None of these witnesses had been aware of any discussion among the faculty of a problem concerning either plaintiff's use of alcohol on the premises or his absences from class. He had a reputation as a good teacher and good disciplinarian. Two witnesses spoke of seeing Mr. Faulkner daily—one just about every morning before class and the second, once or twice a day at the duplicating machine. None of these witnesses had personally noticed either an odor of alcohol or prolonged absences from his class. Three of these witnesses expressed their strong surprise upon learning of Faulkner's suspension.

(5) There was testimony from several teachers regarding the "common practice" of team teachers leaving the teaching area for brief periods of time to have a cigarette or to run a school errand.

(6) When asked if he had any explanation for the same accusation being made by "all of these different people at different times," plaintiff stated: "I don't know what they smelled; it was not alcohol that had been consumed at school, I do know that."

[2] Upon review of the entire record as submitted, we are satisfied, and we so hold, that the findings of fact and conclusion of the defendant board of education are supported by substantial evidence and based upon a preponderance of the evidence. N.C. Gen. Stat. § 115C-325(*l*)(4) (1983).

> "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Comr. of Insurance v. Fire Insurance Rating Bureau*, 292 N.C. 70, 80, 231 S.E. 2d 882, 888 (1977); *accord, Comr. of Insurance v. Automobile Rate Office*, 287 N.C. 192, 214 S.E. 2d 98 (1975). "Substantial evidence is more than a scintilla or a permissible inference." *Comr. of Insurance v. Automobile Rate Office, supra* at 205, 214 S.E. 2d at 106; *Utilities Commission v. Trucking Company*, 223 N.C. 687, 690, 28 S.E. 2d 201, 203 (1943).

Thompson v. Board of Education, supra, 292 N.C. at 414-15, 233 S.E. 2d at 544.

As Justice Exum has noted: "The 'whole record' test is not a tool of judicial intrusion; instead, it merely gives a reviewing court the capability to determine whether an administrative decision has a rational basis in the evidence." *In re Rogers*, 297 N.C. 48, 65, 253 S.E. 2d 912, 922 (1979). *See also* L. Jaffe, *Judicial Control of Administrative Action* (1965).

A reasonable mind might well conclude upon a review of the above evidence, as did the Board, that Terry M. Faulkner had engaged in the following behavior:

> [O]n occasion or occasions during the 1980-81 school year . . . has consumed some form of alcoholic beverages at school, or, at least, has had the odor of alcohol on his breath at school during instructional hours, and has, during the school day, on

occasions during the 1981-1982 school year, and after reprimand and warning against the same, consumed alcoholic beverages, or at least, has had the odor of alcohol on his breath.

We further hold that when ascribed to a career teacher in North Carolina, this conduct constitutes "habitual or excessive use of alcohol" within the meaning and intent of N.C.G.S. 115C-325(e)(1)(f), becoming thereby lawful grounds for dismissal.

We are aware of an apparent tension between N.C.G.S. 115C-325(j)(4) and -325(*l*)(1), (2). Subsection (j) provides that (j)(4) *shall* apply to any hearing pursuant to -325(*l*). (4) states that rules of evidence shall not apply to such hearings and the board may give probative effect to evidence that is of a kind commonly relied upon by reasonably prudent persons in the conduct of serious affairs. This would allow the use of certain hearsay evidence.

N.C.G.S. 115C-325(*l*)(1) refers to a basis of "competent evidence adduced at the hearing by witnesses who shall testify under oath . . . ." (*l*)(2) also refers to "relevant competent evidence."

In attempting to reconcile the apparent discrepancies in the statutes, a strong argument can be made that "competent evidence" as used in 115C-325(*l*)(1) and (2) includes evidence described in 115C-325(j)(4), because (j)(4) refers specifically to hearings under 115C-325(*l*).

However, we do not find it necessary to resolve this apparent dichotomy because we reach the same conclusion when the "hearsay" evidence is excluded from consideration. The testimony of the witnesses Hardison, Motley, and Rice alone support the Board's decision by the preponderance of the evidence upon a whole record review. Plaintiff never denied having the odor of alcohol on his breath and candidly conceded that he had no reason to believe that any of the witnesses were not telling the truth. The testimony of the five teachers who testified for Faulkner was basically negative; they had never detected any odor of alcohol about him or heard the subject discussed.

In construing N.C.G.S. 115C-325(e)(1)(f), "habitual or excessive use of alcohol" as a permissible ground for the decision to dismiss a career teacher, we must be guided by the following principle:

> The object of all interpretation is to determine the intent of the law-making body. Intent is the spirit which gives life to a legislative enactment. The heart of a statute is the intention of the law-making body. *Trust Co. v. Hood, Comr.*, 206 N.C., 268; *S. v. Earnhardt*, 170 N.C., 725. In the language of Chancellor Kent: "In the exposition of a statute the intention of the lawmaker will prevail over the literal sense of the terms, and its reason and intention will prevail over the strict letter. When the words are not explicit, the intention is to be collected from the context, from the occasion and necessity of the law, from the mischief felt and the remedy in view, and the intention is to be taken or presumed according to what is consonant with reason and good discretion." I Kent Com., 461.

State v. Humphries, 210 N.C. 406, 410, 186 S.E. 473, 476 (1936).

A settled rule of construction therefore requires that all statutes relating to the same subject matter shall be construed *in pari materia* and harmonized if this end can be attained by any fair and reasonable interpretation. *Castevens v. Stanly County*, 209 N.C. 75, 183 S.E. 3 (1935); *State v. Baldwin*, 205 N.C. 174, 170 S.E. 645 (1933). *See generally* 12 Strong's N.C. Index 3d *Statutes* § 5.4 (1978). It is equally well settled that every statute is to be considered in the light of the state constitution and with a view to its intent. *State v. Emery*, 224 N.C. 581, 31 S.E. 2d 858 (1944); *Belk Brothers Co. v. Maxwell, Comr. of Revenue*, 215 N.C. 10, 200 S.E. 915 (1939).

Concerning the duties of our elementary and secondary teachers, the legislature has ordained: "(b) To Provide for General Well-Being of Students.—It shall be the duty of all teachers . . . to encourage temperance, morality, industry, and neatness; to promote the health of all pupils . . . ." N.C. Gen. Stat. § 115C-307 (b) (1983). With regard to education in this state, Article IX, Section 1, of the North Carolina Constitution charges: "Religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools, libraries, and the means of education shall forever be encouraged."

With the above, we have a statutory and constitutional context for a closer examination of the language at issue. We find that the following definitions are meaningful in ascertaining the legislature's intent regarding N.C.G.S. 115C-325(e)(1)(f):

> *Excess*: "something that exceeds what is usual, proper, proportionate . . . undue or immoderate indulgence . . . a state of surpassing or going beyond limits." Webster's Third New International Dictionary 792 (1971).
>
> *Proper*: "marked by suitability, fitness, accord, compatibility." *Id.* at 1817.
>
> *Temperate*: "moderate in indulgence of appetite or desire . . . self-controlled." *Id.* at 2352.
>
> *Temperance*: "moderation in or abstinence from the use of intoxicating drink." *Id.*
>
> *Example*: "a pattern or representative action or series of actions tending or intended to induce one to imitate or emulate." *Id.* at 791.

Our inquiry focuses on the intent of the legislature with specific application to teachers who are entrusted with the care of small children and adolescents. We do not hesitate to conclude that these men and women are intended by parents, citizenry, and lawmakers alike to serve as good examples for their young charges. Their character and conduct may be expected to be above those of the average individual not working in so sensitive a relationship as that of teacher to pupil. It is not inappropriate or unreasonable to hold our teachers to a higher standard of personal conduct, given the youthful ideals they are supposed to foster and elevate. *See generally* E. Reutter and R. Hamilton, *The Law of Public Education* (2d ed. 1976). *See also* 68 Am. Jur. 2d *Schools* §§ 176-177 (1973).

Based on the foregoing, we hold that the defendant, New Bern-Craven County Board of Education, was entirely proper in concluding that a course of conduct involving the use of alcohol by a teacher on school property during school hours, the same being obvious to his students and other school personnel and parents, repeated after continued warnings, is "excessive" within the meaning of N.C.G.S. 115C-325(e)(1)(f). Having properly found this

course of conduct to exist, the defendant board acted lawfully in exercising its authority to dismiss Terry Faulkner.

The decision of the Court of Appeals is

Reversed.

Justice EXUM dissenting.

The majority opinion does not address the question raised by plaintiff concerning the admissibility, or competency, of the hearsay evidence adduced against plaintiff on the ground that the "testimony of the witnesses Hardison, Motley, and Rice alone support the Board's decision" that plaintiff engaged in the "habitual or excessive use of alcohol" in violation of N.C. Gen. Stat. § 115C-325(e)(1)(f). The majority's decision reversing the Court of Appeals is based solely on its consideration of the testimony of these three witnesses.

First, I think the majority correctly restricts its consideration of the case to the testimony of the three witnesses named because the other hearsay, and in some cases double hearsay, evidence was, as plaintiff contends, incompetent and should not have been considered by the Board. Indeed, the Board itself apparently ignored most of this hearsay evidence. Except for its finding No. 8, referring to "other complaints" received by the principal and superintendent "during the early part of the 1981-82 school year," the Board's findings on the alcohol use issue, findings Nos. 4, 6 and 7, rest exclusively on the testimony of Hardison, Motley and Rice. The Board in its Court of Appeals brief, page 14, noted that evidence of Hardison's student interviews "did not form the basis for any findings or conclusions by the Board." The majority has now determined that the Board's decision on the alcohol use issue may be sustained on the basis solely of the Board's findings Nos. 4, 6 and 7.

The witness Hardison, who was principal of the school, testified that near the beginning of the 1980-81 school year he detected what he "believed to be the smell of alcohol" on plaintiff's breath. Plaintiff then denied that he had been drinking. Hardison, the school principal, asked Mrs. Satz, a school counselor and friend of the plaintiff, if she would consult with plaintiff about this conduct. Apparently plaintiff taught throughout the

1980-81 school year without further incident. At least there is no evidence of any violation on his part during that school year. Motley, a parent, testified that during the first week of the 1981-82 school year at the end of the school day she "believed" she recognized the odor of alcohol on plaintiff's breath. She also testified that plaintiff "was very, very nice. I asked him for the assignments, and, you know, he offered to help me, you know, go to Phillip's locker and get his books, which we did; and he gave me his books and his assignments; and I left. You know, I was maybe in his presence maybe just a few minutes, three minutes, maybe." Finally, Rice, a teacher, testified that she smelled alcohol on plaintiff's breath at a teacher's workday before the opening of the 1981-82 school year. After school opened "once or twice, at least—maybe twice; not any more," Rice smelled alcohol on plaintiff's breath in the morning before the tardy bell.

In addition to his own testimony that he had never drunk alcoholic beverages at school, plaintiff offered the testimony of the assistant principal and five teachers from MacDonald School who had known and worked with him for at least seven years and some for his entire twelve-year teaching career at the school. These witnesses had almost daily contact with the plaintiff during both the 1980-81 and 1981-82 school years. All of them testified that they had never smelled the odor of alcohol on plaintiff's breath. Several of these witnesses testified to plaintiff's good reputation among his peers and the orderliness with which he conducted his classes. On cross-examination, Hardison, the principal, testified that he had daily contact with plaintiff during the 1980-81 school year and at no time during this period, except for the one occasion at the year's beginning, did he smell alcohol on plaintiff's breath. Hardison evaluated plaintiff as follows:

> His strengths as a teacher I have found over the years has been his ability to manage his classroom, his ability to project an aura of being in control of his classroom, his organizational and his training knowledge in the area he was assigned to teach, and most especially, language arts; just, in my impression, has been and is, a talented and well-prepared and well-trained, and gifted in that area.

The upshot, therefore, of the evidence against this able, career teacher is that during two of his twelve years as a teacher

at MacDonald School one person smelled and two persons "believed" they smelled alcohol on his breath—once at the beginning of the 1980-81 school year and no more than three times at the beginning of the 1981-82 school year. When this testimony is weighed against the evidence favorable to plaintiff in the application of the "whole record" standard, I am satisfied that it does not support the Board's conclusion that plaintiff has made habitual or excessive use of alcohol so as to justify his dismissal on this ground.

I am further satisfied for the reasons stated in the opinion of the Court of Appeals that the evidence fails as well to support the Board's conclusion that plaintiff failed to fulfill the duties and responsibilities imposed upon teachers within the meaning of N.C. Gen. Stat. § 115C-325(e)(1)(i).

I vote to affirm the decision of the Court of Appeals.

Justice FRYE joins in this dissenting opinion.

NORTHERN NATIONAL LIFE INSURANCE COMPANY v. LACY J. MILLER MACHINE COMPANY, INC.

No. 422A83

(Filed 5 June 1984)

1. Insurance § 19.1— solicitation of life insurance—agent of insurer

The trial court properly denied plaintiff-insurance company's motions for directed verdict and judgment notwithstanding the verdict in an action in which plaintiff sought a declaratory judgment enabling it to cancel a $100,000 life insurance policy issued to the defendant where the evidence tended to show that an insurance agent looked for companies which had "key man" life insurance policies; that the agent found that plaintiff-insurance company did not require physical exams for their "key man" insurance policies; that the insurance agent prepared a "key man" policy for the former president of defendant company with knowledge that the former president did not meet the requirement of active fulltime employment at the time the insurance agent filled out the insurance application; that the insurance agent delivered the application to plaintiff insurance company signed as "Licensed Registered Agent"; that the agent collected the premiums for plaintiff-insurance company and sent them to plaintiff's general agent; that after plaintiff approved the application, it licensed the insurance agent as its agent and paid him a commission. From this evidence the court could have found that the insurance agent

"solicited" the application for insurance with plaintiff-insurance company and that the insurance agent was an agent of the plaintiff-insurance company. G.S. 58-197. Further, although G.S. 50-40.3 states that a broker *as such* is not the agent of an insurance company, and the insurance agent in this case was referred to as an "insurance broker," a broker or other person who "solicits an application for insurance upon the life of another" is an agent of the insurance company by the express terms of G.S. 58-197. G.S. 58-39.4(b).

2. **Insurance § 19.1— agent's knowledge of falsity of statements in life insurance policy application—evidence supporting conclusions**

In an action in which plaintiff-insurance company sought to cancel a $100,000 life insurance policy issued to the defendant on the basis of false statements in the application, the evidence supported the conclusion that the insurance company's agent had knowledge of the falsity of the statements in the application when they were made where the evidence tended to show that the agent completed the application by himself without properly soliciting information from the defendant and where there was evidence from which the jury could have inferred that the agent was put on actual notice that the insured person did not work fulltime as stated in the application.

3. **Appeal and Error § 20— denial of petition for discretionary review—no approval of Court of Appeals' decision**

A denial of a petition for discretionary review does not constitute approval of the decision of the Court of Appeals. Further, the Supreme Court is not bound by precedents established by the Court of Appeals.

4. **Appeal and Error § 69— stare decisis not applying to Court of Appeals' decision**

The procedural issues in the present case are substantially different from those in a similar case reaching a different result in the Court of Appeals, and the doctrine of *stare decisis* did not compel a different decision by the Court of Appeals than that which it reached.

Justice MARTIN dissenting.

Justice MEYER joins in this dissenting opinion.

Justice MEYER dissenting.

Justices EXUM and MARTIN join in this dissenting opinion.

APPEAL by the plaintiff pursuant to G.S. 7A-30(2) from the decision of a divided panel of the Court of Appeals, 63 N.C. App. 424, 305 S.E. 2d 568 (1983), which found no error in the judgment entered by *Washington, Judge*, in Superior Court, DAVIDSON County on March 19, 1982.

In an action seeking a declaratory judgment, the plaintiff, Northern National Life Insurance Company, sought to cancel a $100,000 life insurance policy issued to the defendant, Lacy J.

Miller Machine Company. The jury found for the defendant. The Court of Appeals found no error. One judge having dissented in the Court of Appeals, the plaintiff appealed to the Supreme Court as a matter of right under G.S. 7A-30(2). Heard in the Supreme Court November 10, 1983.

Smith, Patterson, Follin, Curtis, James and Harkavy, by Norman B. Smith and John A. Dusenbury, Jr.; John T. Manning; and Cansler & Lockhart, by Thomas Ashe Lockhart, for plaintiff appellant.

House, Blanco & Osborn, P.A., by Lawrence U. McGee and John S. Harrison; and Wilson, Biesecker, Tripp & Sink, by Joe E. Biesecker, for defendant appellee.

MITCHELL, Justice.

Northern National Life Insurance Company (hereinafter "Northern"), the plaintiff-appellant, contends in this appeal that the majority in the Court of Appeals erred in upholding the trial court's refusal to grant the plaintiff's motion for a directed verdict and judgment notwithstanding the verdict. Since we find that the trial court was correct in submitting this case to the jury, we affirm the decision of the Court of Appeals.

The Lacy J. Miller Machine Company (hereinafter "Miller Company") is a North Carolina corporation in which the decedent, Lacy J. Miller, was a majority shareholder. Miller also served on the board of directors and as president of the company. Miller was removed from office on January 28, 1980 by the board of directors. James T. Donley and Joseph Buie were members of the board of directors and minority shareholders in the corporation. Until the removal of Miller on January 28, 1980, they served as vice president and secretary-treasurer respectively.

At trial the evidence tended to show that Roger C. Brooks was an insurance agent affiliated with Equitable Life Insurance Company (hereinafter "Equitable"). When Brooks visited the Miller Company corporate offices early in 1979, Buie and Donley informed him that the company was interested in purchasing insurance on the life of Lacy J. Miller. Brooks learned from Buie and Donley that the company had a mandatory stock purchase plan whereby the company agreed to purchase shares of stock

held by officers of the company in the event of those officers' deaths. Brooks attempted to procure life insurance coverage for the Miller Company from Equitable on the life of Miller, but Equitable refused to issue such coverage because Miller suffered from a heart condition. Brooks testified that he continued to look for an insurance program to fund the Miller Company's stock purchase plan.

Brooks stated that in September 1979 he placed a group hospitalization insurance policy with Equitable for the Miller Company, and that after September he visited the corporate headquarters of the company on an average of once a month. Brooks stated that late in 1979 he learned of policies offered by Northern and by Manhattan Life Insurance Company. Brooks believed that the policies might suit the Miller Company's needs. He learned that both insurance companies offered "key man" policies to employers on the lives of important employees without requiring physical examinations for the insured employees. Brooks learned about the policies from Barney Haynes, General Agent for Manhattan and for Northern.

Brooks spoke to Buie and Donley about the Manhattan and Northern policies in January 1980. Brooks stated that Buie and Donley were "skeptical" about the likelihood that insurance could be issued on the life of Miller because of his heart condition. Brooks told Buie and Donley that the requirements under Northern's policy were that the employer pay all premiums, that the insured not be known to be terminally ill at the time of the application or issuance of the policy, that the insured be actively involved in the fulltime pursuit of the duties of his employment, and that the insured be an employee of the employer. Brooks said he told Buie and Donley they should submit applications to Northern.

Brooks testified that he personally had questions about Miller's eligibility for the policies because he knew from previous experience that Miller had had a heart attack and a drinking problem. Brooks stated, however, that with regard to Miller, the requirement of active fulltime employment concerned him more than any other requirement. He stated that he knew that Miller was not in his office on a forty hour a week basis but that he thought Miller was president of the company and active in deci-

sion making. Brooks told Haynes about Miller's irregular schedule, and Haynes said that as long as Miller had a decision making role in the firm he would qualify under the plan.

Brooks testified that in late January or early February 1980 he received blank applications for the policy from Northern. He delivered a Northern application to Don R. House, attorney for the Miller Company, and he explained to House the requirements for eligibility for the policy. When that application was returned to Brooks, it was blank except for Lacy J. Miller's signature. Brooks testified that he received at the same time nine other applications from the Miller Company for Northern's "key man" life insurance. The applications other than the one seeking insurance on Miller's life were signed by Buie or by Donley on behalf of the corporation. The application for insurance on Miller's life was signed only by Miller. Brooks stated that on February 5, 1980 he filled out the remainder of the application for insurance on the life of Miller, using as his source of information his own knowledge about Miller and his experience in trying to place another policy for the Miller Company in September 1979. Brooks stated that he had also obtained information from Northern's files and from the conversations he had with Buie and Donley in late December 1979 and early to mid-January 1980. The application completed by Brooks included the statements that Lacy J. Miller was currently an active and fulltime employee of the Miller Company and that his position was that of president with office and public relations duties. Brooks signed the application as "Licensed Resident Agent." The completed application bore his signature and that of Lacy J. Miller, but no others.

The information on the application was inaccurate as of February 5, 1980, the day it was completed by Brooks. The application failed to disclose that on January 22, 1980 a temporary restraining order had been issued at the request of Buie, Donley and the Miller Company enjoining Miller from "taking or attempting to take any action whatsoever with regard to the assets, funds, obligations, rights, [or] employees of the corporation." The order was issued pursuant to a lawsuit filed January 21, 1980 in Davidson County in which the plaintiffs, Buie, Donley, and the Miller Company, sought to enjoin Lacy Miller from further involvement with the corporation. In affidavits in support of the restraining order, Donley and Buie stated that Miller had been in-

active in the business since 1975, and that he had neglected his corporate duties and responsibilities. On January 28, 1980, Miller was removed as president and replaced by Donley in a meeting of the Miller Company's Board of Directors.

After completing the application for the Northern policy on the life of Miller, Brooks submitted that application and the nine others to Barney Haynes. He stated that he did not know when he completed the application that Miller had been removed as president of the corporation, that a restraining order had been issued or that Buie and Donley had filed affidavits.

Northern received applications for the policy insuring the lives of Miller and nine other employees of the corporation on February 19, 1980. Terry L. Anderson, Chief Underwriter for Northern, stated in a deposition which was read to the jury that the applications were reviewed and approved by Northern. Before issuing the policy, however, Northern licensed Brooks as its agent. The policies were then typed and mailed to Haynes by Northern with a request for an additional premium. On April 4, 1980 the additional premium was received and found sufficient. On April 17, 1980 the insurance was considered issued by Northern, according to the testimony of Anderson. The policy was backdated to February 5, 1980, the date of application. Lacy J. Miller died May 13, 1980.

Northern brought this declaratory judgment action seeking a cancellation of the policy because of the false statements in the application. Northern sought to show that Brooks was an agent of the Miller Company and not an agent of Northern and that whatever knowledge Brooks had of the falsity of the statements was to be imputed to the Miller Company. At the close of all the evidence at trial, both Northern and the Miller Company made motions for directed verdict which the trial court denied. The following were the stipulated issues submitted to the jury and the jury's verdicts.

> 1. Was Roger C. Brooks the agent of Lacy J. Miller Machine Co., Inc., in obtaining the insurance policy on the life of Lacy J. Miller?
>
> ANSWER: NO

2. Was there a false statement of a material fact in the application for insurance on the life of Lacy J. Miller?

ANSWER: YES

3. Was Roger C. Brooks the agent of Northern National Life Insurance Company in obtaining the insurance policy on the life of Lacy J. Miller?

ANSWER: YES

4. As such, did Roger C. Brooks know or have reason to know of a false statement of a material fact in the application of the insurance on the life of Lacy J. Miller?

ANSWER: YES

5. Was a false statement of material fact inserted in the application by Roger C. Brooks without the actual or implied knowledge of the Lacy J. Miller Machine Co.?

ANSWER: YES

Northern moved for a judgment notwithstanding the verdict and the motion was denied. From the jury verdict and judgment awarding the Miller Company the full amount of coverage on the policy, Northern appealed.

The Court of Appeals held that there was no error in the trial court. One judge dissented on the ground that the disposition of a related case, *Manhattan Life Insurance Company v. Lacy J. Miller Co.*, 60 N.C. App. 155, 298 S.E. 2d 190 (1982), *disc. review denied*, 307 N.C. 697, 301 S.E. 2d 389 (1983), governed this case and that a directed verdict for Northern should therefore have been granted. We affirm the holding of the majority in the Court of Appeals.

I.

[1] The plaintiff-appellant Northern contends the Court of Appeals erred in holding that the trial court properly denied Northern's motions for directed verdict and judgment notwithstanding the verdict. Northern contends there was insufficient evidence that Brooks "solicited" the Miller Company for insurance business in any manner sufficient to make him Northern's agent. Northern further argues that, even if Brooks was its agent, there was insuf-

ficient evidence to show that he had any knowledge of the falsity of any statements in the application for the policy on the life of Miller. Northern finally contends the Court of Appeals erred by failing to follow precedent it had established in *Manhattan*. After considering each argument, we affirm the Court of Appeals.

We begin by reviewing familiar principles governing motions for directed verdict and motions for judgment notwithstanding the verdict. A motion for directed verdict under Rule 50 of the North Carolina Rules of Civil Procedure tests the legal sufficiency of the evidence, considered in the light most favorable to the nonmovant, to take the case to the jury. *Kelly v. International Harvester Co.*, 278 N.C. 153, 179 S.E. 2d 396 (1971). It is only when the evidence is insufficient to support a verdict in the nonmovant's favor that the motion for directed verdict should be granted. *Snow v. Duke Power Company*, 297 N.C. 591, 256 S.E. 2d 227 (1979). A verdict may never be directed when there is conflicting evidence on contested issues of fact. *Cutts v. Casey*, 278 N.C. 390, 180 S.E. 2d 297 (1971).

A motion for judgment notwithstanding the verdict is technically a renewal of a motion for a directed verdict. It is a motion that judgment be entered in accordance with the movant's earlier motion for directed verdict, notwithstanding the contrary verdict actually rendered by the jury. *Summey v. Cauthen*, 283 N.C. 640, 197 S.E. 2d 549 (1973). The test for determining the sufficiency of the evidence when ruling on a motion for judgment notwithstanding the verdict is the same as that applied when ruling on a motion for directed verdict. *Id.*

It is proper to direct a verdict for a moving party with the burden of proof only if the credibility of the movant's evidence is manifest as a matter of law. *North Carolina National Bank v. Burnette*, 297 N.C. 524, 256 S.E. 2d 388 (1979). In *Burnette* this Court recognized that, although it is futile to state a general rule for use in the determination of manifest credibility, recurring situations where credibility is manifest include:

> (1) Where the nonmovant establishes proponent's case by admitting the truth of the basic facts upon which the claim of proponent rests.

(2) Where the controlling evidence is documentary and nonmovant does not deny the authenticity or the correctness of the documents.

(3) Where there are only latent doubts as to the credibility of oral testimony and the opposing party has "failed to point to specific areas of impeachment and contradictions."

297 N.C. at 537-38, 256 S.E. 2d at 396 (citations omitted).

The movant in this case was the plaintiff Northern, the party with the burden of proof. Northern contends that, since the determination whether Brooks was agent for the Miller Company or for Northern is the crucial issue in this case, Northern was entitled to a directed verdict because the record is devoid of any evidence to impeach Brooks or contradict his assertions that he acted as agent for the Miller Company. Northern points to the third situation in which credibility may be manifest and argues that there was at best only latent doubt as to Brooks' agency with the Miller Company. We do not agree.

Since we find that there was substantial evidence that Brooks solicited the insurance business of the Miller Company and was therefore the agent of the insurance company under G.S. 58-197, we do not find Brooks' declarations that he was agent for the Miller Company controlling on the question of agency. Although testimony by an insurance agent as to his authority to bind an insurance company is competent on that question, it is not conclusive. *Wiles v. Mullinax*, 275 N.C. 473, 168 S.E. 2d 366 (1969). We are not persuaded that this case presents the kind of situation in which credibility is manifest and in which a verdict should be directed in favor of the party with the burden of proof.

Even without reliance on principles which advise against directing verdicts for parties with the burden of proof, we find the trial court properly refused to grant a directed verdict or judgment notwithstanding the verdict for Northern. Northern seeks to avoid liability on the policy on Miller's life because of the false material representations in the application. Both parties acknowledge that the dispositive question in this appeal is whether the misrepresentations in the application should be attributed to Northern or to the Miller Company. An insurance

company is not bound by a contract for insurance where the insured makes representations that are false and material. *Tolbert v. Mutual Benefit Life Insurance Co.*, 236 N.C. 416, 72 S.E. 2d 915 (1952). But it is well established that an insurance company cannot avoid liability on a policy on the basis of facts known to it at the time the policy went into effect. *Cox v. Equitable life Assurance Society*, 209 N.C. 778, 185 S.E. 12 (1936); *Willetts v. Integon Insurance Corp.*, 45 N.C. App. 424, 263 S.E. 2d 300, *disc. review denied*, 300 N.C. 562, 270 S.E. 2d 116 (1980). Furthermore, the knowledge of its agent is imputed to the insurer, absent collusion and fraud. *Cox v. Equitable Life Assurance Society*, 209 N.C. 778, 185 S.E. 12 (1936).

Since it is undisputed in this case that Brooks completed the blank application over Miller's signature, the dispositive question is whether Brooks was the agent for the Miller Company or for Northern. G.S. 58-197 provides that:

> A person who solicits an application for insurance upon the life of another, in any controversy relating thereto between the insured or his beneficiary and the company issuing a policy upon such application, is the agent of the company and not of the insured.

The plaintiff argues that the Court of Appeals erred when it held that the evidence that Brooks "solicited" the Miller Company's application and was therefore agent of the insurance company was sufficient to take to the jury. We do not agree.

We note that a majority of states have a statute similar to G.S. 58-197. *See* R. Anderson, 3 Couch on Insurance 2d, § 26:15 (1960). Many of those statutes were enacted in the early part of this century to curb abusive practices on the part of insurance companies which would issue policies but avoid paying benefits provided under the terms of the policies by finding technical defects in agents' authority to bind the companies. *See, e.g. Paulson v. Western Life Insurance Co.*, 292 Or. 38, 636 P. 2d 935 (1981) (analyzing the history and purpose of an almost identical statute).

Other jurisdictions have interpreted the term "solicit" in solicitation statutes in a variety of ways, generally finding solicitation where a person holds himself or herself out as an in-

surance agent, inviting or receiving insurance business, delivering policies and receipts, or where a person procures an application for insurance upon which an insurer issues a policy. R. Anderson, 3 Couch on Insurance 2d, § 26:17 (1960). As the Court of Appeals majority pointed out, the term "solicit" is defined neither by statute nor by case law in this State. The Court of Appeals appropriately determined that "solicit" must therefore be interpreted to further the intent of the legislature and, absent a special definition, that the term must be given its ordinary meaning. Because there was sufficient evidence that Brooks "solicited," using the ordinary meaning of the term, we find it unnecessary to reach a precise definition of solicitation as it is used in G.S. 58-197.

Northern argues that the evidence precluded any reasonable inference that Brooks solicited the Miller Company within the meaning of the statute. Northern points out that Brooks was not licensed with Northern, had never done any business with Northern and in fact had never heard of it until he sought key man life insurance policies for the Miller Company. Also, Brooks testified that he acted "per se" as an agent for the Miller Company in trying to service the company as one of his better clients. We find the plaintiff's argument unpersuasive.

In deciding that there was sufficient evidence of solicitation on the part of Brooks to take the case to the jury, we note that he regularly called upon the Miller Company on an average of once per month. He acknowledged that he first learned of the Miller Company's need for key man policies when he visited the headquarters in March 1979. Brooks tried to find a suitable policy and when he learned of the Northern plan he approached Buie and Donley, corporate officers of the Miller Company, and told them about that plan. He obtained more information and sought and received blank applications for insurance policies with Northern from Northern's General Agent Barney Haynes. Brooks delivered the applications, completed one for insurance on Miller and others, and signed the one for insurance on Miller as "Licensed Registered Agent." Brooks also collected the premiums for Northern and sent them to Haynes. After Northern approved the applications, it licensed Brooks as its agent and paid him a commission. Brooks testified that the Miller Company never paid him a commission.

Using the ordinary meaning of the term "solicit" we find that where, as here, there is evidence that a person actively participated in the placement of a life insurance policy by approaching corporate officers with information about the policy, obtaining and completing blank applications for the policy, collecting premiums, distributing policies, and collecting a commission, there is ample evidence that the person has "solicited" an application for insurance upon the life of another within the meaning of G.S. 58-197. We find that the evidence was sufficient in this case to submit to the jury the question whether Brooks was the agent of Northern.

Although the point has not been raised on appeal, we note that throughout the briefs and records of this case, Brooks is referred as as an "insurance broker." A broker is statutorily defined by G.S. 58-39.4(b) as follows:

> An insurance broker is hereby defined to be an individual who being a licensed agent, procures insurance through a duly authorized agent of an insurer for which the broker is not authorized to act as agent.

The authority of a broker is defined by G.S. 58-40.3(a) as follows:

> A broker, as such, is not an agent or other representative of an insurer, and does not have the power, by his own act, to bind an insurer for which he is not agent upon any risk or with reference to any insurance contract.

There is some authority in this State that a broker is the agent for an insured rather than for the insurance company. *See, e.g., Collins v. Quincy Mutual Fire Insurance Co.*, 39 N.C. App. 38, 249 S.E. 2d 461 (1978), *aff'd*, 297 N.C. 680, 256 S.E. 2d 718 (1979); *Williams v. Canal Insurance Company*, 21 N.C. App. 658, 205 S.E. 2d 331 (1974). In *Collins* this Court implied in *dicta* that a broker is an agent of the insured and not the insurer when we stated that the question presented in that case would not have arisen

> had the broker, through whom plaintiff sought insurance, been an agent of defendant. In such case, the agent's knowledge that plaintiff was acting on behalf of himself *and* his co-tenants would have been imputed to the [defendant] insurer. . . .

297 N.C. at 686, 256 S.E. 2d at 721 (emphasis original).

The view of a broker's authority found in G.S. 58-40.3 and in the *Collins dicta* does not conflict with our interpretation of the solicitation statute, G.S. 58-197. Although G.S. 58-40.3 states that a broker *as such* is not the agent of an insurance company, a broker or other person who "solicits an application for insurance upon the life of another" is an agent of the insurance company by the express terms of G.S. 58-197. Likewise, although this Court in *Collins* stated that the broker was not the agent of the insurer, *Collins* does not stand for the proposition that a broker *may not* be an agent of an insurer. Where a broker "solicits" within the meaning of G.S. 58-197, he is deemed an agent of the insurer in situations covered by that statute. The evidence in this case was sufficient to permit the jury to find that Brooks was Northern's agent even if he was a broker.

II.

[2] The plaintiff Northern next contends that the evidence did not support the conclusion that Brooks had any knowledge of the falsity of the statements in the application. Northern argues that the Court of Appeals' failure to reverse the trial court was therefore error. Northern acknowledges that Brooks stated that he knew Miller had had a heart attack in 1977 and was often absent from work. It is Northern's contention, however, that Brooks did not know that Miller had been removed from office or that Buie and Donley had sworn in affidavits that Miller was inactive. Brooks stated that he received some of the information he placed on the application from Buie and Donley. Northern argues that those officers of the Miller Company acted in bad faith in failing to tell Brooks the true facts.

Whether answers on an application for insurance are attributable to the agent of the insurer or to the insured must be resolved by the factfinder. *Chavis v. Home Security Life Insurance Co.*, 251 N.C. 849, 112 S.E. 2d 574 (1960). Furthermore, where incorrect answers are inserted by an agent of the insurer without the knowledge of the applicant the answers will not vitiate the policy absent fraud or collusion on the part of the applicant. *Heilig v. Home Security Life Insurance Co.*, 222 N.C. 231, 22 S.E. 2d 429 (1942); *see also Mathis v. Minnesota Mutual Life Insurance Co.*, 302 F. Supp. 998 (M.D.N.C. 1969) (interpreting North Carolina law).

In the case before us, Brooks stated that he completed the application for insurance on the life of Miller using information he had obtained from personal knowledge he had gained when dealing with the Miller Company in September of 1979. He also obtained information from Northern files and from Buie and Donley. Brooks testified that although he was not sure about when he confirmed from Buie and Donley that Miller was president of the corporation, he thought it was in mid-January during the investigational stages of placing the policy. Miller was removed from office on January 28, 1980. Brooks testified that he did not remember asking questions related to Miller's employment status at the time he completed the application. We believe there was sufficient evidence that Brooks completed the application without properly soliciting information from the Miller Company to submit to the jury the question whether the misrepresentations were attributable to Brooks or to the Miller Company.

Additionally, evidence was introduced from which the jury could have inferred that Brooks was put on actual notice that Miller did not work fulltime. The knowledge of an agent is imputed to the insurer when the agent acts within the scope of his authority and in the absence of fraud or collusion. *Cox v. Equitable Life Assurance Society*, 209 N.C. 778, 185 S.E. 12 (1936). Knowledge of facts which the insurer has or should have had constitutes notice of whatever an inquiry into such facts would have disclosed and is binding on the insurer. Whatever puts a person on inquiry amounts in law to "notice" of such facts as an inquiry pursued with reasonable diligence and understanding would have disclosed. *Gouldin v. Inter-Ocean Insurance Co.*, 248 N.C. 161, 102 S.E. 2d 846 (1958).

The facts of this case disclose that Brooks was aware that Miller was rarely in his office. Brooks testified that the Equitable Life Insurance Company for whom he was an agent had waived its "actively at work" requirement for Miller on one of its policies issued for the Miller Company. As a result of Brooks' exposure to the Miller Company and Miller, Brooks made a specific inquiry of Northern's General Agent Haynes to find out precisely how "fulltime" was defined under Northern's fulltime work requirement. Brooks stated that that requirement was the one which troubled him most with regard to Miller. Furthermore, when the application on Miller's life came to Brooks, it was blank except for the

signature of Miller. The other applications were signed either by Buie or by Donley as corporate officers of the corporation. The only application bearing Miller's signature was the policy insuring Miller himself.

We conclude that, considering the facts in the light most favorable to the defendant, the jury could have found Brooks knew or had reason to know that Miller was not a fulltime employee. Since the evidence also would support a jury finding that Brooks' actions amounted to solicitation and that he was an agent for Northern, the jury properly could have imputed Brooks' actual or constructive knowledge to Northern.

III.

The plaintiff Northern argues that *stare decisis* compelled the Court of Appeals to follow the precedent established by another panel of the Court of Appeals which upheld summary judgment for the insurance company in a related case, *Manhattan Life Insurance Company v. Lacy J. Miller Machine Company,* 60 N.C. App. 155, 298 S.E. 2d 190 (1982), *disc. rev. denied,* 307 N.C. 697, 301 S.E. 2d 389 (1983). We disagree.

[3] We note at the outset that the doctrine of *stare decisis* is not determinative on the appeal to this Court of the case at hand. It is fundamental that the highest court of a jurisdiction may overrule precedents established by decisions of intermediate appellate courts. 20 Am. Jur. 2d *Courts,* § 231 (1965). This Court is not bound by precedents established by the Court of Appeals. Although this Court denied a petition for discretionary review in *Manhattan,* we have often stated that such a denial does not constitute approval of the decision of the Court of Appeals. It may mean only that no harmful result is likely to arise from the Court of Appeals' opinion. *See Peaseley v. Virginia Iron, Coal and Coke Co.,* 282 N.C. 585, 194 S.E. 2d 133 (1973).

[4] Northern argues, however, that the panel of the Court of Appeals which decided this case was bound by *Manhattan.* In rejecting this argument, we find it suffices to say that the procedural issues in this case are substantially different from those in *Manhattan,* and that the doctrine of *stare decisis* did not compel a different decision by the Court of Appeals than that it reached.

Holding that the trial court correctly denied both the defendant's and the plaintiff's motions for directed verdict and judgment notwithstanding the verdict, we affirm the decision of the Court of Appeals for the reasons previously stated herein.

Affirmed.

Justice MARTIN dissenting.

Believing as I do that the Court of Appeals erred in holding that Brooks, as agent for plaintiff insurance company, solicited the application of insurance on the life of Miller pursuant to N.C.G.S. 58-197, I respectfully dissent.

Brooks did not seek out the Miller Company and present it with a plan for key man insurance. The uncontradicted evidence is that Buie and Donley, officers of the Miller Company, told Brooks that the company wanted additional life insurance on the life of Lacy Miller and asked Brooks to attempt to locate an insurance company who would issue the policy. The majority opinion agrees with this: "Buie and Donley informed him [Brooks] that the company was interested in purchasing insurance on the life of Lacy J. Miller."

Brooks thereafter tried to place the insurance with Equitable, but it refused to issue the policy because Miller suffered from a heart condition. Brooks continued to look for a company that could issue a policy to satisfy the needs of defendant. After Buie and Donley expressed an interest in obtaining a policy from plaintiff, Brooks then sought to establish some relationship with plaintiff.

The evidence shows that Buie and Donley, acting for the defendant, knew that the company had a problem with funding the stock purchase agreement. Lacy Miller was a poor insurance risk. He had a severe heart condition as well as problems with alcohol. He was no longer a "key man" with the company. He had been removed as president of the company and had even been enjoined by the court from taking any action with respect to the business. Buie and Donley were anxious to place this insurance and had Brooks working to do so on their behalf.

"Solicit" is not defined in the statute. Its ordinary meaning is to be applied. It means to approach with a request or a plea as in selling or begging. Webster's Third New International Dictionary 2169 (1971). There is no evidence that Brooks approached the defendant in an effort to sell it the policy or to persuade it to buy the policy. All the evidence is to the contrary—defendant requested Brooks to find a company that would issue a policy covering Miller. Brooks did not initiate the transaction; Buie and Donley did. The statute was not passed to protect consumers from their own activities.

Brooks was regularly servicing the insurance needs of defendant. He was not an insurance agent for plaintiff during the time in question. Brooks was an "insurance broker" and is so described in the record and briefs. It is unchallenged that a broker does not have the power to bind an insurer for which he is not an agent upon any risk or insurance contract. N.C. Gen. Stat. § 58-40.3(a) (1982). It was for this reason that plaintiff made Brooks its agent at the time the policy was issued. This statute covers exactly what Brooks was doing: procuring the policy from plaintiff for whom he was not an agent.

I find that the Court of Appeals erred in concluding that the evidence was sufficient to submit the issue to the jury as to whether Brooks solicited the application pursuant to N.C.G.S. 58-197. I vote to reverse.

Justice MEYER joins in this dissenting opinion.

Justice MEYER dissenting.

I join in the dissenting opinion of Justice Martin but wish to add the following:

Any impartial review of the record in this case leaves no doubt in the reader's mind that Brooks, in securing the insurance coverage in question, was either the agent of the Miller Company or an independent broker, and not an agent of the insurer Northern National Insurance Company.

Brooks was not licensed by, nor in any way affiliated with, Northern National Insurance Company. He was in fact affiliated with another unrelated company, the Equitable Life Assurance

Society. Brooks had solicited the Miller Company on behalf of Equitable but Equitable had declined to issue coverage on Mr. Miller because of his heart condition. When Brooks began his search for a company that would issue the coverage, he had never done any business with Northern and in fact had never heard of Northern National Insurance Company. Brooks himself testified that, in attempting to obtain the coverage on Mr. Miller, he acted as agent for the Miller Company and not Northern. The Miller Company was Brooks's good client which he called on an average of once a month. Brooks obtained the policy application for the key man insurance from National's General Agent Barney Haynes as anyone could have done. The premiums Brooks collected were turned over to National's Agent Haynes. The only time National licensed Brooks as its agent was after it approved the Miller Company's applications and issued the coverage and then only for the obvious purpose of paying him commissions.

Even if one is unconvinced that Brooks acted as agent of the Miller Company in the transaction in question, it does not automatically follow that he was the agent of Northern National Insurance Company. If Brooks was in fact not the agent of the Miller Company, he was, at most, merely a broker acting through National's general agent Barney Haynes. G.S. § 58-39.4(b) envisions this very arrangement:

> An insurance broker is hereby defined to be an individual who being a licensed agent, procures insurance through a duly authorized agent of an insurer for which the broker is not authorized to act as agent.

The authority of a broker is defined by G.S. § 58-40.3(a) as follows:

> A Broker, as such, is not an agent or other representative of an insurer, and does not have the power, by his own act, to bind an insurer for which he is not agent upon any risk or with reference to any insurance contract.

Although, as the majority points out, there is authority in the case law of this State which would make Brooks, as broker, the agent of the Miller Company, it is completely unnecessary to go that far in the case now before us. I believe the majority misperceives the proper analysis of the question of whether, in a

given situation, one is acting as "broker" or as "agent." The majority seems to perceive the term "insurance broker" as a *vocational status* of an individual who, in a given transaction, might also be an agent. This is an improper analysis. The appropriate analysis must be done on the basis of the single transaction, such as the one now before the Court, in which the party must be *either* broker or agent, he cannot be both. If one applies the proper analysis to the facts before us, Brooks was a broker in this transaction between the Miller Company and National and not an agent of National.

There was insufficient evidence of Brooks's acting as agent of National to submit that issue to the jury. The credibility of Northern's evidence as to the status of Brooks as either agent of the Miller Company or independent broker was clearly manifest as a matter of law. The trial judge should have granted National's motion for judgment *n.o.v.* I vote to reverse the Court of Appeals.

Justices EXUM and MARTIN join in this dissenting opinion.

STATE OF NORTH CAROLINA v. OSCAR GARCIA GONZALEZ AND RALPH WOODS, JR.

No. 325PA83

(Filed 5 June 1984)

1. **Larceny § 5.3— possession of recently stolen property—inference raised**

The doctrine of possession of recently stolen property raises an inference that the possessor is the thief, and the inference of fact which is derived from possession of recently stolen goods is considered by the jury as an evidentiary fact along with all the other evidence in a case in its attempt to determine whether the State has met its burden of proving defendant's guilt beyond a reasonable doubt.

2. **Robbery § 4.3— armed robbery—doctrine of possession of recently stolen property**

The State's evidence was sufficient for the jury to find defendant guilty of armed robbery under the doctrine of possession of recently stolen property where it tended to show that a service station attendant placed his gun under the counter of the service station at 3:00 p.m. when he began work; during the course of a robbery of the attendant, a masked gunman hid behind the counter where the gun had been placed in order to avoid detection by a customer of

the service station; the attendant gave the cash register drawer and the cash contained therein to the masked gunman as he hid behind the counter; as the masked gunman left the service station he ran into another masked man wearing a blue leisure jacket, and after exchanging words, both men ran from the service station together; the attendant noticed that his gun was missing immediately after the robbers left the service station; the gun which had been taken from the service station was found on the person of defendant when he was arrested several hours after the robbery; at the time of his arrest, defendant was wearing a light blue leisure jacket matching the description of the one worn by one of the robbers; defendant appeared "terribly nervous" while an officer talked to him prior to his arrest; and defendant falsely told the arresting officer that he worked at a local mill in town and gave the officer a false name for purposes of identification.

3. **Constitutional Law § 72; Criminal Law § 77.3— statement of codefendant as implicating defendant—denial of right of confrontation**

In a prosecution of three persons for the armed robbery of a service station attendant, the extrajudicial statement of a nontestifying codefendant that "I told him I was with some guys, but that I didn't rob anyone, they did," clearly implicated defendant where only two persons were seen in the service station at the time of the robbery, and defendant and a second codefendant were being tried jointly with the nontestifying codefendant. Therefore, admission of the codefendant's statement violated defendant's Sixth Amendment right to confront the witnesses against him and was prejudicial error.

4. **Criminal Law §§ 77.3, 162— statement of nontestifying codefendant—no waiver of objection or invited error**

Defendant's counsel did not waive his right to object to the admissibility of a nontestifying codefendant's extrajudicial statement or invite the erroneous admission of the statement by failing to object before the statement was read to the jury where the trial court ordered the State to sanitize the extrajudicial statements of three defendants before the statements would be deemed admissible; the allegedly sanitized versions of the codefendants' statements were given to defendant's counsel two days later during the course of the trial; it appears that, aside from one 15 minute recess during the trial and prior to the admission of the second codefendant's statement, defendant's counsel did not have a reasonable amount of time to review the extrajudicial statements; and defendant's counsel moved to strike the portion of the nontestifying codefendant's statement which implicated defendant immediately after the codefendant's statement was read into evidence.

Justice MEYER dissenting.

Justices COPELAND and MITCHELL join in the dissenting opinion.

ON discretionary review of the decision of the Court of Appeals, 62 N.C. App. 146, 302 S.E. 2d 463 (1983), affirming defendant Woods' convictions of armed robbery and carrying a concealed weapon. Judgment was entered at the 21 June 1982

State v. Gonzalez

Criminal Session of Superior Court, MONTGOMERY County, by the *Honorable James A. Beaty, Jr., Judge Presiding.* Heard in the Supreme Court 16 February 1984.

Rufus L. Edmisten, Attorney General, by Floyd M. Lewis, Associate Attorney, for the State.

Adam Stein, Appellate Defender, by James R. Glover, Director, Appellate Defender Clinic, for the defendant-appellant, Ralph Woods, Jr.

FRYE, Justice.

Defendant was charged in indictments, proper in form, with armed robbery, larceny of a firearm and carrying a concealed weapon, violations of G.S. 14-87, G.S. 14-72, and G.S. 14-269 respectively. Upon defendant's plea of not guilty, his case was duly calendared for trial. Defendant's case was consolidated for trial with the cases of codefendants, Oscar Garcia Gonzalez and Ervin Calvin Crawford, who also were charged with the armed robbery of the same store which defendant had been charged with robbing.[1] A jury found defendant guilty of armed robbery and carrying a concealed weapon. Codefendant Gonzalez was convicted as charged. Codefendant Crawford was acquitted.

The trial court sentenced defendant to active terms of imprisonment of twenty years for the armed robbery conviction and six months for the conviction of carrying a concealed weapon. The sentences were to run consecutively. The Court of Appeals affirmed defendant's convictions.[2] This Court allowed defendant's petition for discretionary review on 27 September 1983.

1. Codefendants Gonzalez and Crawford also were charged with larceny of a firearm as was defendant Woods. However, the charges of larceny of a firearm against all defendants were not submitted to the jury, the trial judge being of the opinion that the larceny charges merged with the robbery charges. Codefendant Gonzalez also was charged with larceny of an automobile.

2. The Court of Appeals found no error in the trial of codefendant Gonzalez, except on the issue of whether Gonzalez's custodial statement was voluntary. Therefore, the cause was remanded to the Superior Court, Montgomery County, for a determination of whether the extrajudicial statement made by Gonzalez was made voluntarily and understandingly. *State v. Gonzalez*, 62 N.C. App. 146, 302 S.E. 2d 463 (1983).

Defendant seeks a new trial and reversal of the Court of Appeals' decision affirming his convictions because of the allegedly erroneous and prejudicial admission of both codefendants' extrajudicial statements during the trial of their consolidated cases. For the reasons stated in this opinion, we agree with defendant's contention that one of his codefendant's extrajudicial statement was erroneously admitted at trial. Therefore, we reverse the decision of the Court of Appeals and grant defendant a new trial.

On Sunday night, 22 November 1981, Steven Dunn was the attendant at the Sandhills Union 76 Service Station in Candor, North Carolina. At approximately 8:50 p.m., a masked man, carrying a blue barrel gun, entered the store. He was wearing a light blue toboggan which had been pulled down over his face. The toboggan did not have any holes in it, and the man appeared to be looking through the fabric of the toboggan. The masked man demanded that Mr. Dunn put the store's money in a bag.

Shortly after the masked man entered the store, a regular customer of the store, Reverend William Turnmire, drove up to the gas pumps. The masked man became frightened and then ran and stooped down behind the counter where Mr. Dunn was standing. Mr. Dunn then gave the masked man the entire cash register drawer, which was later determined to have contained approximately $1,030.00.

As the masked man was running out of the back door of the store, he bumped into another man, who was wearing a toboggan pulled down over his face and a light blue leisure jacket. One of the two men said, "Let's get out of here," and they both ran from the service station. After both men had left the service station, Mr. Dunn and Reverend Turnmire observed a green Buick station wagon, which had been parked on a street beside the station, leaving the scene. Neither Mr. Dunn nor Reverend Turnmire could identify either of the masked men or the defendants.

Immediately after the masked men left the service station, Mr. Dunn discovered that his personal gun, a R.G. .38 Rohm pistol, which he had placed behind the counter at 3:00 p.m., was missing. He did not see anyone take the gun. He did remember that the gun had two bullets in it.

At approximately 9:45 p.m., a Biscoe police officer observed a green station wagon fitting the description of the vehicle involved

in the robbery. The officer pursued the vehicle which was later abandoned behind a house on a dead-end street. After the car disappeared behind the house, the pursuing officer heard a gunshot which came from the general direction of the car. After other police officers had arrived at the scene, a search of the then unoccupied car revealed a cash register drawer, some clothes, a certificate of title and a bill of sale showing that the car was owned by Oscar Gonzalez.

At about 3:30 a.m. on 23 November 1981, Mr. Gonzalez was stopped while driving a silver Thunderbird. It was subsequently determined that the Thunderbird was stolen and Mr. Gonzalez was arrested. A subsequent search of Mr. Gonzalez led to the discovery of a roll of bills, totalling $1,039.00.

Sometime before 8:00 a.m. on that same morning, Star Police Chief W. L. Batten drove to the Quick Chek in Star, after receiving a call from a local citizen reporting that he had dropped off a nervous acting man at the Quick Chek.[3] Upon his arrival at the Quick Chek, Chief Batten talked to defendant Woods. Defendant Woods was wearing a blue leisure jacket. Chief Batten said Woods looked and acted "terribly nervous." While patting down the defendant, Chief Batten discovered a blue steel .38 caliber R.G. pistol. Defendant was then placed under arrest. It was later determined that the gun contained one spent shell casing and one live bullet.

During the course of the trial, Mr. Dunn identified the gun taken from the possession of defendant Woods as being his gun, which he had placed under the store counter prior to the robbery. Additionally, the allegedly sanitized versions of the extrajudicial statements of codefendants Gonzalez and Crawford were admitted into evidence.

None of the defendants presented any evidence.

I.

Defendant first contends that there was insufficient evidence adduced at trial to permit him to be convicted of armed robbery.

3. The testimony adduced at trial does not disclose when Chief Batten actually arrived at the Quick Chek. However, the testimony does show that Chief Batten was working the midnight to 8:00 a.m. shift.

Defendant argues that the evidence was insufficient to identify him as one of the perpetrators of the armed robbery. He also argues that the State's evidence is only circumstantial with inferences built upon inferences. Therefore, the question presented by defendant's assignment of error is whether the trial court erred in failing to dismiss the charge of armed robbery on the ground that the evidence was insufficient to support such a verdict.

This Court on numerous occasions has stated the principles that are applicable to a defendant's motion to dismiss. *State v. Lowery*, 309 N.C. 763, 309 S.E. 2d 232 (1983); *State v. Earnhardt*, 307 N.C. 62, 296 S.E. 2d 649 (1982); *State v. Powell*, 299 N.C. 95, 261 S.E. 2d 114 (1980). In *Lowery*, this Court summarized the general principles as follows:

> The question for the court in ruling upon defendant's motion for dismissal is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If substantial evidence of both of the above has been presented at trial, the motion is properly denied. *Powell*, 299 N.C. at 98, 261 S.E. 2d at 117; *See State v. Roseman*, 279 N.C. 573, 580, 184 S.E. 2d 289, 294 (1971). In considering a motion to dismiss, the evidence must be considered in the light most favorable to the State and the State is entitled to every reasonable intendment and every reasonable inference to be drawn therefrom. *State v. Bright*, 301 N.C. 243, 257, 271 S.E. 2d 368, 377 (1980). Contradictions and discrepancies in the evidence are strictly for the jury to decide. *State v. Bolin*, 281 N.C. 415, 424, 189 S.E. 2d 235, 241 (1972).
>
> The trial court in considering a motion to dismiss is concerned only with the sufficiency of the evidence to carry the case to the jury; it is not concerned with the weight of the evidence. *State v. McNeil*, 280 N.C. 159, 162, 185 S.E. 2d 156, 157 (1971). The test of whether the evidence is sufficient to withstand a motion to dismiss is whether a reasonable inference of defendant's guilt may be drawn from the evidence, and the test is the same whether the evidence is circumstantial or direct. *Bright*, 301 N.C. at 257, 271 S.E. 2d at 377. If

> the trial court determines that a reasonable inference of defendant's guilt can be drawn from the evidence, then the defendant's motion to dismiss should be denied and the case should be submitted to the jury. *State v. Smith*, 40 N.C. App. 72, 79, 252 S.E. 2d 535, 540 (1979); *See State v. Rowland*, 263 N.C. 353, 358, 139 S.E. 2d 661, 665 (1965).

Lowery, 309 N.C. at 766, 309 S.E. 2d at 235-36. The familiar and often stated principles quoted above are applicable to defendant's assignment of error.

[1] In the instant case, the State's case against defendant was entirely circumstantial. Since no one could positively identify defendant as being one of the two masked men that robbed the service station, the State had to rely upon circumstantial evidence in order to place defendant at the scene of the crime. Therefore, the State chose to rely upon the doctrine of possession of recently stolen goods[4] to prove defendant's guilt. That doctrine holds that:

> The possession of stolen property recently after the theft, and under circumstances excluding the intervening agency of others, affords presumptive evidence that the person in possession is himself the thief, and the evidence is stronger or weaker, as the possession is nearer to or more distant from the time of the commission of the offense.

State v. Patterson, 78 N.C. 470, 472-73 (1878). Although the above quoted language states that the doctrine of possession of recently stolen property "affords presumptive evidence that the person in possession is himself the thief," it is more accurate to state that it raises an inference that the possessor is the thief. *State v. Joyner*, 301 N.C. 18, 269 S.E. 2d 125 (1980); *State v. Frazier*, 268 N.C. 249, 150 S.E. 2d 431 (1966). The inference of fact which is derived from possession of recently stolen goods is considered by the jury as an evidentiary fact along with all the other evidence in a case, in its attempt to determine whether the State has met its burden of proving defendant's guilt beyond a reasonable doubt

4. The doctrine is often referred to as the doctrine of recent possession of stolen goods or simply the doctrine of recent possession. However, the doctrine is more correctly stated in terms of possession of recently stolen goods.

to the satisfaction of the jury. *State v. Fair*, 291 N.C. 171, 229 S.E. 2d 189 (1976); *Joyner*, 301 N.C. at 28, 269 S.E. 2d at 132.

In order for the State to invoke the doctrine of possession of recently stolen goods, the State must prove beyond a reasonable doubt each fact necessary to give rise to the inference. *State v. Maines*, 301 N.C. 669, 273 S.E. 2d 289 (1981). In other words, the State must prove beyond a reasonable doubt that: (1) the property is stolen; (2) the stolen goods were found in the defendant's custody and subject to his control and disposition to the exclusion of others; and (3) the possession was recently after the larceny. *Id.* at 674, 273 S.E. 2d at 293. However, once the doctrine of possession of recently stolen goods is determined to apply in a given case, "it suffices to repel a motion for nonsuit [dismissal] and defendant's guilt or innocence becomes a jury question." *Id.* This doctrine has been applied in an armed robbery case. *See State v. Bell*, 270 N.C. 25, 153 S.E. 2d 741 (1967).

[2] The evidence in the instant case tended to show that Mr. Dunn placed his gun under the counter of the service station at 3:00 p.m. when he began work. During the course of the robbery, the masked gunman hid behind the counter where the gun had been placed in order to avoid detection by a customer of the service station. Mr. Dunn gave the cash register drawer and the cash contained therein to the masked gunman as he hid behind the counter. As the masked gunman left the service station, he ran into another masked man wearing a blue leisure jacket, and after exchanging words, both men ran from the service station together. Mr. Dunn noticed that his gun was missing immediately after the robbers left the service station. Police Chief Batten testified that the gun, which Mr. Dunn had identified as belonging to him, was taken from the person of defendant Woods when he was arrested hours after the robbery.[5] At the time of defendant's arrest, he was wearing a light blue leisure jacket matching the description of the one worn by one of the persons who robbed the service station. Further testimony of Chief Batten tended to show that defendant appeared "terribly nervous" while he [Batten] was talking to him. Defendant also falsely told Chief Batten that he

5. As stated in Footnote 3, the record evidence does not disclose the exact time Chief Batten arrived at the Quick Chek. The evidence also does not disclose the exact time defendant Woods was arrested.

worked at a local mill in town, in addition to giving him a false name for purposes of identification.

The above evidence clearly supports a finding that the State's evidence was sufficient to invoke the doctrine of possession of recently stolen goods. The State's evidence tends to prove that the stolen gun was found in defendant's exclusive possession recently after the armed robbery.

Defendant admits that the evidence was sufficient to permit the inference that he stole Mr. Dunn's gun, but he contends the evidence is insufficient to permit the "further inference that he took the cash drawer and cash that was the subject of the armed robbery." Therefore, defendant contends that the State is trying to prove his guilt of stealing one item of property upon a theory that he was in possession of another item of property "claimed to have been" stolen at the same time.

Defendant's argument is without merit. The State's evidence tends to show that the gun, which was stolen at the same time as the cash register drawer, was discovered in defendant's possession within several hours after the armed robbery. Therefore, based upon the doctrine of possession of recently stolen goods, defendant was placed at the scene of the crime at the time the crime was committed. The testimony of Mr. Dunn and Police Chief Batten also supports the conclusion that defendant was present and actually participated in the robbery. Mr. Dunn testified that both robbers had blue toboggans pulled down over their faces. He also stated that as one of the robbers was leaving the service station, he ran into the other robber, who was wearing a light blue leisure jacket and one of them stated, "Let's get out of here." Then, both men ran from the service station. Chief Batten testified that when defendant was arrested he was wearing a light blue leisure jacket, similar to the jacket which Mr. Dunn stated was worn by the robber who remained outside the service station.

After the State had produced the above evidence which tends to show that defendant was present at the scene of the crime and actually participated in the armed robbery, it became a question for the jury as to whether defendant was acting in concert with the other robber who was inside the service station, which was the theory upon which defendant's conviction of armed

robbery was predicated. If the jury believed—as they obviously did—that defendant was acting in concert with the other robber, the question of whether he or the other robber actually stole the cash register drawer and its cash contents was irrelevant. Under the doctrine of acting in concert, it is not necessary that defendant do any particular act constituting a part of the crime, as long as he is present at the scene, and there is sufficient evidence to show that he is acting together with another or others pursuant to a common plan or purpose to commit the crime. *State v. Forney*, 310 N.C. 126, 310 S.E. 2d 20 (1984); *State v. Joyner*, 297 N.C. 349, 255 S.E. 2d 390 (1979). Therefore, since the State's evidence tends to show that defendant was present at the scene of the crime and actually participated in the armed robbery, defendant could be found guilty of armed robbery without the State's reliance upon improper inferences. Defendant's assignment of error is overruled.

II.

Defendant next contends that he was "deprived of his right to a fair trial by the consolidation of his trial with the trial of defendants Gonzalez and Crawford and the resulting admission of the expurgated extrajudicial statements of defendants Gonzalez and Crawford without a limiting instruction." Defendant's basic contention is that he was denied his sixth amendment right to confront the witnesses against him by the trial court's erroneous admission of the extrajudicial statements of the two non-testifying codefendants being tried with him. Stated more specifically, defendant contends that the trial court violated the holdings in *Bruton v. United States*, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed. 2d 476 (1968) and *Blumenthal v. United States*, 332 U.S. 539, 68 S.Ct. 248, 92 L.Ed. 154 (1947), *reh'g denied*, 332 U.S. 856 (1948), by admitting the extrajudicial statements of the other two codefendants and by failing to give a limiting instruction after their admission.

At trial, the State called the cases of Oscar Garcia Gonzalez, Ralph Woods, Jr., and Ervin Calvin Crawford together. Codefendants Gonzalez and Crawford objected to the consolidation of the cases for trial and made motions for separate trials.[6] They argued

6. We note that defendant's counsel did not object to the joinder of charges against the multiple defendants in this case. At trial, defendant's counsel stated to

that since each defendant had made an extrajudicial statement which incriminated the other two defendants, it would be impossible to sufficiently sanitize the statements so that they could be fairly and legally used at trial. The State contended that, if it decided to introduce the statements of any of the defendants, "those statements would not implicate any other people."

The trial judge denied both codefendants' motions for separate trials. The trial judge ruled that sanitized versions of the statements of each codefendant would be admissible but only to the extent that the statements "detail the involvement of [the declarant] . . . and not as to the other two."

During the course of the trial the allegedly sanitized statements of codefendants Gonzalez and Crawford were introduced into evidence. Captain Walser testified that codefendant Gonzalez made the following statement:

> On November the 22nd, 1981, on a Sunday night, myself, Oscar Garcia Gonzalez, drove to a service station convenient [sic] store near Candor. I was riding in my vehicle, a green Buick stationwagon with mag wheels. I drove up to the store. I was parked near the back door. A customer came into the lot so I went into the store. I drove onto the road and then turned right. I stopped after traveling one mile or one and one-half miles and got into the back seat and took all the money from the cash drawer. After traveling about five minutes the police got behind me. I turned down a road which was a dead end. The car was stopped and I was getting ready to run when I heard a shot. I thought it was the police shooting so I ran. I ran into the woods and hid. I stayed there until the law left. I found a car with the keys in it which was a grey Ford LTD or Thunderbird. I drove the car away and was stopped by the law.

Deputy Green testified that codefendant Crawford made the following statement:

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the court: "I have not joined in this matter at this time. It appears to me that if you grant the motion, it's already made and any argument I would make would be moot." Defendant's counsel also did not move for severance at any time during the trial. However, pursuant to N.C. Gen. Stat. § 15A-1446(b), in the interest of justice we review the assignments of error raised by defendant relating to the consolidation of the charges for trial.

I left my cousin's, James Pearson, house in Aberdeen and was headed back to High Point, North Carolina, and stopped the car at the next service station I saw open. I was driving the vehicle. It was a 76 station, had a 76 on a big round ball type sign. I thought the bathrooms were on the back side of the building with an outside entrance. This is why I parked where I did. I wasn't paying attention. I was smoking a joint. I never observed any mask. The front right door was unlocked all the time, the back door was locked. I never observed a gun. I don't recall seeing a black plastic drawer. I was pretty high on reefer by now. I ease off and drive approximately one-fourth mile and pull over, I get out of the vehicle. I went to Star and kept on walking north until a subject drove by me and turned into a driveway. I ask him if I could use the telephone. He said his parents were asleep but he would check. They said okay. I called my wife but she didn't have the car. My niece had it. I ask him for a ride to Asheboro to the bus station. He said he would take me to Seagrove. We started out. Then he decided that he didn't have enough gas to make it. We turned around and went to Biscoe for gas. I don't recall his name, but he was a white young male. His car was a blue Toyota Celica I think. I realized his father was following us near Seagrove. The father flashed his lights and pulled along side. The boy said that's my dad so we stopped. His dad advised him where—his dad asked him where he was going and he said Seagrove. His dad told him to get on back home because the Union 76 had been robbed. We then went on to Seagrove where I got out at Quick Chek. His father followed us on to the Quick Chek. I stood there for a few minutes, got cold again, so I started to walk facing traffic north. A man stopped and picked me up. I don't recall what type of vehicle it was except it was a small car. A black man was driving. He carried me all the way home. I didn't know the man or his name. He said he was headed to Greensboro. I told him I was headed to High Point and my car broke down. He said he had seen a car down the road and I told him that was it. He said he would take me home. I arrived home about 12:30 a.m., December the 23rd, '81. About 1:00 a.m.—correction—November the 23rd, '81. About 1:00 a.m., November the 23rd, 1981, we received a call from the Police Department. I then told her what had hap-

> pened. The police never talked to me in person until today in court. Officer Ramseur said he needed to talk to me about an armed robbery in Montgomery County. *I told him I was with some guys, but that I didn't rob anyone, they did.* I told him I was ready to clear up the matter and he called Montgomery County and advised them I was ready for pickup. I asked him specific questions. Did you see a gun at anytime that night? His answer, no, sir. Do you own a blue denim type sports blazer? His answer, I own a blue jacket. It is a thin jacket, almost see through. Question, where is it? Answer, at my mother's. [I]t is navy blue. Question, did you know the black man that stopped for you? Answer, I did not know him. Question, do you have kin folks in this area? Answer, No, sir. Question, do you know any people that lives [sic] in this area? Answer, I used to know a girl in Troy in 1971, Reginia Williams. Question, is there anything you want to add? Answer, I can't understand how I can be charged with this armed robbery and larceny of a firearm. I never set foot on the premises. (Emphasis added.)

The jury was not instructed that the above statements could only be considered as evidence against codefendants Gonzalez and Crawford respectively.

Defendant contends that the admission of the extrajudicial statements of codefendants Gonzalez and Crawford violated the holding in *Bruton*. In *Bruton*, the United States Supreme Court held that in a joint trial the admission of a non-testifying co-defendant's extrajudicial confession, which implicates his co-defendants, is a violation of the codefendant's "right of cross-examination secured by the Confrontation Clause of the Sixth Amendment." *Id.* at 126, 88 S.Ct. at 1622, 20 L.Ed. 2d at 479. The Supreme Court held that the giving of limiting instructions by the trial judge was not a "substitute for petitioner's constitutional right of cross-examination. The effect is the same as if there had been no instruction at all." *Id.* at 137, 88 S.Ct. at 1628, 20 L.Ed. 2d at 485-86.

This Court recognized that the holding in *Bruton* was binding upon this State in *State v. Fox*, 274 N.C. 277, 163 S.E. 2d 492 (1968). In *Fox*, this Court stated that the effect of *Bruton* on criminal trials in this State was as follows:

> The result is that in joint trials of defendants it is necessary to exclude extrajudicial confessions unless all portions which implicate defendants other than the declarant can be deleted without prejudice either to the State or the declarant. If such deletion is not possible, the State must choose between relinquishing the confession or trying the defendants separately.

Id. at 291, 163 S.E. 2d at 502. In response to *Bruton* and *Fox*, the General Assembly enacted N.C. Gen. Stat. 15A-927(c)(1) which provides:

> (c) Objection to Joinder of Charges against Multiple Defendants for Trial; Severance.
>
> (1) When a defendant objects to joinder of charges against two or more defendants for trial because an out-of-court statement of a codefendant makes reference to him but is not admissible against him, the court must require the prosecutor to select one of the following courses:
>
> a. A joint trial at which the statement is not admitted into evidence; or
>
> b. A joint trial at which the statement is admitted into evidence only after all references to the moving defendant have been effectively deleted so that the statement will not prejudice him; or
>
> c. A separate trial of the objecting defendant.

In addressing defendant's assignment of error concerning the alleged *Bruton* violation, the Court of Appeals found no error in the admission of the statement of codefendant Gonzalez. *State v. Gonzalez*, 62 N.C. App. 146, 302 S.E. 2d 463 (1983). The Court of Appeals noted that the confession of codefendant Crawford, by inference, implicated defendant Woods, thus violating the holding in *Bruton*. However, the Court of Appeals found that prejudicial error had not been committed because the record showed that counsel for defendant received sanitized versions of the statement before they were presented to the jury, "yet no objections were made before the statement was read to the jury." *Gonzalez*, 62 N.C. App. at 154, 302 S.E. 2d at 468. Therefore, the Court of Appeals stated:

> Thus, we hold that they waived their opportunity to object and in essence invited the error. The inadmissibility of evidence is waived by a defendant's failure to make timely objection when he had an opportunity to learn that the evidence was objectionable. *State v. Cook*, 280 N.C. 642, 187 S.E. 2d 104 (1972); *State v. Jeeter*, 32 N.C. App. 131, 230 S.E. 2d 783, *disc. rev. denied*, 292 N.C. 268, 233 S.E. 2d 394 (1977). "Invited error is not ground for a new trial." *State v. Payne*, 280 N.C. 170, 171, 185 S.E. 2d 101, 102 (1971).

Id.

We agree with the ruling of the Court of Appeals that the extrajudicial statement of codefendant Gonzalez was not prejudicial to defendant Woods. The statement of codefendant Gonzalez did not mention defendant Woods or make reference to him in any way. Therefore, we hold that the statement of codefendant Gonzalez did not violate the holdings in *Bruton* and *Fox* or the statutory mandate of N.C. Gen. Stat. 15A-927(c)(1).

[3] However, we reach the contrary decision concerning the extrajudicial statement of codefendant Crawford. The extrajudicial statement of codefendant Crawford contained the following: "I told him I was with some guys, but that I didn't rob anyone, they did." Since defendant Woods and codefendant Gonzalez were being tried jointly with codefendant Crawford, and since only two persons were seen in the service station at the time of the robbery, this statement clearly implicated defendant Woods. Since codefendant Crawford did not testify at trial, the introduction of this extrajudicial statement constitutes error and, without a doubt, violates *Bruton*, *Fox*, and N.C. Gen. Stat. 15A-927(c)(1). In short, defendant was denied his "right of cross-examination secured by the Confrontation Clause of the Sixth Amendment." *Bruton*, 391 U.S. at 126, 88 S.Ct. at 1622, 20 L.Ed. 2d at 479.

[4] Contrary to the conclusion of the Court of Appeals, we find no evidence to support a finding that defendant's counsel waived his right to object to the admissibility of the statement or invited the above mentioned error. The record evidence shows that on 21 June 1982 the trial court ordered the State to sanitize the extrajudicial statements of all the defendants before the statements would be deemed admissible. However, the allegedly sanitized versions of the codefendants' statements were not given to de-

fendant's counsel until two days later, on 23 June 1982, during the course of the trial and immediately preceding the admission of the statement of codefendant Gonzalez. Thereafter, the trial continued with the State presenting its evidence. Aside from one fifteen minute recess during the trial and prior to the admission of the statement of codefendant Crawford, it appears that the defendant's counsel did not have a reasonable amount of time to review the extrajudicial statements.[7] Immediately after the statement of codefendant Crawford was read into evidence, counsel for defendant Woods moved to strike that portion of the statement which implicated defendant.[8]

Based on the foregoing evidence, we are convinced that defendant's motion was timely made in view of the belated tender of the allegedly sanitized statements and the continuing trial. We do not find any conduct on the part of defendant's counsel which would support a finding of waiver or invited error. *But see State v. Waddell*, 289 N.C. 19, 220 S.E. 2d 293 (1975), *death sentence vacated*, 428 U.S. 904 (1976) (defendant not prejudiced by evidence that defendant had been declared an outlaw where such evidence was initially and repeatedly disclosed by defendant's own counsel); *State v. Payne*, 280 N.C. 170, 185 S.E. 2d 101 (1971) (an initial statement by defense counsel that he has no objection to the court reporter reading a witness' prior testimony to the jury for purposes of clarification bars the right to assign as error on appeal that the trial court improperly allowed the court reporter to read such testimony). If anything, the evidence shows that the State invited a new trial in this case by failing to adequately sanitize the extrajudicial statements in accordance with the trial judge's instructions and the specific mandates of *Bruton*, *Fox* and N.C. Gen. Stat. 15A-927(c)(1).

7. The transcript does show that the trial was stopped in order for the clerk to make copies of the "sanitized" versions of the extrajudicial statements of the defendants prior to the admission of the Gonzalez statement. However, we cannot determine how much time the attorneys had to review these statements after the clerk returned with their respective copies.

8. We note that even though counsel for defendant only made a motion to strike, such motion had the same effect as an objection in terms of preserving the alleged error for appellate review. *See* N.C. Gen. Stat. § 15A-1446(a). The Court of Appeals referred to this motion as an objection.

Since the erroneous admission of codefendant Crawford's statement deprived the defendant of a right arising under the Constitution of the United States, prejudice is presumed. N.C. Gen. Stat. § 15A-1443(b). The error is not harmless beyond a reasonable doubt; therefore, defendant is entitled to a new trial. *Id.* *See Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed. 2d 705, *reh'g denied*, 386 U.S. 987 (1967).

In view of our conclusion that the trial judge erred in admitting the extrajudicial statement of codefendant Crawford—an error which entitles defendant to a new trial—we do not reach the question of whether the trial court also erred by failing to give limiting instructions to the jury after the admission of the extrajudicial statements of codefendants Gonzalez and Crawford.

In conclusion, we hold that defendant is entitled to a new trial. Thus, 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, Montgomery County, in order that a new trial may be conducted.

Reversed and remanded.

Justice MEYER dissenting.

I respectfully dissent from the majority's conclusion that the defendant is entitled to a new trial for violation of his sixth amendment right of confrontation because of the admission of codefendant Crawford's extrajudicial statement. The record clearly supports the finding by the Court of Appeals that defendant waived his objection to the reading of the statement. Nor do I agree with the majority that Crawford's statement incriminates the defendant. The decision in *Bruton v. United States*, 391 U.S. 123, 20 L.Ed. 2d 476 (1968), does not dictate the result reached in this case. Our decision in *State v. Jones*, 280 N.C. 322, 185 S.E. 2d 858 (1972), supports a contrary result.

The majority boldly concludes that defendant's motion to strike the allegedly inculpatory portion of Crawford's statement "was timely made" in view of the State's "belated tender" of the sanitized version of the statement because "it appears that the defendant's counsel did not have a reasonable amount of time to review the extrajudicial statement." In short, the majority adopts

a novel, as yet undefined, "reasonable amount of time" rule to excuse defense counsel's failure to object prior to the reading of the statement.

On the subject of "reasonable amount of time to review" the statement in question, the majority says this:

> Contrary to the conclusion of the Court of Appeals, we find no evidence to support a finding that defendant's counsel waived his right to object to the admissibility of the statement . . . . The record evidence shows that on 21 June 1982 the trial court ordered the State to sanitize the extrajudicial statements of all the defendants before the statements would be deemed admissible. However, the allegedly sanitized versions of the codefendants' statements were not given to defendant's counsel until two days later, on 23 June 1982, during the course of the trial and immediately preceding the admission of the statement of codefendant Gonzalez. Thereafter, the trial continued with the State presenting its evidence. Aside from one fifteen minute recess during the trial and prior to the admission of the statement of codefendant Crawford, it appears that the defendant's counsel did not have a a reasonable amount of time to review the extrajudicial statements.[7]

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7. The transcript does show that the trial was stopped in order for the clerk to make copies of the "sanitized" versions of the extrajudicial statements of the defendants prior to the admission of the Gonzalez statement. However, we cannot determine how much time the attorneys had to review these statements after the clerk returned with their respective copies.

One can draw several possible inferences from the majority's discussion of its new "reasonable amount of time" rule: first, counsel was not afforded a reasonable amount of time to review the sanitized statement because it was not disclosed until during the trial; or second, we must automatically assume conclusively that fifteen minutes is never a sufficient amount of time; or, third, that one must make that same assumption whenever the record fails to reflect what amount of time in excess of fifteen minutes

counsel had to review the sanitized statement. I find no support for any of these propositions.

I read nothing in G.S. § 15A-927(c)(1) or G.S. § 15A-903(b), under our discovery statute, that would *require* a codefendant's sanitized extrajudicial statement to be disclosed prior to trial. The fact that defense counsel is not afforded pretrial statements of the State's witnesses until after those witnesses have testified at trial on direct examination, *see* G.S. § 15A-903(f), militates strongly against the argument that counsel cannot be expected (or is unable) to review the sanitized version of a codefendant's statement during trial. As the majority notes, prior to the admission of Crawford's statement, the trial judge ordered a recess. Had defense counsel required more time to review the statement, he was free to so request, as is the procedure adopted in G.S. § 15A-903(f). That section provides that upon defendant's request, the court "may recess proceedings in the trial for a period of time that it determines is reasonably required for the examination of the statement . . . ."

Additionally, I find no basis in case law or statute to support the majority's assumption that counsel's failure to object to a portion of a sanitized statement is inevitably due to a lack of sufficient time to review the statement. Defense counsel's own admission to the trial judge belies such a conclusion, but rather attributes the failure to the fact that counsel himself had overlooked that portion when he reviewed the statement:

> I move to strike that portion of the statement as follows; I was with some guys but I didn't rob anyone, they did. I think that ties and puts all meaning back into the statement as was originally there. And I'm sorry I overlooked this when I read the statement, but apparently—I don't think it's being sanitized enough, to use the D.A.'s termonology [sic].
>
> THE COURT: All right. Motion denied. Let the record show that the Court prior to statements being presented in open court instructed the District Attorney to make all statements available to counsel for the defendants, that the Clerk made copies of the statements and a copy of each statement from Gonzalez and Crawford were presented to the defendants and their counsel, that no objections were made to the statements in the form presented at that time. Let the

> record further show that at the time the officer read the statement no objections were made to anything that was stated at that time. The objection came after the statement had been completed. Motion denied.

I believe the trial judge properly denied defendant's motion to strike and furthermore I would hold, as did the Court of Appeals, that defendant waived any objection by failing to timely object.

Nor can I agree with the majority's conclusion that "the introduction of this extrajudicial statement constitutes error and, without a doubt, violated *Bruton*, *Fox*, and N.C. Gen. Stat. 15A-927(c)(1)." Embedded within the straightforward, innocuous account of Crawford's version of the events, is the objected-to statement: "I told him I was with *some guys*, but that I didn't rob anyone, *they* did." (Emphasis added.) This one statement, containing a reference to *some guys*, unnamed and unidentified, at most, may be said only to *obliquely* incriminate the defendant, and certainly does not rise to the level of the "powerfully incriminating extrajudicial statements of a codefendant," which were "deliberately spread before the jury" in *Bruton*. *Id.* at 135-36, 20 L.Ed. 2d at 485. If the *Bruton* rule is to be applied with practicality and common sense, it affords no precedent whatsoever which would redound to defendant's benefit in this case. I consider the majority's broad extension of the *Bruton* rule completely unwarranted and very unwise. I find no precedent in any jurisdiction which would support it.

This Court, as well as the Court of Appeals,[1] has, in the past, taken a practical and common sense approach to the rule

1. In *State v. Freeman*, 31 N.C. App. 335, 337-38, 229 S.E. 2d 238, 240 (1976), the original statement read:

> "Me and Lawrence I don't know his last name, he is Bill's half brother, were riding around in Lawrence's car, a '66 or '67 Pontiac gray station wagon. We went to Eddie's Grocery. Lawrence had a shotgun. We parked beside the store. We both went inside and demanded the money. We picked up Bill Alexander at Mooresville Drug. We went toward Coddle Creek and had a flat tire. Me and Bill went through the woods. Lawrence stayed with the car. We went to James Reid's house to get him to take us to Bill's house. We took the shotgun and rifle and asked him to keep them for us. Shortly after we left the police got behind us. I threw the money out of the car. Then the police stopped us."

Together the State and defense attorney sanitized the statement as follows:

enunciated in *Bruton*. In *State v. Jones*, 280 N.C. 322, 185 S.E. 2d 858, this Court considered statements attributed to a codefendant which defendant contended were inculpatory. These statements consisted of the following: "that there were six of us involved," "the stamps were stolen out of a safe in Lumberton," "they had to use a truck." We noted that "[n]o statement attributed to Sterling [the codefendant] contains a reference to Phillip [the defendant] *by name* or identifies him in any other way. The *sine qua non* for application of *Bruton* is that the party claiming incrimination without confrontation at least be incriminated." *Id.* at 340, 185 S.E. 2d at 869. I find the facts in the present case more compelling than in *Jones* and would hold that defendant was not incriminated by Crawford's one reference to "some guys."

Justices COPELAND and MITCHELL join in this dissenting opinion.

"Me and two other guys were riding around in a car. We went to Eddie's Grocery; we had a shotgun; we parked beside the store—I and one of the other guys went in the store and demanded the money; then we went toward Coddle Creek and had a flat tire. Then I and one of the men went through the woods; the other guy remained with his car. I and the other man went to James Reid's house to get him to take us home; we took the shotgun and a rifle and asked Reid to keep them for us. Shortly after the police got behind us and I threw the money out of the car; then the police stopped us."

The Court of Appeals concluded:

"In reviewing the above portions of the trial record, it is apparent to this Court that the trial judge admitted Nichols' statement only after modifying it in accordance with the *Fox* decision. He admitted the extrajudicial confession only after deleting all parts that referred to or implicated the defendant. It is manifest that the statement admitted into evidence did not tend to incriminate the defendant Freeman. The statement merely indicated that Nichols had an accomplice and it in no way indicated the identity of that accomplice. Defendant's right to confrontation was therefore not infringed and the trial judge did not err in admitting the modified confession."

In re Montgomery

IN THE MATTER OF: D. MONTGOMERY, A MINOR FEMALE CHILD; S. MAXWELL, A MINOR FEMALE CHILD; A. MAXWELL, A MINOR FEMALE CHILD; AND D. MAXWELL, A MINOR MALE CHILD

No. 345PA83

(Filed 5 June 1984)

1. **Parent and Child § 1— termination of parental rights—separate finding regarding adequate fulfillment of child's intangible and non-economic needs not required**

The Court of Appeals erred in finding that due process requires a separate and distinct finding regarding the adequate fulfillment of a child's intangible and non-economic needs in termination of parental rights proceedings. The Termination of Parental Rights statute, as drafted, provides an appropriate forum to address the "intangible needs" issue, as well as protects a parent's interests in preserving the family. G.S. 7A-289.34, G.S. 7A-451(14), (15), G.S. 7A-289.29, G.S. 7A-289.32(7), G.S. 7A-289.23, G.S. 7A-289.22(1), (2), and G.S. 7A-289.31(a), (b).

2. **Parent and Child § 1— termination of parental rights—fundamental principles**

The fundamental principle underlying North Carolina's approach to controversies involving child neglect and custody is that the best interest of the child is the polar star. The fact that a parent does provide love, affection and concern, although it may be relevant, should not be determinative, in that the court could still find the child to be neglected within the meaning of our neglect and termination statutes.

3. **Parent and Child § 1— standard of proof in termination of parental rights proceedings**

In the adjudication stage, petitioner must prove by clear, cogent, and convincing evidence the existence of one or more grounds for termination listed in G.S. 7A-289.32. Once the petitioner has proved this ground by this standard, it has met its burden within the statutory scheme of G.S. 7A-289.30(d) and (e) and G.S. 7A-289.31(a). The petitioner having met his burden of proof at the adjudication stage, the court then moves on to the disposition stage, where the court's decision to terminate parental rights is discretionary. G.S. 7A-289.30(e).

4. **Parent and Child § 1— termination of parental rights—sufficiency of evidence**

In a proceeding to terminate parental rights, the evidence was sufficient to support the trial court's finding of neglect, and the appellate court was bound by those findings even though there may have been evidence contra.

5. **Parent and Child § 1— meaning of "cost of care"**

The Court of Appeals misinterpreted the language of G.S. 7A-289.32 in holding that a petitioner must establish the "reasonable needs of the child" and that a finding as to the cost of foster care failed to establish such reasonable needs since "cost of care" refers to the amount it costs the Department of Social Services to care for the child, namely, foster care, and specific findings of fact as to the reasonable needs of the child are not required.

6. **Parent and Child § 1— finding of failure to pay reasonable cost of care for children supported by evidence**

The trial court could properly conclude that the father of the children in a proceeding to terminate parental rights had not paid a reasonable portion of the cost of caring for the children, and that he had the ability to pay where the evidence tended to show that the father paid only $90.00 for the support of his four children over a forty-five week period; his earnings ranged between $100 and $125 per week; and he had enough money to venture $60.00 per week into a hog operation at the time when he knew he had been ordered to pay $30.00 per week for the support of the children.

7. **Parent and Child § 1— termination of parental rights—mental retardation or mental illness—constitutionality of statute**

G.S. 7A-289.32(7), which provides for the termination of parental rights upon the finding that "the parent is incapable as the result of mental retardation or mental illness of providing for the proper care and supervision of the child . . . and that there is a reasonable probability that such incapability will continue throughout the minority of the child," did not deny respondents procedural or substantive due process or equal protection under the law.

WE allowed discretionary review from the Court of Appeals, *Judge Hill*, concurred in by *Judges Johnson* and *Phillips*, which vacated and remanded judgment of *Greene (Edward), Judge*, entered 8 January 1982 in District Court, HARNETT County.

This cause involves proceedings to terminate parental rights of the respondent-appellees, Geraldine Montgomery and David Maxwell, in their four minor children. The appellant, the Harnett County Department of Social Services, hereinafter referred to as petitioner or DSS, filed four separate petitions for termination of the parental rights to each of the four children. For our purposes, we shall treat those four petitions as one. Guardians ad litem were appointed for the minor children and for the parents. At the time of the hearing in the Juvenile Division of the Harnett County District Court, the children were 10, 9, 7 and 5 years of age.

From the evidence presented at the hearing the trial court made certain findings of facts. An order granting the petition to terminate parental rights as to each child was entered, citing as grounds for termination, neglect by the mother and both neglect and a failure to provide a reasonable cost of care by the father.

The facts disclose that respondents Geraldine Montgomery and David Maxwell are the parents of these four minor children. At the time of the birth of the first child, the mother was 16

years of age while the father was about 4 years older than the mother. The parents were not married then and have not since legitimated their relationship. The children lived with the parents until they were removed by DSS in September 1980.

Since 1978, the family has lived in a three-room house with one bathroom, located on the farm where the father was employed. During the period between 12 October 1979 and 14 August 1980, prior to the September 1980 removal of the children, the house was sparsely furnished, having a single bed on which the parents slept and a mattress on the floor on which the four children slept. The trial court found that "[d]espite urging from the Social Worker, and despite the fact that financial resources were available to the parents from the husband's earnings and social services, the parents failed to provide additional beds or otherwise improve the crowded and inadequate living space . . ."

Mr. Maxwell earned approximately $120.00 per week as a welder and general handyman on the farm owned by his employer. Ms. Montgomery tended to the house and children. Testimony also revealed that the mother suffered from mental problems. She often related to others that she believed someone was looking in the windows of her house and also that someone was trying to get inside her mind. She continuously claimed, for a period of about 14 months, that she was pregnant, when in fact she had had a hysterectomy. Psychological evaluations indicated that both the mother and the father were mentally retarded, having scored 55 and 54, respectively, on the Wechsler Adult Intelligence Test.

During the 1979-80 school year, the children of school age had poor attendance records, missing at least 34 days each. Their grades were also unsatisfactory. Subsequent to DSS acquiring custody of the children, their school attendance and performance showed much improvement.

Petitioner first became involved with the family on 16 October 1979 when a social worker visited the home. During the following 10 months this same DSS employee visited the family over ten times, and found on different occasions the mother talking incoherently, the children at home rather than in school, and enough food in the house for one family meal. After April of 1980 following the respondents' separation, the social worker visited the mother and children in the homes of her relatives.

On 5 September 1980, the trial court adjudged the children neglected and granted custody to petitioner. The court found no improvement in the family's situation at either the 6 March 1981 or the 4 September 1981 review hearings. The father failed to comply with the trial court's 6 March 1981 order to pay $30.00 per week for the support of his four children. The cost of care to the DSS was $150.00 per child per month. At the time of the 8 January 1982 hearing to terminate the parental rights, the father had provided only 3 of 45 payments, to wit, $90.00.

At the time of the termination hearing, there was some evidence of progress being made with regard to Ms. Montgomery. The mother was attempting to improve her homemaking skills with the assistance of DSS. She also was receiving counseling and medicine for her mental problems.

Other facts relevant to the specific assignments of error, will be incorporated into the opinion.

Woodall, McCormick & Felment, P.A. by Edward H. McCormick for petitioner-appellant.

O. Henry Willis, Jr. for respondent-appellees.

Rufus L. Edmisten, Attorney General, by David R. Minges, Associate Attorney, and Jane Rankin Thompson, Assistant Attorney General appearing as AMICUS CURIAE for the State.

Ruff, Bond, Cobb, Wade & McNair by William H. McNair and Moses Luski appearing as AMICUS CURIAE for Mecklenburg County Department of Social Services.

COPELAND, Justice.

I.

The Court of Appeals, in *In re Montgomery*, 62 N.C. App. 343, 303 S.E. 2d 324 (1983), reversed the trial judge's judgment terminating parental rights on the grounds of neglect pursuant to N.C. Gen. Stat. § 7A-289.32(2). That court held that the clear, cogent, and convincing evidence standard of proof requires the party seeking termination of parental rights for neglect to prove not only that the physical and economic needs of the child are not adequately met, but also that the intangible non-economic needs

of a child are not adequately met. The petitioner argues that the Court of Appeals committed error by engrafting this new "non-economic" or "non-physical indicia" test onto the requirements for establishing grounds for terminating parental rights. For the following reasons, we agree.

This case involves the interpretation of the Termination of Parental Rights Act, Chapter 7A, Article 24B of the General Statutes, specifically N.C. Gen. Stat. § 7A-289.32 which provides in pertinent part:

> *Grounds for terminating parental rights.*—The court may terminate the parental rights upon a finding of one or more of the following:
>
> (2) The parent has abused or neglected the child. The child shall be deemed to be abused or neglected if the court finds the child to be an abused child within the meaning of G.S. 7A-517(1), or a neglected child within the meaning of G.S. 7A-517(21). . . .
>
> (4) The child has been placed in the custody of a county department of social services, a licensed child-placing agency, or a child-caring institution, and the parent, for a continuous period of six months next preceding the filing of the petition, has failed to pay a reasonable portion of the cost of care for the child. . . .
>
> (7) That the parent is incapable as a result of mental retardation, mental illness, organic brain syndrome, or any other degenerative mental condition of providing for the proper care and supervision of the child, such that the child is a dependent child within the meaning of G.S. 7A-517(13), and that there is a reasonable probability that such incapability will continue throughout the minority of the child.

The statute referred to in subsection (2) of the above-quoted statute, N.C. Gen. Stat. § 7A-517(21), appears as follows:

> (21) *Neglected Juvenile.*—A juvenile who does not receive proper care, supervision, or discipline from his parent, guardian, custodian, or caretaker; or who has been abandoned; or who is not provided necessary medical care or other remedial care recognized under State law, or who lives

in an environment injurious to his welfare, or who has been placed for care or adoption in violation of law.

In its opinion, the Court of Appeals reasoned that the North Carolina statutory definition of neglect is "sufficiently broad to allow interpretation by the courts . . ." Although we agree that the appellate courts, in applying our statutes to the particular case being considered, often must construe these broadly worded statutes, we also acknowledge that our courts are restrained by the bounds of legislative intent. *Mazda Motor v. Southwestern Motors*, 296 N.C. 357, 250 S.E. 2d 250 (1979). However, after our careful reading of the statute, we must conclude that the Court of Appeals, in contravention of our Legislature's intent, erroneously elevated the burden of proof required in proceedings terminating parental rights.

[1] The Court of Appeals, in *Montgomery*, prefaced its opinion with a brief summarization of the "due process evolution" in the area of parental rights, particularly highlighting the United States Supreme Court cases of *Stanly v. Illinois*, 405 U.S. 645, 31 L.Ed. 2d 551 (1972) and *Santosky v. Kramer*, 455 U.S. 745, 71 L.Ed. 2d 599 (1982). Those cases stand for the premise that the parents' right to retain custody of their child and to determine the care and supervision suitable for their child, is a "fundamental liberty interest" which warrants due process protection. *Id.*, at 758-59, 71 L.Ed. 2d at 610. Both *Stanly* and *Santosky*, as the Court of Appeals correctly noted, confine their consideration to procedural due process matters. However, the Court of Appeals interpreted *Santosky* as requiring a petitioner to establish that a child's intangible, non-economic needs were not being fulfilled by his or her parents before said parents' parental rights could be terminated. That court opined the following:

> Nevertheless, the [United States Supreme] Court appeared to endorse an approach that would take into account more than physical or economic factors; an approach that would reflect some consideration by the trial judge of all the circumstances of the parent-child relationship in each individual case. The [United States Supreme] Court noted that termination proceedings "often required the fact finder to . . . decide issues difficult to prove to a level of absolute certainty, such as lack of parental motive, absence of affection

> between parent and child, and failure of parental foresight and progress. *Id.* at 769, 102 S.Ct. 1388, 81 [sic] L.Ed. 2d 599. *Santosky* implicitly demands serious consideration of the unquantifiable attributes of the parent-child relationship that warrant its protected status under the Due Process clause.

Montgomery at 348, 303 S.E. 2d at 327.

Certainly neither we nor our learned lawmakers dispute the importance of love, affection and other intangible qualities that exist in the normal familial relationships. In fact the General Assembly has clearly expressed their desire to ensure that children receive that "degree of care which promotes [their] healthy and orderly physical and emotional well-being." N.C. Gen. Stat. § 7A-289.22(1). Section (2) of that statute further articulates that:

> (2) It is the further purpose of this Article to recognize the necessity for any child to have a permanent plan of care at the earliest possible age, while at the same time recognizing the need to protect all children from the *unnecessary severance of a relationship with biological or legal parents.* (Emphasis added.)

The Legislature has properly recognized that in certain situations, where the grounds for termination could be legally established, the best interest of the child, considering the intangibles, indicate that the family unit should not be dissolved.

N.C. Gen. Stat. § 7A-289.31(a) and (b), which governs the disposition stage of a termination proceeding, provide that the trial court may elect not to terminate parental rights if the best interests of the child require such a result:

> (a) Should the court determine that any one or more of the conditions authorizing a termination of the parental rights of a parent exist, the court shall issue an order terminating the parental rights of such parent with respect to the child *unless the court shall further determine that the best interests of the child require that the parental rights of such parent not be terminated.* [Emphasis added.]
>
> (b) Should the court conclude that irrespective of the existence of one or more circumstances authorizing termination of parental rights, the best interests of the child require that

such rights should not be terminated, the court shall dismiss the petition, but only after setting forth the facts and conclusions upon which such dismissal is based.

In sum, where there is a reasonable hope that the family unit within a reasonable period of time can reunite and provide for the emotional and physical welfare of the child, the trial court is given discretion not to terminate rights.

Furthermore, with respect to termination proceedings, our statutes provide additional procedures, consistent with due process, to protect the various interests of the parties involved. In every contested case, a guardian ad litem must be appointed to represent the "best interest of the child." *See*: N.C. Gen. Stat. § 7A-289.29. In cases such as the one at present, a parent has the right to the representation of an appointed guardian ad litem "where it is alleged that a parent's rights should be terminated pursuant to G.S. 7A-289.32(7) . . ." N.C. Gen. Stat. § 7A-289.23. Also our statutes provide the parent with appointed counsel during the disposition phase, *Id.* and N.C. Gen. Stat. § 7A-451(a)(14) and (15), as well as the right to appeal. N.C. Gen. Stat. § 7A-289.34.

We are satisfied that the Termination of Parental Rights statute as drafted provides an appropriate forum to address the "intangible needs" issue, as well as protects a parent's interest in preserving the family. Thus, the Court of Appeals' expansion of the grounds for terminating parental rights was unnecessary and improper.

We must further hold that the Court of Appeals' determination, that due process requires a separate and distinct finding regarding the adequate fulfillment of a child's intangible and non-economic needs, is not justified. This Court has not found it constitutionally necessary to develop such an additional requirement to justify termination for neglect. In our case of *In re Moore*, 306 N.C. 394, 293 S.E. 2d 127, *reh. denied*, 306 N.C. 565 (1982); *appeal dismissed sub. nom. Moore v. Dept. of Social Services*, --- U.S. ---, 74 L.Ed. 2d 987 (1983), decided subsequent to *Santosky*, we were asked to determine whether the neglect ground for termination, as stated in N.C. Gen. Stat. § 7A-289.32(2), satisified the requirements of substantive due process. This Court in *Moore*

upheld the constitutionality of the definition of neglect without revising the statutory language.

[2] Our discussion would not be complete unless we re-emphasized the fundamental principle underlying North Carolina's approach to controversies involving child neglect and custody, to wit, that the best interest of the child is the polar star. The fact that a parent does provide love, affection and concern, although it may be relevant, should not be determinative, in that the court could still find the child to be neglected within the meaning of our neglect and termination statutes. Where the evidence shows that a parent has failed or is unable to adequately provide for his child's physical and economic needs, whether it be by reason of mental infirmity or by reason of willful conduct on the part of the parent, and it appears that the parent will not or is not able to correct those inadequate conditions within a reasonable time, the court may appropriately conclude that the child is neglected. In determining whether a child is neglected, the determinative factors are the circumstances and conditions surrounding the child, not the fault or culpability of the parent. Therefore, the fact that the parent loves or is concerned about his child will not necessarily prevent the court from making a determination that the child is neglected. As we stated in *Wilson v. Wilson*, 269 N.C. 676, 678, 153 S.E. 2d 349, 351 (1967), "[t]he welfare or best interest of the child is always to be treated as the paramount consideration to which even parental love must yield. . . ."

II.

We shall combine, for our purposes, the petitioner's next two assignments of error regarding the Court of Appeals' review of the trial judge's findings and conclusions.

[3] The proper evidentiary standard of proof in termination of parental rights proceedings, according to the *Santosky* holding, is clear and convincing evidence. Showing great foresight, the North Carolina General Assembly prior to the *Santosky* decision amended our termination statute to require a similar "clear, cogent, and convincing" standard. *See*: N.C. Gen. Stat. § 7A-289.30(e). It is well established that "clear and convincing" and "clear, cogent, and convincing" describe the same evidentiary standard. *See*: 30 Am. Jur. 2d, Evidence § 1167. This intermediate standard is greater than the preponderance of the

evidence standard required in most civil cases, but not as stringent as the requirement of proof beyond a reasonable doubt required in criminal cases. *Santosky* at 745, 71 L.Ed. 2d at 599. Our termination statute provides for a two-stage termination proceeding. N.C. Gen. Stat. § 7A-289.30, entitled "Adjudication Hearing on Termination," governs the adjudication stage and provides:

> (d) The court shall take the evidence, find the facts, and shall adjudicate the existence or non-existence of any of the circumstances set forth in G.S. § 7A-289.32 which authorizes the termination of parental rights of the respondent.
>
> (e) All findings of fact shall be based on clear, cogent, and convincing evidence.

N.C. Gen. Stat. § 7A-289.31 governs the disposition stage of a termination proceeding, and provides in pertinent part that:

> (a) Should the court determine that any one or more of the grounds for termination of the parental rights of a parent exist, the court shall issue an order terminating the parental rights of such parent with respect to the child unless the court shall further determine that the best interests of the child require that the parental rights of such parent not be terminated.

When read together, we construe these sections to mean that in the adjudication stage, the petitioner must prove by clear, cogent, and convincing evidence the existence of one or more of the grounds for termination listed in N.C. Gen. Stat. § 7A-289.32. Once the petitioner has proven this ground by this standard, it has met its burden within the statutory scheme of N.C. Gen. Stat. § 7A-289.30(d) and (e) and § 7A-289.31(a). The petitioner having met his burden of proof at the adjudication stage, the court then moves on to the disposition stage, where the court's decision to terminate parental rights is discretionary.

[4] In the case *sub judice*, the trial court made certain findings of facts based on the evidence presented. Although the question of the *sufficiency* of the evidence to support the findings may be raised on appeal, *see* N.C. Gen. Stat. § 1A-1, Rule 52 of the Rules of Civil Procedure, our appellate courts are bound by the trial courts' findings of fact where there is some evidence to support those findings, even though the evidence might sustain findings

to the contrary. *Williams v. Pilot Life Ins. Co.*, 288 N.C. 338, 218 S.E. 2d 368 (1975); *see also*: 1 Strong, N.C. Index 2d, Appeal and Error, § 57.3. In cases involving a higher evidentiary standard, such as in the case *sub judice*, we must review the evidence in order to determine whether the findings are supported by clear, cogent and convincing evidence and the findings support the conclusions of law. *In re Moore*, at 404, 293 S.E. 2d at 133.

Here, the Court of Appeals vacated the trial judge's order to terminate the respondents' parental rights based upon its determination that there was insufficient evidence of neglect to support the judge's findings and conclusions. After giving careful consideration to the entire record, we hold that there exists substantial evidence in support of the neglect findings and conclusions.

We note at the outset that our appellate courts should refrain from accepting as facts of a case, findings that are not part of the record on appeal. It appears that the opinion of the Court of Appeals stated findings which do not appear in the trial court's findings of fact. These findings are:

> The poverty of the respondent-appellants is at least partially due to a desire to be self-reliant and not dependent on public assistance. Respondent-appellant Maxwell's failed venture into hog farming, while it indicated a lack of business judgment, was nonetheless rooted in a desire to better provide for his family.
>
> Testimony from respondent-appellant Montgomery, the mother, indicated no inability to properly look to the needs of her children. . . . Her failure to compel their regular attendance at school, which we do not condone, was at least partially attributable to her illness and not due to any failure to recognize the value of education . . .
>
> The respondent-appellants kept most of the scheduled visits with their children after they were placed in foster care; any failures were due to legitimate transportation problems and were usually accompanied by a long distance telephone call to inform the Department of Social Services of their problem. . . . The children are healthy and emotionally well-adjusted, evidence of the parents' ability to provide

them with adequate physical, emotional and psychological nuturing.

Montgomery at 352-3, 303 S.E. 2d at 329.

In summary the trial court found the acts of neglect in this case to include:

1—Failure to send the three school age children to school with resulting poor grades. The children each missed school for over 30 days.

2—Failure to provide beds and adequate living space for the children during the period October 79 to August 80 (prior to removal of the children from the home) even though financial resources were available to the parents.

3—During August of 1980, the parents were separated and were providing no place at all for the children.

4—Prior adjudication of neglect.

5—The mother was unstable, delusional (believed that she could have a baby even though she had had a hysterectomy and believed that someone or something was trying to get inside of her) was nervous, failed to take medicine to control her condition and gets angry at her children when she does not take her medicine and that this condition causes problems between her and her husband when the children lived with them and that she yells at the children because of it.

6—That the parents lacked the ability to care for the children and this inability will continue throughout the minority of the children.

Judge Greene gave patient and careful consideration to the evidence. His observation of the parties and the witnesses provided him with an opportunity to evaluate the situation that cannot be revealed on printed page. Whether these four minor children were inadequately cared for, within the statutory definition of neglect, was a question for the trier of fact, with the burden of proof being upon the petitioner. The pages of testimony supply ample and competent evidence to support the trial court's findings of neglect, and they are binding upon us on appeal, even

though there may be evidence contra. *Hice v. Hi-Mil, Inc.*, 301 N.C. 647, 273 S.E. 2d 268 (1981).

[5] The trial court also found as fact that the four children had been placed in the custody of the Harnett County Department of Social Services, and that the father, "for a continuous period of six months next preceding the filing of the petition, has failed to pay a reasonable portion of the cost of care of the [children]." This finding was made with regard to petitioners' attempt to establish the fourth ground of termination for neglect of N.C. Gen. Stat. § 7A-289.32. The Court of Appeals misinterpreted the language of the statute in their holding that a petitioner must establish the "reasonable needs of the child," and that a finding as to the cost of foster care failed to establish such reasonable needs. As we stated in *In re Clark*, 303 N.C. 592, 281 S.E. 2d 47 (1981), "cost of care" refers to the amount it costs the Department of Social Services to care for the child, namely, foster care. Specific findings of fact as to the reasonable needs of the child are not required.

[6] The Court of Appeals further determined that the trial judge erroneously concluded that Mr. Maxwell had not paid a reasonable portion of the costs of caring for the children, and that he had the ability to pay. That court reasoned that specific findings with respect to the needs of the children and to the earnings and standard of living of both the child and the parents were necessary. In *Clark* we addressed the issue of "reasonable portion" of the cost of care:

> . . . A parent's *ability to pay* is the controlling characteristic of what is a "reasonable portion" of [the] cost of foster care . . . A parent is required to pay that portion of the cost of foster care . . . that is fair, just, and equitable *based upon the parent's ability or means to pay.* What is within a parent's "ability" to pay or what is within the "means" of a parent to pay is a difficult standard which requires great flexibility in its application. G.S. § 7A-289.32(4) requires a parent to pay a reasonable portion of the child's foster care costs. The requirement applies irrespective of the parent's wealth or poverty. (Emphasis added.)

Id., at 603-604, 281 S.E. 2d at 55.

Here, the father respondent paid ninety dollars for the support of his four children over a forty-five week period. In other words that comes to about fifty cents per week per child. The father testified that his earnings ranged between $100.00 and $125.00 per week, and that he had enough money to venture $60.00 per week into a hog operation at a time when he knew of the $30.00 per week obligation. We believe there was ample evidence from which the trial court could conclude that respondent Maxwell failed to pay a reasonable portion of the costs of care of the children.

III.

[7] The petitioner raises for the first time on appeal, the constitutionality of subsection (7) of N.C. Gen. Stat. § 7A-289.32. Because we consider this question important to the public interest, we shall consider the merits of this issue, pursuant to Rule 2 of the Rules of Appellate Procedure.

The statute in question provides for the termination of parental rights upon a finding that "the parent is incapable as a result of mental retardation or mental illness of providing for the proper care and supervision of the child . . . and that there is a reasonable probability that such incapability will continue throughout the minority of the child." N.C. Gen. Stat. § 7A-289.32(7). The respondents appellees argue that this section denies them their due process rights as well as equal protection under the law.

The constitutional analysis employed in *In re Moore*, 289 N.C. 95, 221 S.E. 2d 307 (1976) to uphold the constitutionality of our sterilization laws is analogous to the instant case. In *Moore* this court upheld, against due process and equal protection attack, a statutory provision which permitted a court ordered sterilization upon a finding "that because of a physical, mental, or nervous disease or deficiency which is not likely to materially improve, the person would probably be unable to care for a child or children." N.C. Gen. Stat. § 35-43. There, as here, we were concerned with the parents' ability to properly care for their children.

Many parental termination statutes are subject to constitutional scrutiny based on due process grounds. This termination statute requires not only notice and a hearing to the parents, N.C. Gen. Stat. § 7A-289.27 and 30, but it also provides other specific

safeguards such as the right to present witnesses on one's own behalf, and the right to cross examine witnesses. A parent has a right to counsel and to appointed counsel in case of indigency, if not waived by the parent. N.C. Gen. Stat. § 7A-289.27. The Act also provides for the appointment of a guardian ad litem to represent the parent who suffers a diminished mental capacity. We believe the provisions of this statute adequately assure respondents, and those similarly situated, of procedural due process protection.

With regard to substantive due process, Justice Moore succinctly explained that "due process may be characterized as a standard of reasonableness and as such it is a limitation upon the exercise of the police power." *Moore* at 101, 221 S.E. 2d at 311. The State in the legitimate exercise of its police power may, within constitutional limits, do what is necessary to " 'protect or promote the health, morals, order, safety and general welfare of society.' " *Moore* at 101, 221 S.E. 2d at 311, quoting *State v. Ballance*, 229 N.C. 764, 769, 51 S.E. 2d 731, 734 (1949). For a statute to pass as constitutional, it must have a rational relation to the State's interests listed above. Protecting children from parental neglect is a sufficient reason to warrant State intervention in the traditional rights of parents to the care, custody and control of their children. The State has long practiced its role as *parens patriae* in determining what is in the best interest of neglected or abused children. *See*: Thomas, Child Abuse and Neglect, Part I: Historical Overview, Legal Matrix, And Social Perspectives, 50 N.C. L. Rev. 293 at 313 (1972). The courts in weighing the parent's rights against the child's best interest must follow the legislature's mandate that the child's welfare is paramount. The legislature has determined that a parent, because of his mental illness or retardation, may not be able to adequately provide for a child. We believe that termination of parental rights of those mentally ill or retarded parents determined incapable of caring for their child, when coupled with evidence of neglect, is a valid and reasonable exercise of the State's police power.

Respondent-appellees finally assert that this statute violates the equal protection clause of the Fourteenth Amendment. The objective of N.C. Gen. Stat. § 7A-289.32(7) is not to punish a parent for his or her particular condition, but to provide for the welfare of children. "The equal protection clauses of the United

States and North Carolina Constitutions impose upon lawmaking bodies the requirement that any legislative classification 'be based on differences that are reasonably related to the purposes of the Act in which it is found.' " [Citations omitted.] *Moore* at 104, 221 S.E. 2d at 313. The purpose of the statute is to protect and promote the welfare of the child. The legislature has considered the very real possibility that a mentally ill or retarded individual may be unable to handle the responsibility of a child. We find there exists a reasonable relation between the classification perpetuated by subsection seven and the objective of the statute. Many courts in our sister states have held that a statutory scheme providing termination of parental rights on the grounds of mental illness or retardation of parents, does not violate equal protection. Annot., 22 A.L.R. 4th (1983).

We conclude that N.C. Gen. Stat. § 7A-289.32(7), which provides for the termination of parental rights upon a showing that a child's parents are mentally incapable of providing for that child, is not unconstitutional. It does not violate the equal protection clause, nor does it deny due process.

In summary, we must emphasize that it is the child's best interests which is our guiding beacon. Although courts should balance the parents' inherent right to maintain their family unit with the welfare of the minor child, it is the latter that should always prevail, if it is determined that the two interests are conflicting. We conclude that the trial judge abided by this basic principle and adjudicated the proper results, with the exception of his determination of unconstitutionality of subsection seven of N.C. Gen. Stat. § 7A-289.32.

This case is reversed and remanded to the Court of Appeals, with orders that it reinstate the trial court's judgment, except with regard to its order concerning N.C. Gen. Stat. § 7A-289.32(7).

Reversed and remanded.

STATE OF NORTH CAROLINA v. LUTHER RAY WILSON, JR.

No. 180A83

(Filed 5 June 1984)

1. **Constitutional Law § 28; Homicide § 31.3— trial for first degree murder —discretion of district attorney—no denial of equal protection**

A defendant tried for first degree murder was not denied his equal protection rights by the district attorney's exercise of discretion in determining who would be prosecuted for first degree murder and thereby be subject to the death penalty where defendant's allegations and evidence failed to show that the district attorney's decision to prosecute him for first degree murder and seek the death penalty was based upon "an unjustifiable standard such as race, religion, or other arbitrary classification."

2. **Constitutional Law § 28; Homicide § 31.3— trial for first degree murder—consideration of wishes of victim's family**

It is not impermissible for the district attorney to consider the wishes of the victim's family as one factor in determining which defendants will be prosecuted for first degree murder and thereby subjected to the death penalty.

3. **Constitutional Law § 28; Homicide § 31.3— determination to try for first degree murder—lack of written guidelines**

The district attorney's lack of written guidelines for determining who will be charged and prosecuted for first degree murder does not violate a defendant's right to equal protection of the laws.

4. **Constitutional Law § 31— indigent defendant—denial of funds for private investigator**

The trial court did not err in the denial of defendant's request for the appointment of a private investigator at State expense based upon the bare allegation that defense counsel did not have enough time to interview all potential witnesses since defendant's allegation did not amount to a clear showing that specific evidence was reasonably available or necessary for a proper defense.

5. **Constitutional Law § 30— no obstruction of access to witnesses by district attorney**

The evidence was insufficient to establish that the district attorney obstructed access by defendant's attorney to two witnesses so as to require sanctions in the form of excluding the testimony of the witnesses at trial where one witness was instructed by the district attorney that she did not have to speak with defendant's attorney unless she wanted to do so, and where defense counsel was told by a detective at the jail that he could not talk with the second witness, who was in jail, unless he obtained the permission of the district attorney.

6. Criminal Law § 96— withdrawal of incompetent evidence

The admission of incompetent testimony by three witnesses concerning the character and arrest record of a defendant who did not testify was not prejudicial error where the trial court sustained defense counsel's objections to such testimony and gave a curative instruction admonishing the jury not to consider it.

7. Criminal Law § 86.8— impeachment of witness—specified criminal acts—exclusion as harmless error

Although defense counsel should have been permitted to ask a State's witness on cross-examination whether he had obtained money by passing forged checks, the exclusion of such testimony could not have improperly influenced the verdict and was thus not prejudicial error.

8. Criminal Law § 87.1— leading questions

The trial judge did not abuse his discretion in permitting the State to ask some arguably leading questions of two State's witnesses.

9. Criminal Law § 89.3— prior statement of witness—admissibility for corroboration

The trial court did not err in permitting an officer to read into evidence a prior statement of a witness in order to corroborate his testimony where the record shows that whenever the officer started to read portions of the statement which were not corroborative of the witness's prior testimony and defendant entered a timely objection, the trial judge stopped the officer's testimony and excluded those portions of the statement which were not corroborative.

10. Criminal Law § 102.8— comment on defendant's failure to testify—no prejudicial error

Even if the prosecutor's argument to the jury, "That's something no one here can answer except the defendant," constituted an impermissible reference to defendant's failure to testify at trial, it was not so extreme or so clearly calculated to prejudice the jury that the trial judge should have *ex mero motu* instructed the jury to disregard the remark, and whatever error there may have been was cured by the trial judge's instructions to the jury which emphasized the presumption of innocence of the defendant and the State's burden of proving its case beyond a reasonable doubt.

APPEAL by defendant from the judgment and sentence entered by the *Honorable Thomas W. Seay, Jr., Judge Presiding,* at the 8 November 1982 Criminal Session of Superior Court, RANDOLPH County. Heard in the Supreme Court 14 March 1984.

Rufus L. Edmisten, Attorney General, by Elizabeth C. Bunting, Assistant Attorney General, for the State.

Charles T. Browne, for defendant-appellant.

FRYE, Justice.

Defendant was charged in bills of indictment, proper in form, with the armed robbery and murder of Leonard Alexander Teel on or about 22 October 1981. Upon defendant's plea of not guilty, a jury found defendant guilty of robbery with a firearm, guilty of murder in the first degree based upon the felony-murder rule, and not guilty of murder in the first degree based upon premeditation and deliberation. After a sentencing hearing, the jury recommended that defendant be sentenced to life imprisonment on the conviction of murder in the first degree. Thereafter, Judge Seay arrested judgment on defendant's conviction of robbery with a firearm because that felony conviction was used as the basis for finding defendant guilty of murder in the first degree. Pursuant to the jury's recommendation, Judge Seay sentenced defendant to life imprisonment.

Pursuant to N.C. Gen. Stat. § 7A-27(a) (1981), defendant appeals his conviction of murder in the first degree and the sentence imposed thereon as a matter of right.

I.

Defendant seeks a new trial, assigning as error: the trial court's denial of certain pre-trial motions; the trial court's alleged erroneous rulings made during the course of his trial; the trial court's signing of the judgment and commitment; and, the trial court's denial of his motion for appropriate relief. After carefully reviewing all of the defendant's assignments of error, we have found none sufficient to upset the jury verdict in this case or the judgment and commitment entered thereon by the trial judge.

The State's evidence, primarily circumstantial, tended to show the following:

The decedent, Leonard Alexander Teel, was last seen alive by his son, Frank Teel, on 22 October 1981. Mr. Teel had visited his son's farm in Asheboro and left his son's house at approximately 5:00 p.m., apparently headed home.

On that same day, defendant and Jeffery Sealy were riding around Randolph County together. After Mr. Sealy and defendant had discussed the possibility of defendant attempting to get a job with Mr. Teel, by whom Mr. Sealy had previously been employed,

Mr. Sealy drove the defendant to the Teel residence. Upon arrival at the Teel residence, defendant, who was wearing a brown leather jacket, got out of the car and stated that he was going to inquire about a job. Defendant instructed Mr. Sealy to pick him up in thirty minutes. Mr. Sealy then departed the scene and went to visit some friends.

Gwinn Miller, who lived behind Mr. Teel, testified that on 22 October 1981 she was working in her engraving shop behind her house. She was startled and frightened by the sudden appearance of a white man wearing a black toboggan and a "brown leathery jacket" who walked past her house and disappeared into the woods. About ten minutes later, Mrs. Miller and her son observed the same man walking near her driveway with a ski mask pulled over his face and a "long gun in his left hand." Mrs. Miller called the sheriff's department.

Eugene Craven, also a neighbor of Mr. Teel, testified that his home was broken into during the late afternoon hours of 22 October 1981. A .22 semi-automatic Hi-Standard pistol, a few bicentennial quarters and two or three watches were stolen.

Approximately thirty minutes after Mr. Sealy had left the defendant at the Teel residence, he returned to the same general area and picked up the defendant in front of a local church. Defendant told Sealy that he had killed "old man Teel." As Sealy and the defendant were driving across the Deep River Bridge, defendant put some items in his toboggan and then threw the toboggan over the bridge. Subsequently, defendant gave Sealy a .22 semi-automatic Hi-Standard pistol and a lady's wristwatch.

Two days later, on 24 October 1981, Frank Teel went to visit his father. Upon arrival at his father's home, he noticed that the screen of the outside door had been cut, the back door was ajar, and the night latch on the back door had been broken. As he entered the house, Frank Teel observed his father's body lying on the floor near the refrigerator. He observed three bullet wounds in his father's chest, and he immediately knew that his father was dead.

A subsequent search of the crime scene, by various law enforcement officers, led to the discovery of four .22 caliber cartridge casings and one live round of .22 caliber ammunition. As a

result of the ensuing police investigation, a .22 semi-automatic Hi-Standard pistol was received from William Routh and traced through a chain of sellers to Mr. Sealy. Additionally, approximately two weeks after the murder of Mr. Teel, an underwater recovery team discovered a Harrison Richardson .22 caliber revolver, which had belonged to the deceased, in the water beneath the Deep River Bridge.

An autopsy revealed that the decedent had one gunshot wound in the head and four gunshot wounds in the chest and upper abdomen area. The examining physician stated that the cause of death was multiple gunshot wounds to the head, chest and abdomen.

A firearms expert from the State Bureau of Investigation testified that the bullet casings discovered at the scene of the crime were fired from the .22 semi-automatic Hi-Standard pistol apparently stolen from Mr. Craven. He also stated that the five bullets removed from the decedent's body could have been fired from the same gun, but they were too decomposed for him to be able to make that determination.

Two witnesses, a former female friend of defendant and a former prison cellmate of defendant, testified that on different occasions defendant told them that he had broken into a man's house with the intention of robbing him, and subsequently had to kill him after the man pointed a gun at him.

No evidence was presented by defendant.

II.

Defendant first assigns as error the trial court's denial of his motion to bar prosecution for murder in the first degree. Defendant contends that the district attorney has unbridled discretion in determining who will be prosecuted for murder in the first degree and thereby subject to the death penalty. He argues that this discretionary power "amounts to a denial of due process and equal protection rights guaranteed by the Fourteenth Amendment of the United States Constitution." Defendant also argues that "he was the only person to be tried for his life in Randolph County within recent memory." Therefore, defendant contends that the district attorney's decisions are arbitrary.

In support of his contentions, the defendant presented evidence at a pretrial hearing that the district attorney's office in the Nineteen-B Judicial District did not have a written policy concerning which defendants would be charged and prosecuted for murder in the first degree. Defendant's evidence showed that during the administration of District Attorney Garland N. Yates, in eight out of nine cases where the defendant had been charged with murder in the first degree (exclusive of defendant's case), the defendant was subsequently allowed to plead guilty to a lesser-included offense or the defendant had been tried on a lesser-included offense. Defendant contends that his case was treated differently because the victim's family wanted him to be tried for murder in the first degree and subject to the death penalty.

During the pretrial hearing, Mr. Yates testified that no written guidelines existed as to which defendants would be charged and prosecuted for murder in the first degree and thereby subject to the death penalty. However, he stated that the various facts and circumstances of each case were determinative in deciding that question. Additionally, in response to a question posed by defense counsel concerning why the death penalty was being sought against defendant, Mr. Yates responded, "Mr. Browne, I'm trying him for first degree murder. I consulted with the family. It's their feeling that they want to pursue first degree murder. Only if the family wanted a plea to second degree murder would it be possible for that plea to be entered." Mr. Yates also stated that he always, if possible, consulted with the victim's family to consider their feelings about the case. However, he stated that the wishes of the family were only one of many factors that he and his staff considered. Based primarily on the above evidence, defendant asserts that the State should have been barred from prosecuting him for murder in the first degree. We disagree.

In *State v. Spicer*, 299 N.C. 309, 261 S.E. 2d 893 (1980), this Court addressed similar arguments relating to the discretionary powers of the district attorney. In *Spicer*, the defendant alleged that in other cases where the prosecuting witness indicated that he or she did not desire to have the case prosecuted, the district attorney had dropped the charges. However, the defendant contended that in his case, the district attorney would not drop the charges against him, even though the prosecuting witnesses in-

dicated that they did not want to prosecute the case. Therefore, defendant Spicer claimed that he was being denied equal protection of the laws.

In *Spicer*, this Court recognized that the district attorney may not, "during the exercise of his discretion, transcend the boundaries of the Fourteenth Amendment's guarantee of equal protection." *Id.* at 312, 261 S.E. 2d at 895. However, this Court stated:

> District attorneys have wide discretion in performing the duties of their office. This encompasses the discretion to decide who will or will not be prosecuted. In making such decisions, district attorneys must weigh many factors such as 'the likelihood of successful prosecution, the social value of obtaining a conviction as against the time and expense to the State, and his own sense of justice in the particular case.' Comment, *The Right to Nondiscriminatory Enforcement of State Penal Laws*, 61 Columbia L. Rev. 1103, 1119 (1961). The proper exercise of his broad discretion in his consideration of factors which relate to the administration of criminal justice aids tremendously in achieving the goal of fair and effective administration of the criminal justice system.
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> . . . .
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> Even if all other cases had been dismissed, defendant has still not sufficiently alleged a denial of equal protection. A defendant must show more than simply that discretion has been exercised in the application of a law resulting in unequal treatment among individuals. He must show that in the exercise of that discretion there has been intentional or deliberate discrimination by design. *Oyler v. Boles, supra; Edelman v. California*, 344 U.S. 357, 97 L.Ed. 387, 73 S.Ct. 293 (1953); *Sunday Lake Iron Co. v. Township of Wakefield*, 247 U.S. 350, 62 L.Ed. 1154, 38 S.Ct. 495 (1918).

Id. at 311-12, 261 S.E. 2d at 895-96. Additionally, in *Oyler v. Boles*, 368 U.S. 448, 82 S.Ct. 501, 7 L.Ed. 2d 446 (1962), a case which challenged, *inter alia*, the allegedly selective enforcement of West Virginia's habitual criminal statute on equal protection grounds, the United States Supreme Court stated that in order to allege grounds supporting a finding of a denial of equal protection, it must be stated "that the selection was deliberately based upon an

unjustifiable standard such as race, religion, or other arbitrary classification." *Id.* at 456, 82 S.Ct. at 506, 7 L.Ed. 2d at 453.

[1, 2] Based upon the foregoing, it is quite clear that defendant has failed to meet his burden in this case. Defendant's allegations and evidence fail to show that the district attorney's decision to prosecute him for murder in the first degree and seek the death penalty was based upon "an unjustifiable standard such as race, religion, or other arbitrary classification." *Id. See also State v. Lawson*, 310 N.C. 632, 314 S.E. 2d 493 (1984). We find nothing impermissible about the district attorney's consideration of the wishes of the family as *one factor* in determining which defendants will be prosecuted for murder in the first degree and thereby subjected to the death penalty.

[3] We also find that the district attorney's lack of written guidelines for determining who will be charged and prosecuted for murder in the first degree does not violate defendant's right to equal protection of the laws. As is quite apparent, every murder case and every defendant are different. Neither the federal constitution, our state constitution, nor the statutory or case law of this State *require* that district attorneys establish such guidelines.

Basically, all the defendant has shown in this case is that the district attorney has exercised his discretion concerning the application of the law which has resulted in different cases being treated differently. Such a result necessarily follows from the exercise of a discretionary power. "[T]he conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation." *Oyler*, 368 U.S. at 456, 82 S.Ct. at 506, 7 L.Ed. 2d at 453. Defendant's assignment of error is rejected.

III.

[4] Defendant contends that the trial court erred by denying him funds to hire a private investigator. In support of his contention, he argues that indigent defendants in other counties have access to private investigators. Defendant also states that due to the number of legal issues involved in his case, defense counsel did not have enough time to interview all potential witnesses who might have been essential in providing him an adequate defense.

The trial court properly denied defendant's request for the appointment of a private investigator at State expense based on the bare allegations made by defendant. Under the settled case law of North Carolina, the appointment of an expert assistant, a private investigator in the instant case, is necessary "only upon a showing by the 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 the defendant will not receive a fair trial." *State v. Williams*, 305 N.C. 656, 670, 292 S.E. 2d 243, 252-53 (1982), *reh'g denied*, 103 S.Ct. 839 (1983); *See also 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). As stated in *Tatum*, "[m]ere hope or suspicion that such evidence is available will not suffice." *Tatum*, 291 N.C. at 82, 229 S.E. 2d at 568. Defendant's allegations do not amount to a clear showing that specific evidence was reasonably available or necessary for a proper defense. Therefore, the trial court properly denied defendant's request for funds to hire a private investigator.

IV.

[5] Defendant assigns as error the trial court's denial of his motion for sanctions against the State because the district attorney allegedly obstructed his attorneys' access to two State witnesses. As sanctions, defendant attempted to have the testimony of the two witnesses excluded. Now, since both witnesses' testimony was admitted, defendant seeks a new trial.

"[A] prosecutor has an implicit duty not to *obstruct* defense attempts to conduct interviews with *any* witnesses; however, a reversal for this kind of professional misconduct is only warranted when it is clearly demonstrated that the prosecutor affirmatively instructed a witness not to cooperate with the defense." *State v. Pinch*, 306 N.C. 1, 12, 292 S.E. 2d 203, 214-15 (1982), *reh'g denied*, 103 S.Ct. 839 (1983) (emphasis in original); *See also State v. Mason*, 295 N.C. 584, 248 S.E. 2d 241 (1978), *cert. denied*, 440 U.S. 984 (1979).

In the instant case, one of the State's witnesses, Sheila Wilson, was instructed by the district attorney that she did not have to speak with the defendant's attorney, unless she wanted to do so. This instruction by the district attorney was permissible.

See Mason, 295 N.C. at 588, 248 S.E. 2d at 244. We note that Ms. Wilson did eventually confer with defense counsel.

The other witness, Jeffery Sealy, was incarcerated at the Randolph County Jail when defendant's attorneys went to the jail to see him. A detective at the jail told defendant's attorneys that they could not talk with Mr. Sealy unless they obtained the permission of the district attorney. The detective testified that he told defendant's attorneys to obtain the permission of the district attorney on his own volition and not because the district attorney had given him any instructions concerning Mr. Sealy's visitors. The detective also testified that he told defendant's attorneys to contact the district attorney because Mr. Sealy's attorney was out of town and he knew that Mr. Sealy's attorney did not want Mr. Sealy to talk to them. The defendant's attorneys were unable to contact the district attorney on that day. Therefore, they were unable to talk with Mr. Sealy.[1]

The defendant's evidence does not show that the district attorney, or anyone acting pursuant to his instructions, affirmatively instructed any witnesses not to cooperate with the defendant's attorneys. The evidence was clearly insufficient, standing alone, to establish an obstruction of access to either witness sufficient to impose sanctions in the form of excluding their testimony at the trial of the instant case. *State v. Pinch*, 306 N.C. 1, 292 S.E. 2d 203 (1982), *reh'g denied*, 103 S.Ct. 839 (1983); *State v. Mason*, 295 N.C. 584, 248 S.E. 2d 241 (1978), *cert. denied*, 440 U.S. 984 (1979). This assignment of error is rejected.

V.

[6] Defendant contends that statements made by three witnesses for the State concerning his character and arrest record were so prejudicial that his motion for a mistrial should have been granted, especially since he did not testify at trial. During the course of the trial the witnesses testified as follows: Roscoe Light testified that he had seen defendant "two days after he had gotten out of prison"; Sheila Wilson testified that she and the

1. The record evidence does not show whether defense counsel attempted on another occasion to interview Mr. Sealy. However, based upon the arguments of counsel to the judge during the consideration of this motion, it appears that no other attempts were made.

defendant "went to pawn some of the stuff he [the defendant] had stolen"; and Randy Currie, a former cellmate of the defendant, testified that defendant "was kind of upset about a whole lot of things and he got to telling me, you know, about he got charged with three counts of breaking and entering." After each witness had made the above statements, defense counsel's objections to the testimony were immediately sustained, and the trial judge promptly gave a curative instruction admonishing the jury not to consider that evidence. However, despite the trial judge's instructions, defendant contends that the cumulative effect of the incompetent evidence prejudiced the minds of the jurors.

We find the following language in *State v. Aycoth*, 270 N.C. 270, 154 S.E. 2d 59 (1967) instructive on this point:

> 'In appraising the effect of incompetent evidence once admitted and afterwards withdrawn, the Court will look to the nature of the evidence and its probable influence upon the minds of the jury in reaching a verdict. In some instances because of the serious character and gravity of the incompetent evidence and the obvious difficulty in erasing it from the mind, the Court has held to the opinion that a subsequent withdrawal did not cure the error. But in other cases the trial courts have freely exercised the privilege, which is not only a matter of custom but almost a matter of necessity in the supervision of a lengthy trial. Ordinarily where the evidence is withdrawn no error is committed.' *S. v. Strickland*, 229 N.C. 201, 207, 49 S.E. 2d 469, 473; *S. v. Green*, 251 N.C. 40, 46, 110 S.E. 2d 609, 613, and cases cited. This is also the rule when unresponsive answers of a witness include incompetent prejudicial statements and the court on motion or *ex mero motu* instructs the jury they are not to consider such testimony. *S. v. Brown*, 266 N.C. 55, 145 S.E. 2d 297. Whether the prejudicial effect of such incompetent statements should be deemed cured by such instructions depends upon the nature of the evidence and the circumstances of the particular case. *S. v. Aldridge*, 254 N.C. 297, 118 S.E. 2d 766.

Id. at 272-73, 154 S.E. 2d at 60-61.

Since the defendant did not testify at trial, evidence concerning his bad character was not admissible. *See State v. Robbins*, 287 N.C. 483, 214 S.E. 2d 756 (1975), *death sentence vacated*, 428

U.S. 903 (1976); *State v. Jarrette*, 284 N.C. 625, 202 S.E. 2d 721 (1974), *death sentence vacated*, 428 U.S. 903 (1976). Therefore, the trial judge properly sustained defendant's objections to the witnesses' testimony.

After carefully reviewing the circumstances under which the incompetent evidence was heard by the jury, along with all of the other evidence presented in this case, we have concluded that the prejudicial effect, if any, of the incompetent evidence was cured by the trial judge's instructions. *State v. Smith*, 301 N.C. 695, 272 S.E. 2d 852 (1981); *State v. Pruitt*, 301 N.C. 683, 273 S.E. 2d 264 (1981); *Robbins*, 287 N.C. at 488-89, 214 S.E. 2d at 760-61. We are convinced that the testimony of each witness, even when considered cumulatively, did not in any way affect the outcome of the trial. In short, that there is no reasonable possibility, that had the incompetent evidence not been heard by the jury, a different result would have been reached at the trial. *See* N.C. Gen. Stat. § 15A-1443(a) (1983). "Verdicts and judgments are not to be lightly set aside, nor for any improper ruling which did not materially and adversely affect the result of the trial." *State v. Bovender*, 233 N.C. 683, 690, 65 S.E. 2d 323, 330 (1951). The trial court correctly denied defendant's motion for a mistrial.

VI.

[7] Defendant next alleges that reversible error was committed when the trial judge sustained an objection to a question asked of Mr. Sealy by defense counsel on cross-examination concerning whether he had obtained money by passing forged checks.

A witness in a trial may be impeached and discredited by cross-examination. *State v. Dawson*, 302 N.C. 581, 276 S.E. 2d 348 (1981); *State v. Waddell*, 289 N.C. 19, 220 S.E. 2d 293 (1975), *death sentence vacated*, 428 U.S. 904 (1976). In order to impeach the witness' credibility, the witness may be asked whether he has committed specified criminal acts or has been guilty of identifiable specific acts of degrading conduct. *Dawson*, 302 N.C. at 584-85, 276 S.E. 2d at 351; *Waddell*, 289 N.C. at 26, 220 S.E. 2d at 298. However, it is within the trial judge's discretion to control the scope of cross-examination, and his rulings thereon will not be disturbed unless it is shown that the verdict is improperly influenced thereby. *Id.* at 26, 220 S.E. 2d at 298-99.

Although we agree that the question asked by defense counsel was proper under the circumstances, it does not appear that the trial judge's ruling influenced the verdict in this case. Thus, the error was not prejudicial.

VII.

[8] We also hold that the trial judge did not err by allowing the State to ask some arguably leading questions of two State witnesses. Neither the content of the questions nor their number were excessive. "A presiding judge has wide discretion in permitting or restricting leading questions, and his rulings will not be disturbed when the evidence is otherwise competent, absent a showing of abuse of discretion." *State v. Williams*, 304 N.C. 394, 418, 284 S.E. 2d 437, 452 (1981), *cert. denied*, 456 U.S. 932 (1982). We find nothing in the questions or answers to show an abuse of discretion.

VIII.

[9] During the course of the trial, Detective Charles Ratcliff was allowed to read into evidence a prior statement of witness Randy Currie in order to corroborate his testimony. Defendant contends that portions of the statement were not corroborative of Mr. Currie's testimony and, therefore, the uncorroborative portions of the statement should have been excluded. The trial transcript shows that whenever Detective Ratcliff started to read portions of the statement which were not corroborative of Mr. Currie's prior testimony and the defendant entered a timely objection, the trial judge stopped the testimony of Detective Ratcliff and excluded those portions of the statement which were not corroborative. This practice was approved by this Court in *State v. Madden*, 292 N.C. 114, 232 S.E. 2d 656 (1977). We find no error in following it here.

IX.

[10] Defendant also contends that the trial court erred in denying his motion for mistrial based upon his allegation that the prosecutor made an impermissible reference to his failure to testify at trial. Defendant argues that the following statement made by the District Attorney during closing arguments was a comment upon his failure to testify:

> This is the gun of Mr. Teel. This was the gun that was taken off of him, off of his body. This was the gun that was thrown in the river. Why the defendant threw this gun in the river? I have no idea why he threw that gun in the river. His statement to Randy Currie would indicated that he thought he threw the other gun in the river. I don't know. That's something no one here can answer except the defendant. How did the murder take place? That's another question.

Defendant did not object to the prosecutor's argument at the time the above statements were made. His objection was made in the form of a motion for mistrial at the close of the district attorney's argument to the jury. This motion was denied. The trial judge's offer to give a curative instruction to the jury was rejected by the defendant. The defendant's closing argument and the trial judge's charge to the jury emphasized the presumption of innocence of the defendant and the State's burden of proving its case beyond a reasonable doubt. Assuming, *arguendo*, that the prosecutor's statement could be construed as an impermissible comment on defendant's failure to testify, it was not so extreme or so clearly calculated to prejudice the jury that the trial judge should have *ex mero motu* instructed the jury to disregard the remarks. Whatever error there may have been, it was cured by the trial judge's instructions to the jury. *See State v. Hardy*, 299 N.C. 445, 263 S.E. 2d 711 (1980). This assignment of error is rejected.

X.

According to defendant, the last assignments of error asserted by him were raised for preservation purposes. Those assignments of error are: (1) that the trial court erred in denying defendant's motion to dismiss; (2) that the trial court erred in denying defendant's motion for appropriate relief; and, (3) that the trial court erred in signing the judgment and commitment.

Defendant's motion to dismiss was properly denied. There was substantial evidence presented at trial of each essential element of the crime charged and of the defendant being the perpetrator of the crime. *State v. Hinson*, 310 N.C. 245, 311 S.E. 2d 256 (1984); *State v. Tysor*, 307 N.C. 679, 300 S.E. 2d 366 (1983). Additionally, no prejudicial error occurred during defendant's trial which would provide a basis for granting his motion for ap-

propriate relief. Accordingly, the trial judge did not err in signing the judgment and commitment.

Defendant received a fair trial free from prejudicial error.

No error.

STATE OF NORTH CAROLINA v. E. Z. BELL

No. 598A83

(Filed 5 June 1984)

1. Kidnapping § 1— indictment for first degree kidnapping

A proper indictment for first degree kidnapping must not only allege the elements of kidnapping set forth in G.S. 14-39(a) but must also allege one of the elements set forth in G.S. 14-39(b), to wit, that the victim was not released in a safe place, was seriously injured, or was sexually assaulted. Where the indictments failed to allege any one of the elements set forth in G.S. 14-39(b), the jury's verdicts of guilty of kidnapping will be considered as verdicts of guilty of kidnapping in the second degree.

2. Rape and Allied Offenses § 3— indictments for attempted rape—failure to allege victims were females

Indictments were not insufficient to charge crimes of attempted rape because they failed to allege that the victims of the crimes named in the indictments were females. If defendant had serious doubts as to the gender of his victims, he was free to determine that fact by moving for a bill of particulars. G.S. 15-144.1(a).

3. Rape and Allied Offenses § 5— first degree sexual offense by aiding and abetting—sufficiency of evidence

The State's evidence was sufficient to support defendant's conviction of a first degree sexual offense based on the theory that he aided and abetted his brother in the commission of the offense where it tended to show that defendant had, earlier in the evening, actively supported his brother's ultimatum to two girls that either they would have sex or walk back to Shaw University from a secluded area on the outskirts of Cary; defendant, together with his brother, refused to let the girls out of the car when they returned to Raleigh; defendant and his brother discussed which girl each wanted and defendant's brother stated repeatedly that he was going to "get some [sex]"; defendant told the girls to take off their clothes or he and his brother would take them off; defendant left the car with one of the girls but thereafter returned to warn his brother that the girl had escaped and the police had been called; defendant knew that his brother was attempting to rape the second girl in the car; the second girl was upset, crying, and fighting off defendant's brother as

defendant attempted to drive the car to a different location; and the sex offense by defendant's brother occurred during this time.

4. Rape and Allied Offenses § 5— attempted first degree rape—guilt as aider and abettor

Defendant was properly convicted of attempted first degree rape as an aider and abettor where the evidence tended to show that defendant's brother intended to have sexual intercourse with the victim by force and without her consent, and that in defendant's presence and with his encouragement, defendant's brother physically forced himself upon the victim with the intent to rape her.

5. Rape and Allied Offenses § 5— attempted first degree rape—defendant aided and abetted by another

The State's evidence was sufficient to sustain the conviction of defendant for attempted first degree rape on the theory that defendant was aided and abetted in this attempt by his brother where it tended to show that defendant, with the assistance and encouragement of his brother, kept the victim and another female confined in the car until they reached a secluded area, that during this time the two men discussed which girl each wanted, that there were repeated references to "getting some [sex]," and that defendant ordered the females to take off their clothes or he and his brother would take them off, *notwithstanding defendant's actual physical assault on the victim took* place outside the presence of his brother after defendant and the victim had left the car, since the attempt was complete upon defendant's act in ordering the females to remove their clothes.

6. Conspiracy § 6; Rape and Allied Offenses § 5— conspiracy to commit rape—*sufficiency of evidence*

The evidence of record, including evidence of the continuing shared mutual intent of defendant and his brother to take the victims to a secluded place and there to engage in sexual intercourse with the victims by force and against their will, was sufficient to permit, but not compel, the jury to conclude that a conspiracy to commit the sexual assaults against the victims was formed between defendant and his brother.

7. Conspiracy § 5.1; Criminal Law § 79— acts and statements of co-conspirator

The acts and statements of defendant's co-conspirator, his brother, were properly admitted into evidence where the State established a prima facie case of conspiracy by defendant and his brother to commit rape.

8. Criminal Law § 42.6— knife found in inventory search of car—chain of custody

A hawkbill knife found in the glove compartment of a car during an inventory search was not inadmissible on the ground that the State could not show an unbroken chain of custody because the inventory search was not conducted until after the car had remained in a garage overnight where a voir dire hearing disclosed that the automobile was locked by an officer who kept the keys; it was then towed to a privately owned garage which was experienced in handling vehicles involved in crimes; the automobile was placed in a locked area within the garage where it remained until law officers searched the ve-

hicle less than six hours later; when officers appeared at the garage, the vehicle was secure in its locked area; and the officer who had the key to the vehicle could see no change in its condition.

9. Criminal Law § 33.3; Rape and Allied Offenses §4— sexual offenses—admission of knife not used in crimes

Although a hawkbill knife found in the glove compartment of a car used in the crimes of kidnapping, attempted rape and sexual offense was neither used nor displayed during the course of the crimes and bore only slight relevance thereto, its admission into evidence was not prejudicial error where defendant failed to show that this evidence so inflamed the jury as to affect the outcome of the trial.

BEFORE *Preston, J.*, at the 6 September 1983 Criminal Session of Superior Court, WAKE County, defendant was tried and convicted of the following offenses: one count of first degree sex offense; two counts of attempted first degree rape; two counts of first degree kidnapping; and one count of conspiracy to commit rape. He was sentenced in a consolidated judgment to life imprisonment for the first degree sex offense and one count of attempted first degree rape; six years for the second count of attempted first degree rape, to run concurrently with the life sentence; two twelve year sentences for two counts of first degree kidnapping, to run concurrently with the life sentence; and one year for conspiracy to commit rape, to run concurrently with the life sentence. Defendant appeals of right pursuant to G.S. § 7A-27(a) from the imposition of a life sentence. Motion to bypass the Court of Appeals on the additional sentences was allowed 8 December 1983. Heard in the Supreme Court 9 April 1984.

In addition to assigning error to the admission of a co-conspirator's statements and evidence of a knife, defendant challenges the sufficiency of indictments charging kidnapping and attempted rape, and sufficiency of the evidence on the charge of first degree sex offense, attempted rape and conspiracy.

We find no error in the convictions and sentences for the crimes of first degree sex offense, the attempted rapes, and conspiracy. For error in the kidnapping indictments in failing to allege the applicable element of G.S. § 14-39(b), we remand those cases for entry of judgments for second degree kidnapping and sentencing thereon.

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

Mike Dodd, attorney for defendant-appellant.

MEYER, Justice.

Facts necessary to a determination of the issues raised are as follows:

On 10 March 1983, in the early evening, defendant and his brother, David Bell, "picked up" two young women as the women were walking from Shaw University to Chavis Heights in the City of Raleigh. Both girls, Janice Williams and Dierdre (Dee) Clark, testified at trial. Janice testified that David Bell was driving a beige Chevrolet Chevette. He and the defendant asked the two girls if they wanted a ride to the park. Janice got into the front passenger seat, while Dee sat in the back seat with the defendant. They drove to a convenience store and bought beer and cigarettes. They then drove to Durham, stopping at another store, and again to play pinball while David used the restroom. In Durham they briefly visited defendant's sister. Upon returning to Raleigh, David Bell turned off the Interstate and drove to a secluded dirt road somewhere near Cary and stopped the car. David informed the girls that they had a choice of having sex with him and the defendant or walking home. Although neither of the girls knew where they were, they left the car and began walking. After a few minutes David drove the car alongside the girls and told them he would return them to Shaw as it was too far to walk. Both girls got into the back seat.

David drove the car through Cary to Hillsborough Street in Raleigh. When they reached the Capitol, Janice asked David to let them out as they could walk back to Shaw. David replied that the defendant had put gas in the car and that they would remain in the car until he said otherwise. Janice continued to ask to be let out. Following another stop at a convenience store, David drove down Poole Road. Janice attempted to escape by opening the passenger door from the back where she was seated. David Bell then stated, "let the stupid bitch fall out. If she doesn't kill herself, like that, then my gun or machete will kill her or hurt her." David Bell and the defendant then discussed which girl each wanted. David stopped the car in a secluded area off Hodge Road

(Leonard Road). Defendant ordered the girls to begin removing their clothes because if they didn't, "[W]e will take them off for you."

Janice convinced the defendant to leave the car and go for a walk. She asked defendant why he was treating her this way and he replied "don't come at me with that southern bull sh-- talk" and he grabbed her by her jacket. She was afraid he would hit her if she refused to comply with his sexual demands. Shortly afterwards she managed to break away and run to a nearby house for help. There was no one at home. The defendant caught her, hit her in the face, and pushed her between the door and the screen door. Janice was screaming loudly and the defendant ran off. She then went to another nearby house where Deborah Daniel, the occupant, promised to call the sheriff. Upon Ms. Daniel's advice, Janice went across the street to the home of Berry Bailey who also called the sheriff and stayed with Janice until the patrol car arrived. Both Ms. Daniel and Mr. Bailey described Janice as being extremely upset and concerned about her friend.

Dee Clark's account was substantially similar to that given by Janice Williams. In addition, Dee testified that as soon as the defendant and Janice left the car on Leonard Road, David Bell climbed into the back seat, removed his pants and after removing her clothes, attempted to have sexual intercourse with her. When defendant arrived back at the car after leaving Janice, he banged on the door and David let him in. David continued his assault on Dee, succeeding only in inserting his finger in her vagina, while defendant attempted to drive the car to a different location. At this time, defendant told David "[I]f you don't get some, I am." Defendant was unable to drive a manual transmission car so David climbed into the front seat and started the car as Deputy Stone arrived and drove in front of the Chevette, blocking the escape. The deputy approached the Chevette and ordered David Bell and the defendant out. David, however, put the car in reverse, catching the deputy with the open car door. The deputy shot David Bell. The defendant was arrested.

The defendant testified on his own behalf. He stated that he did want to have sex with the girls, but he wanted it to be voluntary; that he did not force himself upon anyone; and that although

he was aware that David Bell was attempting to rape Dee Clark, he considered that to be his brother's business.

[1] Defendant first contends that the trial court erred in failing to dismiss the indictments charging first degree kidnapping. He bases his argument upon the authority of our recent holding in *State v. Jerrett*, 309 N.C. 239, 307 S.E. 2d 339 (1983). We agree.

The indictments in the present case provide as follows:

INDICTMENT – KIDNAPPING (83CRS16188)

STATE OF NORTH CAROLINA	In the General Court of Justice
County of Wake	Superior Court Division

The State of North Carolina

vs.

E. Z. BELL, Defendant

THE JURORS FOR THE STATE UPON THEIR OATH PRESENT that on or about the 10th day of March, 1983, in Wake County E. Z. Bell unlawfully and wilfully did feloniously kidnap Dierdre Lynnette Clark, a person who had attained the age of 16 years, by unlawfully confining her; restraining her; and removing her from one place to another, without her consent; for the purpose of facilitating the commission of a felony, to wit: Rape or First Degree Sexual Offense. This act is in violation of the following: G.S. 14-39, and against the peace and dignity of the State.

The language in the second indictment parallels that above, alleging that the defendant kidnapped Janice Harriette Williams.

G.S. § 14-39 provides in pertinent part that:

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

(4) Holding such other person in involuntary servitude in violation of G.S. 14-43.2.

(b) There shall be two degrees of kidnapping as defined by subsection (a). If the person kidnapped either was not released by the defendant in a safe place or had been seriously injured or sexually assaulted, the offense is kidnapping in the first degree and is punishable as a Class D felony. If the person kidnapped was released in a safe place by the defendant and had not been seriously injured or sexually assaulted, the offense is kidnapping in the second degree and is punishable as a Class E felony.

In *Jerrett* we held that in order to properly indict a defendant for first degree kidnapping, it was necessary for the State to allege both the essential elements of kidnapping as provided in G.S. § 14-39(a) *and* at least one of the elements of first degree kidnapping listed in G.S. § 14-39(b), to wit: that the victim was not released in a safe place, was seriously injured, or was sexually assaulted. The indictments in the present case fail to allege any one of the elements of first degree kidnapping as set out in G.S. § 14-39(b). They are, however, sufficient to support a conviction for second degree kidnapping. Therefore, the jury's verdicts will be considered verdicts of guilty of kidnapping in the second degree. The judgments imposed upon the verdicts of guilty of kidnapping in the first degree must be vacated and the cases remanded to Superior Court, Wake County, for judgments and resentencing as upon verdicts of guilty of kidnapping in the second degree. *See State v. Corley*, 310 N.C. 40, 311 S.E. 2d 540 (1984).

[2] Defendant next contends that the indictments for attempted rape are insufficient to allege the crime charged because neither indictment alleges that the victims of the crimes were females.

G.S. § 15-144.1 provides in pertinent part that:

(a) In indictments for rape it is not necessary to allege every matter required to be proved on the trial; but in the body of the indictment, after naming the person accused, the date of the offense, the county in which the offense of rape was allegedly committed, and the averment "with force and arms," as is now usual, it is sufficient in describing rape to allege that the accused person unlawfully, willfully, and feloniously did ravish and carnally know the victim, naming her, by force and against her will and concluding as is now required by law. Any bill of indictment containing the averments and allegations herein named shall be good and sufficient in law as an indictment for rape in the first degree and will support a verdict of guilty of rape in the first degree, rape in the second degree, attempted rape or assault on a female.

In the present case the indictments complied fully with the requirements set forth above and were fully sufficient to charge attempted rape. Defendant presents a hypertechnical argument and offers no indication of how he has been prejudiced or misled by the State's failure to specifically state that *Dierdre Lynnette* Clark and *Janice Harriette* Williams were females. If defendant had serious doubts as to the gender of his victims, he was free to determine that fact by moving for a Bill of Particulars. *See e.g. State v. Whitfield*, 310 N.C. 608, 313 S.E. 2d 790 (1984); *State v. Effler*, 309 N.C. 742, 309 S.E. 2d 203 (1983). This assignment of error is overruled.

[3] Defendant contends that the evidence was insufficient as a matter of law to go to the jury on the indictment for first degree sexual offense.

It is well established law that in ruling on a motion to dismiss, the trial court is to consider the evidence in the light most favorable to the State; that the State is entitled to every reasonable inference to be drawn therefrom; that contradictions and discrepancies are for the jury to resolve; and that the defendant's evidence, unless favorable to the State, is not to be taken into consideration. *State v. Earnhardt*, 307 N.C. 62, 296 S.E. 2d 649 (1982).

On the facts presented the only theory upon which defendant's conviction of first degree sexual offense can be upheld is

that of aiding and abetting his brother, David Bell, in the commission of a first degree sex offense on Dierdre Clark. *See* G.S. § 14-27.4(a)(2)c. It is defendant's contention that his conduct amounted to nothing more than mere presence at the scene, and that there was no showing that he "knowingly encouraged, instigated or aided his brother in committing the crime." We disagree.

The relevant principles of law on this issue are as follows:

> All who are present at the place of a crime and are either aiding, abetting, assisting, or advising in its commission, or are present for such purpose to the knowledge of the actual perpetrator, are principals and equally guilty. (Citations.) An aider and abettor is one who advises, counsels, procures, or encourages another to commit a crime. (Citations.) To render one who does not actually participate in the commission of a crime guilty of the offense committed, there must be some evidence tending 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 lend assistance when and if it should become necessary. (Citations.) *State v. Ham*, 238 N.C. 94, 97, 76 S.E. 2d 346, 348; *State v. Burgess*, 245 N.C. 304, 309, 96 S.E. 2d 54, 58; *State v. Horner*, 248 N.C. 342, 350, 103 S.E. 2d 694, 700; *State v. Hargett*, 255 N.C. 412, 415, 121 S.E. 2d 589, 592; *State v. Gaines*, 260 N.C. 228, 231, 132 S.E. 2d 485, 487.

State v. Aycoth, 272 N.C. 48, 51, 157 S.E. 2d 655, 657 (1967); *see State v. Barnette*, 304 N.C. 447, 284 S.E. 2d 298 (1981).

In the present case, the evidence, when taken in the light most favorable to the State, tends to show: The defendant had, earlier in the evening, actively supported David Bell's ultimatum to the girls that either they would have sex or walk back to Shaw from the secluded area on the outskirts of Cary. Defendant, together with his brother, refused to let the girls out of the car when they returned to Raleigh. When they turned off Poole Road, defendant and his brother discussed which girl each wanted and David stated repeatedly that he was going to "get some [sex]." Defendant told the girls to take off their clothes or he and his brother would take them off.

The defendant returned to the car to warn his brother, David Bell, that Janice had escaped and the police had been called. He knew that David Bell was attempting to rape Dierdre and in fact at one point stated, "[I]f you don't get some, I am." Dierdre was upset, crying, and fighting off David Bell as the defendant attempted to drive the car to a different location. During this time the sex offense occurred. We find this evidence sufficient to support defendant's conviction of first degree sex offense based on the theory that he aided and abetted David Bell in the commission of the offense. *See State v. Barnette*, 304 N.C. 447, 284 S.E. 2d 298. *See also State v. Polk*, 309 N.C. 559, 308 S.E. 2d 296 (1983).

Defendant contends that the evidence was insufficient as a matter of law to go to the jury on the indictments for attempted first degree rape.

[4] The evidence, as recited herein, leaves little doubt that David Bell attempted to rape Dierdre Clark and that the defendant aided and abetted in this attempt. The two elements of attempted rape are the intent to commit rape and an overt act done for that purpose which goes beyond mere preparation but falls short of the completed offense. *State v. Freeman*, 307 N.C. 445, 298 S.E. 2d 376 (1983). Here there is plenary evidence that David Bell intended to have sexual intercourse with the victim, Dierdre Clark, by force and without her consent. In defendant's presence and with his encouragement, David Bell physically forced himself upon Dierdre Clark intending to rape her. Defendant was properly convicted of the attempted first degree rape of Dierdre Clark.

[5] With respect to defendant's conviction of the attempted first degree rape of Janice Williams, the evidence is likewise clear that the defendant intended to rape this victim. With the assistance and encouragement of his brother, David Bell, the defendant kept the victim confined in the car until they reached a secluded area off Hodge Road. During this time the two men discussed which girl each wanted. There were repeated references to "get[ting] some [sex]." This evidence of intent, coupled with defendant's act in ordering the women to remove their clothes, was sufficient to sustain his conviction for the attempted first degree rape of Janice Williams on the theory that defendant was aided and abetted in this attempt by his brother. While it is true that the actual physical assault on Janice took place outside the presence

of David Bell, we nevertheless believe that, on the facts as presented, the attempt was complete upon defendant's act in ordering the women to remove their clothes, an act which served to make the intent unequivocal. Because "the reason for requiring an overt act is that without it there is too much uncertainty as to what the intent actually was," "whenever the design of a person to commit a crime is clearly shown, slight acts in furtherance of the design will constitute an attempt." 21 Am. Jur. 2d *Criminal Law* § 159 (1981). This assignment of error is overruled.

[6] We likewise find no merit to defendant's final contention challenging the sufficiency of the evidence on the indictment for conspiracy to commit the rape of Janice Williams and Dierdre Clark.

A criminal conspiracy is an agreement between two or more people to do an unlawful act or to do a lawful act in an unlawful way. *State v. LeDuc*, 306 N.C. 62, 291 S.E. 2d 607 (1982); *State v. Bindyke*, 288 N.C. 608, 220 S.E. 2d 521 (1975). The agreement may be an express understanding or a mutual, implied understanding. *Id.* The existence of a conspiracy may be established by direct or circumstantial evidence. *Id.*

We believe that the evidence of record, including evidence of the continuing shared mutual intent of the defendant and his brother to take the victims to a secluded place and there to engage in sexual intercourse with the victims by force and against their will, was sufficient to permit, but not compel, the jury to conclude that a conspiracy to commit the sexual assaults against the victims was formed between defendant and his brother. *See State v. Polk*, 309 N.C. 559, 308 S.E. 2d 296.

[7] Defendant next contends that the trial judge erred in admitting David Bell's statements as testified to by Janice Williams. He argues that the State failed to establish the existence of a conspiracy, therefore the statements constituted hearsay testimony and their admission violated his sixth amendment right to confrontation.

In *State v. Polk*, 309 N.C. 559, 564, 308 S.E. 2d 296, 298-99, we stated that:

> The rule governing the admission of co-conspirators' statements is that once the State has made a *prima facie*

showing of the existence of a conspiracy, "the acts and declarations of each party to it in furtherance of its objectives are admissible against the other members." *State v. Conrad*, 275 N.C. 342, 348, 168 S.E. 2d 39, 43 (1969). Prior to considering the acts or declarations of one co-conspirator as evidence against another, there must be a showing that:

> (1) a conspiracy existed; (2) the acts or declarations were made by a party to it and in pursuance of its objectives; and (3) while it was active, that is, after it was formed and before it ended.

We further stated that:

> Because of the nature of a conspiracy, the State can seldom establish a *prima facie* case of conspiracy by extrinsic evidence before tendering the acts and declarations of the conspirators which link them to the crimes charged. Therefore, our courts often permit the State to offer the acts or declarations of a conspirator before the *prima facie* case of conspiracy is sufficiently established.

Id. at 565-66, 308 S.E. 2d at 299.

We have held that the facts of this case were sufficient to establish a *prima facie* case of conspiracy to commit rape. As such, the acts and statements of the co-conspirator, defendant's brother, were properly admitted into evidence. This assignment of error is overruled.

Finally, defendant assigns as error the admission into evidence of a hawkbill knife found in the glove compartment of David Bell's car during an inventory search. He bases his argument on relevancy and chain of custody grounds. The weapon was not used or displayed during the commission of the crimes.

[8] We reject defendant's chain of custody argument by which he contends that, because the inventory search was not conducted until after the car had remained in a garage overnight, the State could not show an unbroken chain of custody. A voir dire hearing on this issue disclosed the following facts:

(1) Law enforcement officials were at the scene of the incident from the time of the initial confrontation until the ar-

rival of Officer J. L. Roberts of the City-County Bureau of Investigation.

(2) Officer Roberts processes crime scenes for physical evidence.

(3) The automobile was locked by Officer Roberts. One window was partially broken out. Officer Roberts kept the keys.

(4) The auto was then towed to a privately owned garage which was experienced in handling vehicles involved in crimes.

(5) The auto was placed in a locked area within the garage where it remained until law enforcement authorities searched the vehicle less than six hours later at 6:00 a.m. on March 11, 1983.

(6) When the law enforcement authorities appeared at the garage, the vehicle was secure in its locked area.

(7) Officer Roberts saw no change in the condition of the vehicle.

(8) The knife was found during the search of the vehicle at the garage.

In *State v. Abernathy*, 295 N.C. 147, 161, 244 S.E. 2d 373, 382 (1978), in response to a similar challenge, we stated:

> Of the authentication of real evidence, this Court has said: "There are no simple standards for determining whether an object sought to be offered in evidence has been sufficiently identified as being the same object involved in the incident giving rise to the trial and shown to have been unchanged in any material respect. . . . Consequently, the trial judge possesses and must exercise a sound discretion in determining the standard of certainty required to show that the object offered is the same as the object involved in the incident giving rise to the trial and that the object is in an unchanged condition. [Citations omitted.]" *State v. Harbison*, 293 N.C. 474, 238 S.E. 2d 449 (1977). *See also* McCormick, Evidence § 212 (2d Ed. 1972).

We believe that under the present facts the trial judge properly admitted the hawkbill knife into evidence.

[9] We agree with the defendant that, inasmuch as the knife was neither used nor displayed during the course of the crimes, it bore slight relevance to the case. We do not agree, however, that the defendant was unduly prejudiced by its admission.

The State relies on *State v. Carnes*, 279 N.C. 549, 184 S.E. 2d 235 (1971), to support its argument that the availability and presence of the knife during the incident is one piece of circumstantial evidence probative of the defendant's intentions. In *Carnes* the contested evidence was a .38 loaded pistol which was not used in the robbery but was found beside the defendants' car within one-half hour of the robbery. In resolving the issue, the Court stated:

> If defendants, on the occasion of the robbery, had a loaded .38 pistol available for use in case their felonious venture "backfired," this would seem a relevant circumstance even though no necessity arose for the display or use of the loaded .38 pistol. Relevant or not, this evidence constituted an insignificant part of the State's case. The overwhelming evidence of defendants' guilt dispels any suggestion that prejudice resulted from the admission in evidence of the .38 pistol and of testimony that it was loaded.

Id. at 553, 184 S.E. 2d at 238.

If, as in *Carnes*, the contested evidence in the present case, the knife, had "any logical tendency, however slight, to prove a fact in issue," its relevancy was indeed slight. *See* 1 Brandis on North Carolina Evidence § 77 (1982). However, prior to the admission of this evidence an extensive voir dire was conducted and the able trial judge heard arguments from both the State and defense counsel. We will not disturb the ruling of the trial judge absent a showing that the admission of the knife misled the jury or unduly prejudiced the defendant. Here the defendant has failed to show that this evidence so inflamed the jury as to affect the outcome of the trial. The assignment of error is overruled.

In the first degree sexual offense, the two attempted rape cases and the conspiracy case, we find no error. The judgments imposed upon the verdicts of guilty of kidnapping in the first

degree are vacated and the cases are remanded to the Superior Court, Wake County, for entry of judgments and resentencing as upon verdicts of guilty of kidnapping in the second degree.

Case No. 83CRS16187 (First Degree Sex Offense, Attempted Rape)—No error.

Case No. 83CRS16190 (Attempted Rape)—No error.

Case No. 83CRS27837 (Conspiracy)—No error.

Case Nos. 83CRS16188 (Kidnapping) and 83CRS16189 (Kidnapping)—Judgment vacated and remanded for judgment and resentencing.

STATE OF NORTH CAROLINA v. EDDIE LEWIS SMITH

No. 66A84

(Filed 5 June 1984)

1. **Burglary and Unlawful Breakings § 1.2— constructive breaking—door opened by another**

A constructive breaking occurs when a "confederate" within the house opens the door to admit defendant. The "confederate" or "other person" who actually creates the opening need not be an "inmate" or someone who regularly resides in the dwelling, but it is enough if that person is acting at the direction, express or implied, of defendant, or is acting in concert with defendant, or both.

2. **Burglary and Unlawful Breakings § 5— first degree burglary—constructive breaking—sufficiency of evidence**

The evidence supported a verdict finding defendant guilty of first degree burglary on a theory of constructive breaking by procuring and using another person to open the door where it tended to show that defendant had opened the bathroom window of the victim's house when he visited the victim earlier on the night of the crime; when defendant and two companions were unsuccessful in their efforts to use a key to open the front door of the victim's house, defendant instructed one companion to go through the bathroom window and unlock the front door; and the companion accomplished this task, aided in part by a boost up to the window by defendant and the second companion.

DEFENDANT appeals a decision by a divided panel of the Court of Appeals, 65 N.C. App. 770, 310 S.E. 2d 115 (1984), affirming a judgment imposed on defendant's conviction of first degree burglary by *Judge James D. Llewellyn* presiding during the 19 April 1982 Session of the NEW HANOVER County Superior Court.

Rufus L. Edmisten, Attorney General, by Marilyn R. Rich, Assistant Attorney General, for the State.

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

EXUM, Justice.

The sole issue before the Court is whether the evidence is sufficient to support defendant's guilt of first degree burglary on a theory of constructive breaking—the only theory upon which the trial court instructed. Defendant contends the evidence supports defendant's guilt of this crime, if at all, only upon the theory that he acted in concert with others, a theory upon which the trial court did not instruct. We conclude, as did the Court of Appeals, that the evidence supports a constructive breaking theory, but our reasoning in support of that conclusion differs from the reasoning of the Court of Appeals. We therefore modify and affirm.

I.

On 9 February 1982 defendant and John Richardson visited Jerome Chavis at Chavis's house. Richardson, testifying for the state, indicated that during this visit, defendant went to the bathroom and told Richardson afterwards that he had opened the bathroom window. The two left, went to defendant's house, and entered an automobile driven by Erick Kea. They drove by Chavis's house and defendant told Kea to stop. Defendant produced keys, which he apparently had obtained while in Chavis's house, and tried unsuccessfully to open the trunk of Chavis's car. Kea made a similar effort and succeeded in opening the trunk. They removed two tool boxes from the car.

Defendant then attempted to open the door to Chavis's house. When he was unsuccessful, he remembered that he had opened the bathroom window. At defendant's direction, Richard-

son, with a boost from both defendant and Kea, crawled through the bathroom window and proceeded through the house to open the front door. Kea and defendant entered Chavis's house after Richardson opened the door. The three men searched the house, taking various items. During this episode, one of them dropped an item which awakened Chavis. At this point, defendant, Richardson, and Kea ran from Chavis's house.

Defendant was indicted for and convicted of first degree burglary, breaking or entering a motor vehicle, and larceny. He and Kea were tried jointly, but only defendant is a party to this appeal. Richardson pled guilty to a lesser offense and testified against defendant and Kea.

The Court of Appeals reversed defendant's convictions for breaking or entering a motor vehicle and larceny. It held that the trial court's failure to give acting in concert instructions with regard to these two charges was fatal, since the state's evidence failed to show that defendant personally broke or entered the motor vehicle or took and carried away any of Chavis's property. These holdings are not before us for review. With regard to the first degree burglary conviction, the majority of the Court of Appeals held that "defendant's act of procuring and using Richardson to open the door constituted a constructive breaking, obviating any need for instructions on acting in concert. . . ." Judge Johnson dissented on that issue, and defendant appeals this aspect of the decision. N.C. R. App. P. 16(b).

II.

Defendant's contention on appeal is that the evidence was insufficient to support his conviction for first degree burglary on the theory of a constructive breaking and the trial court erred in submitting this theory to the jury. Defendant argues defendant could be found guilty only on a theory of acting in concert which the trial court did not submit.

To establish defendant's guilt of first degree burglary, the state must prove, beyond a reasonable doubt, that defendant broke and entered an occupied dwelling or sleeping apartment with intent to commit a felony therein during the night. N.C. Gen. Stat. § 14-51. A "breaking" is an essential element of first degree burglary. *State v. Wilson*, 289 N.C. 531, 538, 223 S.E. 2d 311, 316

(1976). The trial court instructed the jury regarding a constructive breaking as follows:

> Now, I charge that for you to find the defendant, Eddie Lewis Smith, or the defendant, Erick George Kea, guilty of burglary in the first degree the State must prove seven things beyond a reasonable doubt, and that is as to each defendant.
>
> First, that there was a breaking by the defendant. Now, a breaking need not be actual. That is, the person breaking need not physically remove the barrier himself. Going through the front door of Mr. Chavis' home after it was opened by Tommy Richardson would be a constructive breaking, and such a constructive breaking is as sufficient as a breaking—is sufficient as a breaking for the purpose of this offense as any physical removal by the defendant of a barrier to entry.

The Court of Appeals found this instruction sufficient in its statement of the applicable law. *State v. Smith*, 65 N.C. App. at 773, 310 S.E. 2d at 117.

The law regarding constructive breakings was explicated by this Court more than 130 years ago.

> Constructive breaking, as distinguished from actual forcible breaking, may be classed under the following heads:
>
> 1. When entrance is obtained by threats, as if the felon threatens to set fire to the house unless the door is opened.
>
> 2. When, in consequence of violence commenced or threatened in order to obtain entrance, the owner, with a view more effectually to repel it, opens the door and sallies out, and the felon enters.
>
> 3. When entrance is obtained by procuring the servants or some inmate to remove the fastening.
>
> 4. When some process of law is fraudulently resorted to for the purpose of obtaining an entrance.
>
> 5. When some trick is resorted to to induce the owner to remove the fastening and open the door, and the felon enters;

> as, if one knock at the door, under pretense of business, or counterfeits the voice of a friend, and, the door being opened, enters.
>
> In all these cases, although there is no *actual breaking*, there is a breaking in law or by construction; 'for the law will not endure to have its justice defrauded by such evasions.' In all other cases, when no fraud or conspiracy is made use of or violence commenced or threatened *in order to obtain an entrance*, there must be an actual breach of some part of the house.

State v. Henry, 31 N.C. (9 Ire.) 463, 467-68 (1849). *Accord Wilson*, 289 N.C. at 539-40, 223 S.E. 2d at 316.

In applying this statement of the law to the facts here, the Court of Appeals determined that defendant constructively broke into the Chavis home by having Richardson enter the house through the open bathroom window and open the front door for defendant. The majority of the Court of Appeals felt that this action fell within the third type of constructive breaking outlined in *Henry*. In essence, that court concluded that Richardson was "some inmate" who removed the fastening to Chavis's front door. As Judge Johnson stated in his dissent, Richardson cannot be considered an "inmate" of the Chavis home within the ordinary meaning of the word. *Smith*, 65 N.C. App. at 775, 310 S.E. 2d at 118 (Johnson, J., dissenting). Although we disagree with the analysis employed by the majority below, we are convinced that the facts involved in this case are sufficient to establish a constructive breaking by defendant.

[1] In general, a constructive breaking is "[a] breaking made out by construction of law . . . [a]s where a burglar gains an entry into a house by threats, fraud, or conspiracy." Black's Law Dictionary 284 (5th ed. 1979). Contrary to defendant's contention, the list of five types of possible constructive breakings contained in *Henry* is not exhaustive but illustrative. The list provides merely a series of examples which illustrate certain general types of fact situations that might give rise to a constructive breaking, *i.e.*, a breaking in law. A constructive breaking in the law of burglary occurs, quite simply, "[w]hen an opening is made not by the defendant but by . . . some other person and, under the circum-

stances, the law regards the defendant as the author thereof. . . ." 3 C. Torcia ed. Wharton's Criminal Law § 330 at 200 (14th ed. 1980). *See* W. LaFave & A. Scott, Criminal Law 708-09 (1972). A constructive breaking occurs when a "confederate within the house opens the door to admit" defendant. R. Perkins, Criminal Law 195 (2d ed. 1969). The "confederate" or "other person" who actually creates the opening need not be an "inmate," or someone who regularly resides in the dwelling. It is enough if that person is acting at the direction, express or implied, of defendant, or is acting in concert with defendant, or both.

[2] Richardson testified that defendant told him that he had opened the bathroom window in Chavis's house. When the three men were unsuccessful in their efforts to use a key to open the front door to Chavis's house, defendant instructed Richardson to go through the open bathroom window and unlock the front door. Richardson accomplished this task, aided in part by a boost up to the window by defendant and Kea. These facts clearly disclose an opening made by a person other than defendant under defendant's direction. They support the trial court's instruction on constructive breaking.

Accordingly, we modify the reasoning of the Court of Appeals and affirm its conclusion that the evidence supports a finding of defendant's guilt on a theory of constructive breaking by "procuring and using Richardson to open the door . . . obviating the need for instructions on acting in concert. . . ." The decision of the Court of Appeals, affirming defendant's conviction of first degree burglary, is

Modified and affirmed.

AMERICAN CLIPPER CORPORATION v. WALTER SCOTT HOWERTON AND FINANCEAMERICA CORPORATION

No. 119A81

(Filed 5 June 1984)

1. **Automobiles and Other Vehicles § 5— retaining manufacturer's statements of origin after transferring vehicle for sale—violation of statute**

G.S. 20-52.1(a) was not designed to provide a method for manufacturers of vehicles to protect themselves against their dealers' defaults by withholding the manufacturer's statement of origin on vehicles transferred to dealers for ultimate sale to consumers, and the manufacturer of a recreational vehicle violated the statute by retaining the manufacturer's statements of origin when it transferred the vehicle to a dealer for sale by the dealer.

2. **Automobiles and Other Vehicles § 5; Uniform Commercial Code § 1— superior title or security interest of manufacturer of vehicle or lender—applicability of Uniform Commercial Code**

Provisions of the Uniform Commercial Code rather than the title transfer provisions of the Motor Vehicle Act governed the issue of whether the manufacturer of a recreational vehicle or the lender which financed the purchase of the vehicle from a dealer had the superior title or security interest in the vehicle after the dealer failed to process the purchaser's title and to pay the manufacturer for the vehicle.

3. **Uniform Commercial Code § 16— transaction between manufacturer of vehicle and dealer as consignment—protection of consignor's interest**

A transaction between a manufacturer of a recreational vehicle and its dealer was a consignment where possession of the vehicle was delivered to the dealer for the purpose of a future sale by the dealer which would be contemporaneous with a sale between the manufacturer and the dealer, the manufacturer was entitled to reclaim physical possession of the vehicle at any time before the dealer's acceptance of an offer to purchase, and the dealer had the option to return the vehicle to the manufacturer at any time. Therefore, the provisions of G.S. 25-2-326(3) governed what the manufacturer had to do to protect its interest as consignor.

4. **Uniform Commercial Code § 16— manufacturer's entrustment of vehicle to dealer—loss of title—superior interest of lender**

Even if the manufacturer of a consigned recreational vehicle retained title by retaining the manufacturer's statements of origin, it ultimately lost title under the law of entrustment set forth in G.S. 25-2-403(2) where it entrusted the vehicle to a merchant dealing in goods of that kind, followed by a sale by that merchant to a buyer in the ordinary course of business. Once a sale was made by the entrustee to such buyer, title passed from the entrustor to the buyer, the buyer could assign title in the vehicle as he wished, and the buyer's assignment of a security interest to the consignee by an installment sale contract and the consignee's assignment of its interest in the installment sale con-

tract to the lender who financed the purchase gave the lender an interest or "title" in the vehicle superior to that of the manufacturer.

5. Uniform Commercial Code § 39— consigned recreational vehicle—manufacturer's retention of statements of origin—perfection of security interest

The manufacturer did not preserve its title in a consigned recreational vehicle by keeping the manufacturer's statements of origin but at most reserved a security interest in the vehicle, G.S. 25-2-41(1), and where the manufacturer maintained the vehicle in its own inventory and intended the consignment as security, the manufacturer was required to comply with the provisions of Art. 9 of the Uniform Commercial Code in order to protect its security interest.

6. Uniform Commercial Code § 43— recreational vehicle—failure of manufacturer to perfect security interest—superior right of assignee of installment sale contract

Where the manufacturer of a consigned recreational vehicle took no action to protect its security interest under Art. 9 of the Uniform Commercial Code, a lender which gave new value in purchasing the installment sale contract from the consignee and took possession of it in the ordinary course of its business had a superior security interest in the installment sale contract under G.S. 25-9-308.

7. Uniform Commercial Code § 43— recreational vehicle—manufacturer's failure to perfect security interest—superior right of assignee of installment sale contract

Even if the manufacturer of a consigned recreational vehicle preserved a security interest in an installment sale contract of the vehicle by its retention of the manufacturer's statements of origin, and even if the assignee of the installment sale contract could be charged with knowledge that the manufacturer so preserved a security interest, the manufacturer could not defeat the assignee's priority under the provisions of G.S. 25-9-308(a) because the manufacturer's security interest was not perfected under G.S. 25-9-304 or 25-9-306. Nor could the manufacturer defeat the assignee's priority under G.S. 25-9-308(b) because the manufacturer's security interest in the installment sales contract, if any, could be claimed "merely as proceeds of its inventory," the recreational vehicle.

8. Corporations § 25— corporation's assignment of installment sale contract—absence of attestation by secretary

A corporate assignor was bound by its assignment of an installment sale contract even though it was signed only by the corporation's president and was not attested or countersigned by the corporation's secretary or assistant secretary where the corporation, pursuant to its course of dealing with the assignee, had clothed its corporate president with apparent authority to execute assignments like the one in issue.

Justices MITCHELL, MARTIN and FRYE took no part in the consideration or decision of this case.

ON defendant's petition to review the decision of the Court of Appeals, opinion by *Judge Becton*, with then *Chief Judge Morris* (now retired) and *Judge Vaughn* (later Chief Judge) concurring, reported at 51 N.C. App. 539, 277 S.E. 2d 136 (1981), affirming summary judgment entered by the late *Judge Riddle* in GUILFORD Superior Court in favor of plaintiff, American Clipper Corporation.

Turner, Enochs & Sparrow, P.A., by Wendell H. Ott and Thomas E. Cone, for plaintiff appellee, American Clipper Corporation.

Pearman & Pearman by Richard M. Pearman, Jr., for defendant appellant, FinanceAmerica Corporation.

EXUM, Justice.

This case was brought as a declaratory judgment action to determine which party has superior title or security interest in a particular recreational vehicle. On stipulated facts and a "Partial Settlement Agreement," Judge Riddle, presiding at the 6 June 1980 Session of Guilford County Superior Court, entered summary judgment for plaintiff American Clipper Corporation (hereinafter Clipper). The Court of Appeals affirmed.

The basis for the Court of Appeals' decision was its conclusion that the provisions of the Motor Vehicle Act (MVA), specifically section 20-52.1, governed the case and took precedence over relevant provisions of the Uniform Commercial Code (UCC), as codified in Chapter 25 of the North Carolina General Statutes.[1] We disagree and reverse.

I.

The parties stipulated to the following facts:

Clipper manufactured a recreational vehicle using a chassis, transmission, and motor obtained from Chrysler Corporation. Clipper shipped the completed vehicle, along with Chrysler's manufacturer's statement of origin (MSO), and its own supplemental MSO, to one of its dealers in Maryland. The Maryland dealer

1. Sections of the UCC and the Motor Vehicle Act will be cited herein only by reference to the section number without the notation "N.C. Gen. Stat."

denied ordering the vehicle and refused delivery, whereupon Clipper shipped the vehicle to a North Carolina dealership with whom it had a prior course of business, Adventure America, Inc. (hereinafter Adventure). Adventure received the vehicle, along with instructional material, an owner's manual, and Clipper and Chrysler warranty forms, on 10 October 1978. Also accompanying the vehicle was a document revealing a purchase price of $15,076 and a statement that "[t]his is not a [sic] invoice . . . ." The original MSO was destroyed after the Maryland dealer's refusal of delivery. Clipper requested and received a duplicate MSO from Chrysler. Clipper retained possession of both the Chrysler MSO and its own MSO.

Clipper was willing to sell the vehicle at the specified price to Adventure, at Adventure's option. No money changed hands. Per oral agreement, Clipper was entitled to reclaim possession of the vehicle any time before Adventure's acceptance of Clipper's offer to sell at the specified price. Clipper authorized Adventure to demonstrate the vehicle to prospective customers. Clipper characterized the transaction with Adventure as a consignment and kept the vehicle on its own inventory list. From October 1978 until June 1979 Clipper periodically contacted Adventure, which assured Clipper that the vehicle was still on Adventure's lot. No sign was posted on the vehicle identifying Clipper as owner or consignor. Clipper and Adventure did not enter into a written security agreement concerning the vehicle. No financing statement was filed. Clipper and Adventure had an "informal understanding" that Adventure would secure a purchaser at a price to be determined by Adventure at which time Adventure would purchase the vehicle from Clipper.

On 12 April 1979, Adventure entered into a "Consumer Credit Installment Sale Contract" (hereinafter "installment sale contract") with defendant Walter S. Howerton for the purchase of the vehicle at a price of $20,799. After a down payment and credit for a trade-in, Howerton's balance was $15,500. Howerton was a "buyer in the ordinary course of business," as this phrase is defined by the UCC.

Defendant FinanceAmerica, Inc. (hereinafter Finance) at that time had had a regular business relationship and course of dealing with Adventure in which Finance provided retail financing for

vehicles sold by Adventure. In this case, as it had done regularly, Adventure used the credit application form and installment sale contract form provided by Finance. Adventure supervised execution of these forms and delivered the executed forms to Finance. As delivered, the installment sale contract form included a "Non-Recourse Assignment and Warranty" paragraph signed by Adventure's president which recited the assignment of Adventure's rights in the vehicle and the contract to Finance. Upon Finance's approval of Howerton's credit and the installment sale, Finance disbursed $15,500 directly to Adventure, and Adventure immediately delivered the vehicle to Howerton. Howerton completed an application for a certificate of title and obtained from Adventure a twenty-day temporary registration for the vehicle, both on forms supplied by Adventure. Based upon their established course of dealing, Finance relied upon Adventure to process Howerton's application for title certification, to furnish the applicable MSOs and to insure that Finance's lien was recorded on the title certificate. Finance never requested an MSO from Adventure nor determined whether Adventure possessed it. Adventure never processed Howerton's title application. Adventure did not pay Clipper for the vehicle. In June 1979, Clipper first learned that the vehicle was gone from Adventure's lot and thereafter brought this action.

Before Clipper filed its complaint on 10 July 1979, the parties entered into a "Partial Settlement Agreement." By the terms of this agreement: Clipper dismissed all claims against Howerton and delivered to Finance both its and Chrysler's MSO. Howerton agreed to execute any necessary documents for Finance's application to the Division of Motor Vehicles for a title certificate in Howerton's name on which would be noted a lien in favor of Finance pursuant to the installment sale contract executed on 12 April 1979 by Adventure and Howerton. Howerton acknowledged the assignment of this installment sale contract by Adventure to Finance and released all claims he might have had arising out of the invalidity, if any, of this assignment or the invalidity, if any, of Finance's security interest. Howerton agreed to pay to Finance the obligations created by this contract in accordance with its terms. The parties agreed that the declaratory judgment action should be determined solely on the basis of the stipulated facts "without regard to any changes in the status of the parties

brought about by the execution or performance of this [partial settlement] agreement." Finally, the agreement provided:

> All parties agree that if Clipper shall obtain a favorable final judgment in the declaratory judgment action referred to above, holding that its right to ownership, title, possession or a security interest with respect to said vehicle is superior to that of either Howerton or Finance, it will receive and accept from Finance the sum of Fifteen Thousand Seventy-Six dollars ($15,076) plus interest at the rate of eight percent (8%) per annum from June 7, 1979, to the date of payment of said sum, in lieu of reclaiming possession of and/or title to said vehicle and in lieu of any other damages to which it may be entitled.

II.

We must decide whether Clipper or Finance shall bear the loss resulting from Adventure's failure to pay Clipper for the vehicle, as it had agreed to do, after selling the vehicle to Howerton. Either Clipper or Finance will have an uncompensated investment in the transaction because of Adventure's default. The question as the parties have put it is whether Clipper has a "right to ownership, title, possession or a security interest with respect to said vehicle superior to that of either Howerton or Finance." We hold that Clipper does not.

Section 20-52.1, a provision of the MVA, provides:

> (a) Any manufacturer transferring a new motor vehicle to another shall, at the time of the transfer, supply the transferee with a manufacturer's certificate of origin assigned to the transferee.
>
> (b) Any dealer transferring a new vehicle to another dealer shall, at the time of transfer, give such transferee the proper manufacturer's certificate assigned to the transferee.
>
> (c) Upon sale of a new vehicle by a dealer to a consumer-purchaser, the dealer shall execute in the presence of a person authorized to administer oaths an assignment of the manufacturer's certificate of origin for the vehicle, including in such assignment the name and address of the transferee and no title to a new motor vehicle acquired by a dealer

under the provisions of subsections (a) and (b) of this section shall pass or vest until such assignment is executed and the motor vehicle delivered to the transferee.

Any dealer transferring title to, or an interest in, a new vehicle shall deliver the manufacturer's certificate of origin duly assigned in accordance with the foregoing provision to the transferee at the time of delivering the vehicle, except that when a security interest is obtained in the motor vehicle from the transferee in payment of the purchase price or otherwise, the transferor shall deliver the manufacturer's certificate of origin to the lienholder and the lienholder shall forthwith forward the manufacturer's certificate of origin together with the transferee's application for certificate of title and necessary fees to the Division. Any person who delivers or accepts a manufacturer's certificate of origin assigned in blank shall be guilty of a misdemeanor.

The Court of Appeals, having determined that this statute controlled the case, concluded as follows:

In all respects, the transactions involving the vehicle were conducted in violation of G.S. 20-52.1. Under the statute, record title to the new vehicle cannot 'pass or vest' until the MSO is properly assigned. Hence, record, paper title remained in the name of Clipper.

Although G.S. 25-2-401 provides that the provisions of the UCC apply to the rights and liabilities of parties to a sales transaction 'irrespective of title to the goods,' the motor vehicle certificate of title statutes, including G.S. 20-52.1, still have vitality and are not implicitly replaced by the adoption of the UCC. *See* Anderson, *Uniform Commercial Code, 'Motor Vehicles.'* § 2-401:9 (1971); *Insurance Co. v. Hayes*, 276 N.C. 620, 174 S.E. 2d 511 (1970).

Pursuant to G.S. 20-52.1 then, Clipper was record title holder to the recreational vehicle in the possession of Howerton. According to the record, Finance never filed or perfected its security interest in the vehicle. If Finance had taken the steps necessary to file or perfect its security interest, it would have discovered that Adventure did not have record title to the vehicle, nor did Howerton. In allocating the risk of

loss between Clipper and Finance, Finance was in the best position to prevent the title confusion which ensued. Finance incurred the risk of loss when it loaned money on collateral without first determining whether its assignor, Adventure, or its debtor, Howerton, had record title to the vehicle. Clipper did the most that it could as a manufacturer; it held onto its MSO and awaited acceptance by Adventure of its offer to sell the vehicle in question. As between Clipper and Finance, then, the trial judge properly found that Clipper held title to the vehicle superior to the rights and title held by Finance. Finance, therefore, should bear the risk of loss accompanying the sale and financing of this vehicle.

It should be noted that this case in no way decides the right to ownership, title and possession of the vehicle as between the manufacturer, Clipper, and the consumer, Howerton. Even if Howerton were found to have superior title to Clipper, under the facts and agreements of this case, Clipper would still have title superior to Finance and would prevail against Finance.

Based on the stipulated facts and Partial Settlement Agreement entered into by the parties, we find that the trial judge acted properly in granting Clipper's motion for summary judgment.

[1] Except for the statement that "in all respects, the transactions involving the vehicle were conducted in violation of G.S. 20-52.1," we disagree with the Court of Appeals' conclusions. Probably Clipper retained the MSOs in an attempt to secure itself against loss of the vehicle through possible default by Adventure. Nevertheless, in retaining the MSOs while at the same time transferring the vehicle to Adventure for sale by Adventure, Clipper itself violated section 20-52.1(a). This statute is not permissive. It *requires* a manufacturer, like Clipper, "transferring a new motor vehicle to another" both to supply and to assign the MSO, which the statute denominates a "certificate of origin," to the transferee "at the time of the transfer."

When a manufacturer transfers a new motor vehicle to another he is required, at the time of transfer, to supply the transferee with a manufacturer's certificate of origin assigned to the transferee. G.S. 20-52.1(a). Any dealer who

transfers a new vehicle to a consumer-purchaser is required, at the time of transfer, to give the purchaser the proper manufacturer's certificate assigned to the transferee. G.S. 20-52.1(c).

King Homes, Inc. v. Bryson, 273 N.C. 84, 90-91, 159 S.E. 2d 329, 331 (1968). Our statutes dealing with the transfer of motor vehicles "are not mere directory rules incidental to the sale and transfer of motor vehicles, to be observed, to be circumvented, or to be disregarded at the will or pleasure of the seller or purchaser of a motor vehicle." *Hawkins v. M & J Finance Corp.*, 238 N.C. 174, 182, 77 S.E. 2d 669, 676 (1953). The statute was not designed to provide a method for manufacturers to protect themselves against their dealers' defaults by withholding MSOs on vehicles transferred to dealers for ultimate sale to consumers. Indeed, either Adventure, Howerton, or Finance at any time after Clipper transferred the vehicle to Adventure could have compelled Clipper to comply with subsection (a) of the statute by supplying the MSOs to Adventure so that they in turn could comply with subsection (c).

The statute was designed, for the protection of the public generally, to regulate the transfer of new motor vehicles from manufacturers to dealers and, ultimately, to consumers. This particular statute provides a method whereby consumers can be assured they are purchasing newly manufactured vehicles. The statute is one segment of an entire statutory scheme of "police regulations designed and intended to provide a simple expeditious mode of tracing titles to motor vehicles so as to (1) facilitate the enforcement of our highway safety statutes, (2) minimize the hazards of theft, and (3) provide safeguards against fraud, imposition, and sharp practices in connection with the sale and transfer of motor vehicles." *Hawkins*, 238 N.C. at 182, 77 S.E. 2d at 676.

Hawkins is instructive. Hawkins, plaintiff, owned a Plymouth car and a Chevrolet truck which he delivered to one Thorne, a used car dealer, under an agreement whereby he authorized Thorne to sell the vehicles for him. Hawkins also delivered to Thorne the certificates of title for the vehicles on which Hawkins had endorsed in blank assignment forms on the reverse side of the certificates. Instead of selling the vehicles, Thorne used them as collateral to secure loans from defendant Finance Corp. The

finance company took possession of the Plymouth automobile and both certificates of title. Hawkins obtained possession of the Chevrolet truck from Thorne and brought an action in claim and delivery against Finance Corp. for the Plymouth and the certificates of title. This Court analyzed the question whether Hawkins or Finance Corp. had superior title to the vehicles, not in terms of the title transfer provisions of the MVA, but in terms of the general law of sales, bailment, and entrustment prevailing at the time. On the question of whether Hawkins was estopped to assert title to the vehicles because he delivered the certificates of title endorsed in blank to Thorne, the Court concluded that he was not on the ground that the endorsements of the assignments were not in compliance with the MVA.

King Homes is also instructive. In that case plaintiff, the manufacturer of a mobile home, brought action for claim and delivery of the mobile home against defendant Bryson who had purchased the home from one of plaintiff's dealers. The plaintiff manufacturer's evidence tended to show the following: Plaintiff arranged with its dealer, Twentieth Century Mobile Homes, Inc., for the dealer to purchase the mobile home for cash. Plaintiff delivered the mobile home to Twentieth Century and received Twentieth Century's check for the price of the mobile home upon delivery. Twentieth Century's check was returned for insufficient funds. Meanwhile, Twentieth Century sold the mobile home to defendant Bryson who paid Twentieth Century cash. Plaintiff's vice president gave contradictory testimony with reference to whether the MSO accompanied the mobile home when it was delivered to Twentieth Century. At one point the vice president said the MSO accompanied the mobile unit. At another point he testified that he retained possession of the MSO.

At the close of plaintiff's evidence the trial court allowed defendant's motion for nonsuit. This Court reversed. In analyzing the question whether plaintiff manufacturer or defendant Bryson had superior title to the mobile home, this Court, as it had done in *Hawkins*, looked to the general law of sales, bailment, and entrustment prevailing at the time. Based on those principles of law, the Court concluded that the evidence in the light most favorable to the plaintiff was sufficient to permit a jury to find that title to the mobile home remained in the plaintiff "and never passed to Twentieth Century because its check was dishonored

by the bank upon which it was drawn." 273 N.C. at 90-91, 159 S.E. 2d at 333. The Court held further that since the evidence when considered most favorably to the manufacturer failed to show that it had invested Twentieth Century with the MSO "or any other indicia of title upon which defendant relied, plaintiff is not estopped . . . from asserting its title even against an innocent purchaser." *Id.* at 91, 159 S.E. 2d at 333.

In *Nationwide Mutual Insurance Co. v. Hayes*, 276 N.C. 620, 174 S.E. 2d 511 (1970), the question was which of two automobile liability insurance policies, one a "nonowner" policy, and the other an "owner" policy, provided coverage for a particular automobile accident. The Court concluded that the question must be determined by fixing the date on which the insured acquired title to the vehicle in question. To resolve this question the Court looked to the title transfer provisions of the MVA, specifically section 20-72, rather than the UCC. All parties to the transfer of the automobile complied with section 20-72. The Court noted that the UCC abandoned "the concept of title as a tool for resolving sales problems," *id.* at 632, 174 S.E. 2d at 518, and held that title to the motor vehicle in question passed when the title transfer requirements of the MVA were complied with and not when the vehicle was delivered. *Hayes* dealt with a situation in which the rights of parties not privy to the sales transaction itself, hinged on the time when legal title to the vehicle passed. For such a determination *Hayes* correctly looked to the title transfer provisions of the MVA which it characterized as "public regulations" rather than the UCC which it characterized as "a private law," *id.* at 639, 174 S.E. 2d at 523. The Court in *Hayes* said, more fully:

> The Uniform Commercial Code, in general, covers transactions in personal property and is particularly related to negotiable instruments, bills of lading and sales in general. The Motor Vehicles Act is concerned only with the automobile and although the word 'automobile' comes within the general term of 'goods,' automobiles are a special class of goods which have long been heavily regulated by public regulatory acts. In this connection, the official comment to section 25-2-401 seems to say that the Uniform Commercial Code makes no attempt to set a specific line of interpretation where a public regulation is involved, but that in case a court should decide to apply this private law definition and reason-

> ing to its public regulation, that there should be a clear and concise definitional basis for so doing. Such comment leads to the conclusion that the sales act, a private law, is not necessarily applicable to public regulations unless the court chooses to make it so.

Id. at 638-39, 174 S.E. 2d at 523. Thus *Hayes* left open the question whether the MVA, as opposed to the UCC, would control in all circumstances.

In deciding the kind of question here presented, albeit in terms of which party had "title," this Court in both *Hawkins* and *King Homes, Inc.* looked to the general law of sales, bailment and entrustment prevailing at the time of the transactions then in question. It did not rely on the title transfer provisions of the MVA except to help resolve the question whether the party who otherwise had title was estopped to deny it. Because of the nature of the then prevailing general law of sales, bailment and entrustment, the Court in *Hawkins* concluded that the original owner of the vehicles had title; and in *King Homes, Inc.* the Court concluded the jury could find title to be in the manufacturer of the mobile home. But, as we noted in *Nasco Equipment Co. v. Mason*, 291 N.C. 145, 153, 229 S.E. 2d 278, 283-84 (1976):

> It seems likely that plaintiff has mistakenly relied on the traditional North Carolina rule that the mere entrustment to a bailee by an owner of a chattel would not preclude the owner from recovering possession as against the mortgagee of the bailee since the bailee had no title and the mortgagee did not occupy the position of a *bona fide* purchaser. The exception to this rule lay in circumstances where the owner clothed the mortgagor with the indicia of ownership. *Wilson v. Finance Co.*, 239 N.C. 349, 79 S.E. 2d 908 (1954). Plaintiff, in essence, is relying on our traditional concepts of title in order to resolve what is essentially a security interest problem, the answer to which must be found in the Uniform Commercial Code. The Code has significantly modified our traditional rules in this area. 'The most basic departure from previous law which is found in the Uniform Commercial Code is the abandonment of the concept of title as a tool for resolving sales problems.' *Insurance Co. v. Hayes*, 276 N.C. 620, 632, 174 S.E. 2d 511, 518 (1970).

[2] We conclude, therefore, that the provisions of the UCC and not the MVA properly resolve the contest here. As the Court tacitly recognized in both *Hawkins* and *King Homes, Inc.*, the title transfer provisions of the MVA were not designed to resolve the kind of question here presented. The UCC, which generally has supplanted the principles relied on in *Hawkins* and *King Homes, Inc.*, was so designed and should have been, but was not, employed by Clipper in this case. For similar holdings from other jurisdictions, see *Wood Chevrolet Company, Inc. v. Bank of the Southeast*, 352 So. 2d 1350 (Ma. 1977); *Cunningham v. Camelot Motors, Inc.*, 138 N.J. Super. 489, 351 A. 2d 402 (1975); *Bank of Beulah v. Chase*, 231 N.W. 2d 738 (N.D. 1975). We now proceed to apply the pertinent provisions of the UCC to the transactions before us.

III.

[3] We agree with Clipper that the transaction between Clipper and Adventure was not a sale of the vehicle. Although Clipper put the vehicle in the possession of Adventure, its dealer, so that Adventure could sell it, the transaction was not a "sale or return" within the meaning of section 25-2-326(1)(b), because Clipper did not sell the vehicle to Adventure. The goods were not delivered for "resale," as required by section 25-2-326(1)(b), but for the purpose of a future sale by Adventure which would be contemporaneous with a sale between Clipper and Adventure. *Stewart v. Brown*, 546 S.W. 2d 204, 206 (Mo. App. 1977).

The transaction between Clipper and Adventure most nearly resembles a consignment. At least before the consignee sells the goods, "[t]he hallmark of the consignment . . . is the absence of an absolute obligation on the part of the consignee to pay for the goods." *Nasco Equipment Co.*, 291 N.C. at 153, 229 S.E. 2d at 284 (1976) (quoting Hawkland, "Consignment Selling Under the Uniform Commercial Code," 67 Com. L.J. 146, 147 (1962)). Clipper was entitled to reclaim physical possession of the vehicle at any time before Adventure's acceptance of the offer to sell. Adventure had the option to return the vehicle to Clipper at any time. It is apparent that Adventure had no "absolute obligation to pay" Clipper.

Because we characterize Clipper's transaction with Adventure as a consignment, the provisions of section 25-2-326(3) are applicable:

> If the consignment were intended as security, the consignor must comply with the filing requirements of Article 9 to prevail. G.S. 25-1-201(37). . . . If the consignment is not for security, reservation of title is not a security interest, but the consignor must nevertheless comply with the requirements of General Statute 25-2-326 in order to defeat any creditor of the consignee.

Id. at 154, 229 S.E. 2d at 284.

Section 25-2-326(3) then sets out what a consignor must do to prevail against a creditor of a consignee:

> (3) Where goods are delivered to a person for sale and such person maintains a place of business at which he deals in goods of the kind involved, under a name other than the name of the person making delivery, then with respect to claims of creditors of the person conducting the business the goods are deemed to be on sale or return. The provisions of this subsection are applicable even though an agreement purports to reserve title to the person making delivery until payment or resale or uses such words as 'on consignment' or 'on memorandum.' However, this subsection is not applicable if the person making delivery
>
> (a) complies with an applicable law providing for a consignor's interest or the like to be evidenced by a sign, or
>
> (b) establishes that the person conducting the business is generally known by his creditors to be substantially engaged in selling the goods of others, or
>
> (c) complies with the filing provisions of the article on secured transactions (article 9).

The parties have stipulated that "while the said vehicle was on Adventure's lot, no signs were posted on the vehicle or elsewhere identifying Clipper as the owner or consignee." There is no indication that Adventure was "generally known by [its] creditors to be substantially engaged in selling goods of others." Clipper made no

attempt to file a financing statement. In short, Clipper did nothing to protect its interest as consignor. *Id.*

[4] Even if Clipper initially retained title to the consigned vehicle by retaining the MSOs, it ultimately lost title under the provisions of section 25-2-403(2), which sets forth the law concerning entrustment. Clipper's giving possession of the vehicle to Adventure was an entrustment of the vehicle. "Any entrusting of possession of goods to a merchant who deals in goods of that kind gives him power to transfer all rights of the entruster to a buyer in ordinary course of business." § 25-2-403(2). Three essential elements must be present to make this statute operative: (1) an entrustment of goods to (2) a merchant dealing in goods of that kind, followed by a sale by that merchant to (3) a buyer in the ordinary course of business. *Toyomenka, Inc. v. Mount Hope Finishing Co.*, 432 F. 2d 722, 727 (4th Cir. 1970).

That Adventure was a merchant dealing in recreational vehicles is evidenced by its maintenance of a lot for the display of such vehicles as well as by its prior course of dealing with Clipper. A "buyer in the ordinary course of business" is "a person who in good faith and without knowledge that the sale to him is in violation of the ownership rights or security interest of a third party in the goods buys in ordinary course from a person in the business of selling goods of that kind. . . ." § 25-1-201(9). The parties have stipulated that Howerton meets this definition.

If all the essential elements of section 25-2-403(2) are satisfied, the entrustee, here Adventure, had the power, under the statute, to transfer such title as the entruster possessed. *Christopher v. McGehee*, 228 Ga. 466, 186 S.E. 2d 97 (1971); 3 Anderson, Uniform Commercial Code § 2-403:54 at 598-99 (3d ed. 1983). Since the elements of the statute were satisfied, Clipper's title was transferred by Adventure, the entrustee, to Howerton, under the provisions of section 25-2-403(2).

Clipper points out, however, that it prevails under the partial settlement agreement if it has title superior to either Howerton *or* Finance. In this respect, the Court of Appeals held that, "Even if Howerton were found to have superior title to Clipper, under the facts and agreements of this case, Clipper would still have title superior to Finance and would prevail against Finance." 51 N.C. App. at 545, 277 S.E. 2d at 139. We disagree.

> The sale by the entrustee makes a definitive transfer of the entruster's title. Hence, not only the immediate buyer from the entrustee but all successive transferees of the goods hold the title of the entruster. That is, once a buyer acquires title by virtue of UCC § 2-403, subsequent purchasers from him benefit by his title without regard to whether they themselves would qualify as buyers in ordinary course of business.

3 Anderson, *supra*, § 2-403:59 at 600-01. Once, therefore, a sale has been made by the entrustee to a buyer in ordinary course of business, title passes from the entruster to the buyer. The entruster no longer has title. The buyer then has the power to transfer to another the interest he received in the goods. Clipper's title to the vehicle passed to Howerton upon Adventure's sale of the vehicle to Howerton. Clipper no longer had title to the vehicle after Adventure's sale. Howerton could assign title in the vehicle as he wished and did assign by the installment sale contract a security interest in the vehicle to Adventure. Finance, as assignee of Adventure's interest in the installment sale contract executed by Howerton, had an interest, or "title," in the vehicle superior to Clipper's. Clipper had no title at all.

[5] Title, however, was not preserved in Clipper by its keeping of the Chrysler MSO and its own supplemental MSO. "Any retention or reservation by the seller of the title (property) in goods shipped or delivered to the buyer is limited in effect to a reservation of a security interest." § 25-2-401(1). *See also* § 25-1-201(37). At most Clipper's retention of the documents reserved a security interest. *Nasco Equipment Co.*, 291 N.C. at 155, 229 S.E. 2d at 285; *Toyomenka*, 432 F. 2d at 728. Clipper's security interest, if any, is not one of those governed by section 20-58.1, *et seq.*

> The provisions of G.S. 20-58 through 20-58.8 inclusive shall *not* apply to or affect: . . . (3) A security interest in a vehicle created by a manufacturer . . . who holds the vehicle in his inventory. Such security interests shall be perfected by filing a financing statement under Article 9 of the Uniform Commercial Code.

§ 20-58.8(b) (emphasis added). The parties have stipulated that Clipper maintained the vehicle on its own inventory after shipment of the vehicle to Adventure. Therefore, Clipper's perfection

of its security interest in the recreational vehicle was governed by Article 9 of the UCC. Additionally, when a consignment is functionally equivalent to a floor plan finance situation, as here, the transaction is treated as one for security and the consignor is required to comply with the provisions of Article 9. *See* J. White & R. Summers, Uniform Commercial Code § 22-4 at 887 (2d ed. 1980). We find that Clipper intended the consignment as security and therefore cannot prevail over Finance since it took no action to protect its security interest under Article 9.

[6] Under the provisions of section 25-9-308 Finance has a superior security interest in the installment sales contract, the chattel paper. Section 25-9-105(1)(b) defines chattel paper as "a writing or writings which evidence both a monetary obligation and a security interest in or a lease of specific goods . . . ." The Court of Appeals' description of Finance's activity as loaning money on collateral is not wholly correct. Finance also purchased chattel paper when it disbursed $15,500 to Adventure in return for the assignment of the Howerton installment sale contract, a writing within the meaning of section 25-9-105(1)(b). Finance gave new value for the installment sale contract and took possession of it in the ordinary course of its business.

> A purchaser of chattel paper or an instrument who gives new value and takes possession of it in the ordinary course of his business has priority over a security interest in the chattel paper or instrument
>
> (a) which is perfected under G.S. 25-9-304 (permissive filing and temporary perfection) or under G.S. 25-9-306 (perfection as to proceeds) if he acts without knowledge that the specific paper or instrument is subject to a security interest; or
>
> (b) which is claimed merely as proceeds of inventory subject to a security interest (G.S. 25-9-306) even though he knows that the specific paper or instrument is subject to the security interest.

§ 25-9-308.

[7] Even if Clipper preserved a security interest in the installment sale contract by retention of the MSOs, a point we do not now decide, and even if Finance can be charged with knowledge

that Clipper so preserved a security interest, Clipper cannot defeat Finance's priority under the provisions of section 25-9-308(a) because Clipper's security interest was not perfected under sections 25-9-304 or 25-9-306. Neither can Clipper defeat Finance's priority under section 25-9-308(b) because Clipper's security interest in the installment sale contract, if any, could be claimed "merely as proceeds of its inventory," the recreational vehicle. We conclude, therefore, that Clipper's security interest in the installment sale contract, if any, is not superior to that of Finance. *See Town and County Mobile Homes, Inc. v. Associates Financial Services Co., Inc.*, No. 74-20-Civ-3 (E.D.N.C. February 1, 1980). *See also* Smith, "Article Nine: Secured Transactions—Perfection and Priorities," 44 N.C. L. Rev. 753, 789-93 (1966).

[8] Finally we note that Clipper, in a footnote in its brief, suggests that Adventure's assignment of the installment sale contract to Finance was "invalid" because, although signed by Adventure's president, it was not attested or countersigned by Adventure's secretary or assistant secretary. Our Business Corporation Act provides in part with respect to the execution of corporate instruments that:

> [A]ny deed, mortgage, contract, note, evidence of indebtedness, proxy, or other instrument in writing, or any assignment or indorsement thereof, whether heretofore or hereafter executed, when signed in the ordinary course of business on behalf of a corporation by its president, a vice-president or an assistant vice-president and attested or countersigned by its secretary or an assistant secretary, . . . not acting in dual capacity, shall, with respect to the rights of innocent third parties, be as valid as if executed pursuant to authorization from the board of directors, unless the instrument reveals on its face a potential breach of fiduciary obligation.
>
> . . . .
>
> (e) Nothing in this section shall be deemed to exclude the power of any corporate representatives to bind the corporation pursuant to express, implied or apparent authority, ratification, estoppel or otherwise.

N.C. Gen. Stat. § 55-36(a) & (e). Clipper concedes that Adventure "would probably be estopped from asserting the invalidity of the

purported assignment" but that Clipper is "not required to accept [its] validity." Clipper cites no authority for either proposition.

In *George E. Shepard, Jr., Inc. v. Kim, Inc.*, 52 N.C. App. 700, 279 S.E. 2d 858, *disc. rev. denied*, 304 N.C. 392, 285 S.E. 2d 831 (1981), defendant corporation executed a contract for the sale of real property by having its vice-president affix her signature. Attached to the contract was a corporate resolution authorizing the vice-president to sign the contract. The vice-president's signature was not attested by a secretary or an assistant secretary of the corporation. Noting that the vice-president had both express and apparent authority to bind defendant corporation, the Court of Appeals held that the corporation was in fact bound by the contract notwithstanding the failure of its secretary or an assistant secretary to attest or countersign the instrument. The Court of Appeals said:

> G.S. 55-36 protects innocent parties from later assertions by corporations that their contracts were not, in fact, authorized by the corporation's board of directors. Thus, in contracts between corporations and innocent third parties, the statute suspends the ordinary agency rules requiring proof of authority. Subsection (e) clearly shows the statute's remedial nature stating 'nothing in this section shall be deemed to exclude the power of any corporate representatives to bind the corporation pursuant to express, implied, or apparent authority, ratification, estoppel or otherwise.' G.S. 55-36(e).

52 N.C. App. at 707-08, 279 S.E. 2d at 863. We agree with this decision and the rationale for it.

In the instant case it is clear that Adventure's president had apparent authority to bind the corporation by his execution of the assignment. The parties have stipulated that the assignment was on a form regularly used by Adventure in its dealings with Finance and that this particular assignment was executed pursuant to the earlier course of dealing between the parties. There is no place on the assignment portion of the form for attestation or countersignature by a corporate secretary or assistant secretary. Having, pursuant to its course of dealing with Finance, clothed its corporate president with apparent authority to execute assignments like the one here in issue, Adventure is bound by the assignment. Further, the assignment is effective against

all parties, including Clipper, insofar as it passes Adventure's interest to Finance.

Having demonstrated that Clipper had no right to ownership, title, possession, or security interest with respect to the vehicle in question, or the installment sale contract, superior to that of Howerton or Finance, and that in both the vehicle and the installment sale contract Finance's security interests take priority over whatever security interests Clipper might have had in both, we conclude that Finance is entitled to prevail in this case. The decision of the Court of Appeals is, therefore,

Reversed.

Justices MITCHELL, MARTIN and FRYE took no part in the consideration or decision of this case.

C.C. WALKER GRADING & HAULING, INC. v. S.R.F. MANAGEMENT CORP., A/K/A SITTING ROCK MANAGEMENT CORP., AND HELEN C. STANLEY, TRUSTEE FOR THE BENEFIT OF THE CHILDREN OF JOHN DAVID STANLEY

No. 77A84

(Filed 5 June 1984)

1. **Appeal and Error § 2— dissent in Court of Appeals—no dissenting opinion—appellate procedure rules precluding further review by appeal of right**

In an appeal from a decision of the Court of Appeals where one judge dissented without filing a dissenting opinion, pursuant to App. R. 16(b) which limits review of the Court of Appeals' decision to the issues which were specifically set out in the dissenting opinion, further review by appeal of right was precluded.

2. **Contracts § 6.15— clearing and grading work on farm—not within license requirement for general contractor**

Plaintiff's work in clearing and grading land for agricultural purposes did not bring it within the provisions of G.S. 87-10 which requires a general contractor to have a license and the provisions of G.S. 87-1 and 87-13 did not apply.

3. **Principal and Agent § 6— ratification of act of agent by principal—estoppel—jury issue**

In an action for monies allegedly due for work performed on a farm, the trial court erred in granting summary judgment for a defendant where there

was a conflict in the evidence as to whether the femme defendant's former husband acted as her agent and as to whether a careful and prudent person might perceive that the femme defendant's former husband had the authority to contract for the work on the farm and that the femme defendant ratified these acts.

APPEAL of right by plaintiff from the decision of the Court of Appeals, 66 N.C. App. 170, 310 S.E. 2d 615 (1984), one judge dissenting, affirming summary judgment for defendant Stanley by *Collier, J.*, at the 27 September 1982 Civil Session, Superior Court, ROCKINGHAM County. Judgment entered 18 October 1982 out of district and out of term. Heard in the Supreme Court 11 April 1984.

On 27 January 1982, plaintiff brought this action for monies allegedly due for work performed on Sitting Rock Farms beginning in March of 1979 and extending into June of that year. From the pleadings, affidavits, and depositions in the case, the following chronology of significant events is gleaned:

Carter C. Walker lives in Madison, North Carolina, has been in the grading and hauling business for about sixteen years, and is president of C.C. Walker Grading and Hauling, Inc. In the fall of 1978, Walker was approached by John David Stanley, husband of defendant Helen Stanley, about clearing a piece of land for Stanley. Pursuant to their fall 1978 negotiations, plaintiff agreed to do two jobs for Mr. Stanley related to converting wooded acreage at Sitting Rock Farms into pasture and areas for horse rings and barns. Walker described the first project, begun in the fall of 1978 and completed in the spring of 1979, as follows:

> I was going to clear some property for fifteen thousand dollars, grade around the edge for fifteen hundred dollars, do the contours and terracing for three thousand dollars, and plowing seeding fertilizer and lime for thirteen thousand two hundred dollars, and some culverts, for a total contract cost of thirty-three thousand dollars.

Walker met with Mr. Stanley several times in the fall of 1978 to discuss plans for the farm. The arrangements they made were informal, the only writings between them consisting of various pages of estimates and notes passed back and forth. Some of the plans discussed that fall were for work that would not be done

until the spring. With regard to their negotiations, Walker stated that "John David Stanley referred to the work as work he and his wife wanted done." On at least two occasions in 1978, Helen Stanley was present when the two men discussed progress on these improvements, including the work to be done the following spring. Walker further recalled assurances from Mr. Stanley that "the money to pay him was coming out of the Family Trust."

The second project with Mr. Stanley called for clearing, grading and seeding land, burning stumps or brush, and rebuilding a pond on the property. By June 1979, plaintiff had completed approximately $63,300 worth of work at Sitting Rock Farms. Plaintiff was paid approximately $30,000 for work done in 1978. As of 30 June 1979, a balance of $30,452.08 remained unpaid.

Sometime early in the spring of 1979, C.C. Walker read in the local newspaper that ownership of Sitting Rock Farms had been transferred to Helen C. Stanley. At that time Mr. Walker had no knowledge of the following events leading up to and surrounding this conveyance or certain new legal relationships created thereby. Helen and John Stanley, who were married in 1953, have been separated at least since September 1982 but were still living together during the latter part of 1978 and the first half of 1979. Helen assumed trusteeship of a trust established for the benefit of her minor children by Governor Thomas B. Stanley, Sr. and his wife on 31 December 1963. In December 1974 and in December 1976, Helen borrowed from the Piedmont Trust Bank of Martinsville and Henry County amounts of $316,981.50 and $300,000, secured by the assets of the Children's Trust. The proceeds of these loans were in turn loaned to John. Helen paid off the loans in September 1978. As of 1 January 1979, John owed the trust a total of $805,136.46, the amounts borrowed, plus interest. Sometime between 1 December 1978 and 1 January 1979, the real property in question, titled in Sitting Rock Farms, Inc., was then conveyed to its president, John David Stanley, individually. At about this same time, Sitting Rock Farms, Inc. was dissolved and a new corporation was established by John Stanley, the S.R.F. Management Corporation. John Stanley was president.

On 1 January 1979, three separate transactions involving these persons and corporate entities were initiated: (1) Helen Stanley, as trustee for the benefit of the children, purchased Sit-

ting Rock Farms from John Stanley. The purchase price was $1,668,974, of which $1,400,000 was paid in cash, leaving a balance due John of $268,974.25 on the transaction. (2) A document entitled a "Loan Repayment Agreement" was enacted by and between John and Helen detailing a plan whereby John was to repay the Children's Trust the $805,136.46 he then owed. In addition to a setoff of the balance due him from the trust on the farm purchase, there was, inter alia, the following provision: "Stanley advanced through Sitting Rock Farms an additional $60,000 for improvements on the land . . . ." (3) At John's suggestion, Helen negotiated a lease agreement with the new S.R.F. Management Corporation, which included the following provision: "Lessee shall bear all expenses in maintaining the premises, including plumbing, heating, air conditioning, painting, fence repair, etc. Lessee shall maintain the premises in good condition. Capital expenditures will be made by the Lessor." This lease was never recorded.

C.C. Walker testified that he never heard anything about a lease of the property, and it was not until late spring that he first learned of the existence of the S.R.F. Management Corporation. As far as he knew, the Stanleys were still married; Walker continued to see Helen around the farm during the spring. At the direction of John Stanley, Walker also took orders that spring from the farm foreman, Granville Cox, who would authorize work that "they"—the Stanleys—wanted done.

Walker's perceptions as to the chain of authority on the farm during the early spring of 1979 were shared by Ms. Bonnie Carter, bookkeeper and later office manager at Sitting Rock Farms until February 1980. Carter testified that although she was aware of the 1 January 1979 transfer of ownership, there was no change in authority in the farm operation during the entire period of her employment. John Stanley was "in ultimate control." Helen Stanley herself informed Carter, with reference to John, "what he says goes." When persons doing business with Sitting Rock Farms, Inc. expressed concern that the letterhead, checks, and books were changed to S.R.F. Management Corporation, Ms. Carter noted, "I was given to understand that I was to reassure these people that nothing had really changed, that it was only a technical change and was still Sitting Rock Farms." At no time did Ms. Carter, present in the office daily during this period, ever hear mention of a lease of the farm to anyone.

On 31 October 1980, the defendant S.R.F. Management Corporation executed and delivered a promissory note for $30,000 to the plaintiff, signed by John Stanley as president. Two delinquent payments were later made on the note. Plaintiff alleges a balance due, including interest, as of 31 January 1982 of $32,335.52.

In her original answer, defendant Helen Stanley, as trustee, denied responsibility for payment of any sum to plaintiff. More specifically, she denied that S.R.F. Management Corporation ever acted as her agent in these matters. As a further defense, she cites the 1 January 1979 lease agreement, as follows:

> That under the terms of said lease the Tenant was responsible for all said maintenance and repairs and improvements on or about the premises. That the Plaintiff [sic], as Landlord, neither consented to nor acquiesced in the improvements alleged to have been effected upon the premises by the Plaintiff. That the relationship between this Defendant and SRF Management Corp. was that of Landlord and Tenant and not principal and agent.

On 27 September 1982, after all depositions, affidavits, and other exhibits had been submitted in the case, Judge Collier allowed defendant Stanley's motion to amend her answer to include the additional affirmative defense of plaintiff's noncompliance with N.C.G.S. 87-1. Plaintiff's failure to obtain a North Carolina general contractor's license until on or about 24 October 1979 barred any claim for relief, Stanley argued.

On 18 October 1982, Judge Collier granted defendant Stanley's motion for summary judgment, writing as follows:

> And the Court finding that the Court has jurisdiction over the person of the Plaintiff and the Defendant, Helen C. Stanley and over the subject matter in controversy between the parties and it further being stipulated by the Plaintiff and Defendant that the Plaintiff did not receive a license to act from the North Carolina Licensing Board of General Contractors until October 24, 1979.

The Court of Appeals upheld the decision to allow defendant's motion to amend. It did not address the question of agency and affirmed the judgment of the trial court.

Leigh Rodenbough for plaintiff appellant.

John T. Weigel, Jr., for defendant appellee, Helen C. Stanley, Trustee.

MARTIN, Justice.

[1] Plaintiff appeals as of right, pursuant to N.C.G.S. 7A-30, from an opinion of the Court of Appeals which notes a dissent but does not include a dissenting opinion. We take this opportunity to set forth the relevant portion of an amendment to the North Carolina Rules of Appellate Procedure adopted by this Court on 3 November 1983, effective with notices of appeal filed in the Supreme Court on and after 1 January 1984:

> Rule 16 of the North Carolina Rules of Appellate Procedure appearing at 287 N.C. 671, 720 entitled "SCOPE OF REVIEW OF DECISIONS OF COURT OF APPEALS" is amended as follows:
>
> . . . .
>
> 3. A new subparagraph (b) to be entitled "Scope of Review in Appeal Based Solely Upon Dissent" is hereby adopted as follows:
>
> > (b) Scope of Review in Appeal Based Solely Upon Dissent. Where the sole ground of the appeal of right is the existence of a dissent in the Court of Appeals, review by the Supreme Court is limited to a consideration of those issues which are specifically set out in the dissenting opinion as the basis for that dissent and are properly presented in the new briefs required by Rule 14(d)(1) to be filed in the Supreme Court. Other questions in the case may properly be presented to the Supreme Court through a petition for discretionary review, pursuant to Rule 15, or by petition for writ of certiorari, pursuant to Rule 21.

309 N.C. 830 (1983).

The intent of this provision is to further ensure that in appeals of right based solely upon dissent, review by this Court shall be limited to those questions on which there was division in the intermediate appellate court. Such review has never been in-

tended for claims on which that court has rendered unanimous decisions. *State v. Campbell*, 282 N.C. 125, 191 S.E. 2d 752 (1972); *Hendrix v. Alsop*, 278 N.C. 549, 180 S.E. 2d 802 (1971).

Where an appeal of right is taken to this Court based solely on a dissent in the Court of Appeals and the dissenter does not set out the issues upon which he bases his disagreement with the majority, the appellant has no issue properly before this Court. Such appeals are subject to dismissal. Application of this procedural amendment to the case at bar precludes further review by appeal of right.

Nevertheless, in this case, we deem it preferable to certify for discretionary review, on our own motion, the following determinative questions: (1) Did the Court of Appeals err in finding that plaintiff was a "general contractor" within the statutory definition and that the services rendered at Sitting Rock Farms between March and June 1979 were governed by the statute? (2) If plaintiff's noncompliance with the above requirement does not bar recovery, does defendant Helen Stanley share liability with defendant S.R.F. Management Corporation for the spring 1979 improvements on the property?

We answer each of these issues in the affirmative and reverse the decision of the Court of Appeals.

[2] With regard to the statutory provision at issue, this Court has held:

> The purpose of Article 1 of Chapter 87 of the General Statutes, which prohibits any contractor who has not passed an examination and secured a license as therein provided from undertaking to construct a building costing $20,000.00 or more, is to protect the public from incompetent builders. When, in disregard of such a protective statute, an unlicensed person contracts with an owner to erect a building costing more than the minimum sum specified in the statute, he may not recover for the owner's breach of that contract. This is true even though the statute does not expressly forbid such suits. 53 C.J.S. *Licenses* § 59 (1948); 33 Am. Jur. *Licenses* §§ 68-72 (1941); Annot., Failure of artisan or construction contractor to procure occupational or business license or permit as affecting validity or enforcement of con-

tract. 82 A.L.R. 2d 1429 (1962); 5 Williston Contracts (Revised Edition 1937) § 1630; 6 Williston Contracts, *Ibid.* § 1766; 6A Corbin Contracts §§ 1510-1513.

Builders Supply v. Midyette, 274 N.C. 264, 270, 162 S.E. 2d 507, 510-11 (1968).

N.C.G.S. 87-1 (Cum. Supp. 1983) defines a "general contractor" as:

> For the purpose of this Article any person or firm or corporation who for a fixed price, commission, fee or wage, undertakes to bid upon or *to construct* or who undertakes to superintend or manage, on his own behalf or for any person, firm or corporation that is not licensed as a general contractor pursuant to this Article, *the construction* of any building, highway, public utilities, grading or any improvement or structure where the cost of the undertaking is thirty thousand dollars ($30,000) or more, shall be deemed to be a "general contractor" engaged in the business of general contracting in the State of North Carolina.
>
> This section shall not apply to persons or firms or corporations furnishing or erecting industrial equipment, power plant equipment, radial brick chimneys, and monuments.
>
> This section shall not apply to any person or firm or corporation who constructs a building on land owned by that person, firm or corporation when such building is intended for use by that person, firm or corporation after completion.

(Emphases ours.)

One who acts as a general contractor must be licensed pursuant to N.C.G.S. 87-10 (Cum. Supp. 1983), which provides, in part, as follows:

> [T]he [Licensing] Board shall issue to the applicant a certificate to engage as a general contractor in the State of North Carolina, as provided in said certificate, which may be limited into five classifications as the common use of the terms are known—that is,
>
> (1) Building contractor, which shall include private, public, commercial, industrial and residential buildings of all types;

(1a) Residential contractor, which shall include any general contractor constructing only residences which are required to conform to the North Carolina Uniform Residential Building Code (Vol. 1-B);

(2) Highway contractor;

(3) Public utilities contractors, which shall include those whose operations are the performance of construction work on the following subclassifications of facilities: . . .

(4) Specialty contractor, which shall include those whose operations as such are the performance of construction work requiring special skill and involving the use of specialized building trades or crafts . . . .

N.C.G.S. 87-13 provides for a criminal penalty for violation of the licensing requirement:

> Any person, firm or corporation not being duly authorized who shall contract for or bid upon the construction of any of the projects or works enumerated in G.S. 87-1, without having first complied with the provisions hereof, or who shall attempt to practice general contracting in this State . . . shall be deemed guilty of a misdemeanor and shall for each such offense of which he is convicted be punished by a fine of not less than five hundred dollars ($500.00) or imprisonment of three months, or both . . . .

This Court has held that the statute must be strictly construed because of the criminal penalties imposed, and its scope may not be extended by implication beyond the meaning of the language so as to include offenses not clearly described. *Vogel v. Supply Co. and Supply Co. v. Developers, Inc.*, 277 N.C. 119, 177 S.E. 2d 273 (1970); *Sand and Stone, Inc. v. King*, 49 N.C. App. 168, 270 S.E. 2d 580 (1980); *Fulton v. Rice*, 12 N.C. App. 669, 184 S.E. 2d 421 (1971). Construing a statute requiring the licensing of real estate brokers and salesmen, the Court has taken care to note:

> Any violation of its provisions is declared to be a criminal offense. For this reason, and for the further reason that it is a statute restricting to a special class of persons the right to

> engage in a lawful occupation, the act must be strictly construed so as not to extend it to activities and transactions not intended by the Legislature to be included. *Milk Producers Co-op v. Dairy*, 255 N.C. 1, 20, 120 S.E. 2d 548; *State v. Mitchell*, 217 N.C. 244, 7 S.E. 2d 567; *State v. Harris*, 213 N.C. 758, 197 S.E. 594.

McArver v. Gerukos, 265 N.C. 413, 417, 144 S.E. 2d 277, 280 (1965).

Defendants argue that the legislature, by the use of the words "grading or any improvement," intended to include the activities undertaken by plaintiff in this case. We do not agree. The guiding principle of statutory construction has been articulated as follows by Justice Barnhill:

> A word or phrase or clause or sentence may vary greatly in color and meaning according to the circumstances of its use. *Towne v. Eisner*, 245 U.S. 418, 62 L.Ed. 372. It is axiomatic, therefore, that a provision in a statute must be construed as a part of the composite whole and must be accorded only that meaning which other modifying provisions and the clear intent and purpose of the act will permit. Its meaning must sound a harmonious—not a discordant—note in the general tenor of the law.

Watson Industries v. Shaw, Comr. of Revenue, 235 N.C. 203, 210, 69 S.E. 2d 505, 511 (1952).

This Court has already applied the above principle to construe the word "improvement" in N.C.G.S. 87-1 as follows:

> The term "improvement" does not have a definite and fixed meaning. *Cities Service Gas Co. v. Christian*, 340 P. 2d 929 (Okl. 1959). "The word 'improvement' is a relative and very comprehensive term, whose meaning must be ascertained from the context and the subject matter of the instrument in which it is used." 42 C.J.S., Improvement, p. 416. The word is sometimes used to refer to any enhancement in value, particularly in relation to non-structural changes to land. *Mazel v. Bain*, 272 Ala. 640, 133 So. 2d 44 (1961). But where, as here, it is used in context with the words *building* and *structure*, its meaning is otherwise. As used here it connotes the performance of construction work and presupposes the prior existence of some structure to be improved.

Vogel v. Supply Co. and Supply Co. v. Developers, Inc., supra, 277 N.C. at 132, 177 S.E. 2d at 281-82.

We hold, following the reasoning in *Vogel,* that the term "improvement" as used in N.C.G.S. 87-1 has no application to the facts in this case where the word is used with reference to land.

Applying this same analysis, we further conclude that the "grading" intended for coverage by the statute and the "grading" undertaken by this plaintiff are clearly distinguishable. Construed in the context of the language of N.C.G.S. 87-1 and -10, quoted above, the word "grading" connotes an activity which is a part of, or preparatory for, work properly termed "building and construction." *See generally* 13 Am. Jur. 2d *Building and Construction Contracts* § 131 (1964).

Plaintiff has described his occupation as follows:

> The bulk of my earlier work was the same kind of work I did for Sitting Rock Farms, that is, I would clear overgrown land for cultivation, removing stumps and bushes, pushing off undergrowth into gulleys, built terraces, farm roads and ponds. We then cultivated the cleared land, seeding and fertilizing it as pasture. That is exactly what I did at Sitting Rock Farms in that period of 1978-79. No engineering or surveying was involved setting grades. . . . We made no attempt whatsoever to change the general contours of the hills as that would have disturbed the fertile topsoil too much, but we would put in terraces and channels for runoff so that the planted pastures would be stable. After completing this phase I came back with farm tractors, plowing and harrowing. Then I fertilized it and seeded it with seed, usually furnished by Mr. Stanley. On the dam, which was really a separate contract of $10,000.00, I raised the existing pond dam about 10 feet, which enlarged the existing smaller pond to an area of about an acre and a half. We built farm roads through the pastures.

These activities are best summarized as putting in pasture and are purely agricultural.[1] In its opinion, the Court of Appeals

1. Under the facts of this case, we are not faced with and do not decide the applicability of the statute to a contract for the construction of a farm dam for an amount of $30,000 or more.

states: "The statute is equally applicable to the clearing and grading required for agricultural purposes as it is to the clearing and grading required for building purposes." 63 N.C. App. at 172, 310 S.E. 2d at 616. We do not agree and decline to hold that plaintiff's activities were intended by the legislature to be subjected to the licensing requirements of Chapter 87 of the General Statutes of North Carolina.

[3] Defendant Stanley argues there was no agency relationship between her and S.R.F. Management Corporation upon which to base her liability to plaintiff and points to the following portion of C.C. Walker's deposition testimony.

> Q. . . . And what, specifically, did you ever discuss about S.R.F. Management having authority to act as agent for Helen C. Stanley in connection with the engagement of work to be done at Sitting Rock Farms?
>
> A. I don't know nothing about no S.R.F. Management Corp.
>
> Q. You've never heard of that before, or at the time you were making these contracts?
>
> A. No, sir.
>
> Q. And you, therefore, obviously have no information about S.R.F. Management Corp.?
>
> A. No.
>
> Q. A company you never heard of acting as agent of Helen C. Stanley do you?
>
> A. No.

We note that throughout the fall of 1978 and spring of 1979, plaintiff dealt directly with *neither* defendant in this lawsuit in performing the services for which he seeks reimbursement. The constant and apparent source of authority was John Stanley or, at the latter's direction, Cox, the foreman. After Helen's purchase of the farm, there was no noticeable change in authority. John remained "in ultimate control." Creditors who were aware of the corporate shift from Sitting Rock Farms, Inc. to S.R.F. Management Corporation were led to believe "that nothing had really changed." Helen herself, as new owner of the property, made it

clear that "what he [John] says goes," expressing apparent approval and assent to the vast improvements taking place in the spring of 1979.

Where, as here, the defendant specifically denies the agency relationship and argues that plaintiff had no knowledge that the alleged agent existed, is the jury thereby precluded from considering the issue? The applicable law is clear and well settled:

> The rule is thus stated in Reinhardt on Agency, secs. 89a to 92, especially in section 91: "The doctrine of estoppel as applying to agency may, therefore, be summarized that where a party holds out another as his agent, or has knowingly allowed such person to act for him in one or more similar transactions without objection, he will, as a general rule, be estopped to deny the agency, whether it in fact existed or not, if a third party, without knowing the real state of the matter, and acting in good faith, and as a reasonable man would act from the appearance of things as created by the supposed principal, relies upon the existence of the agency and deals with the supposed agent as such, if the transaction be within the real or apparent scope of the authority exercised." But, "It is not necessary, however, that the principal's assent or sanction be given in advance of the performance of the transaction which constitutes the subject-matter or purpose of the agency. If his assent be obtained after the transaction by a confirmation of the assumed relation, it is equally binding and efficacious. Such a confirmation of the authority of the supposed agent is called a ratification." Reinhardt on Agency, sec. 96. This assent is equivalent to prior authority.

Trollinger v. Fleer, 157 N.C. 81, 87, 72 S.E. 795, 797 (1911). Where a principal accepts the benefits of unauthorized acts of his alleged agent, with knowledge that the agent was acting on his behalf, the principal thereby ratifies such acts and is bound thereby. *Trust Co. v. Gill, State Treasurer*, 286 N.C. 342, 211 S.E. 2d 327 (1975).

Pursuant to this analysis, we find that there is ample evidence from which a jury might conclude that after 1 January 1979 John Stanley acted as agent for defendant Helen Stanley. A careful and prudent person might perceive that John had the

authority to contract for the spring 1979 work on the farm or that Helen had ratified these acts. There was a direct conflict between the plaintiff and the defendant in their testimony on this question, and it is for the jury to pass upon the evidence and to find the truth of the matter.

The above rule applies equally when a corporation holds out or permits a person to hold himself out as its agent. *Moore v. W O O W, Inc.*, 253 N.C. 1, 116 S.E. 2d 186 (1960). *See also* 19 Am. Jur. 2d *Corporations* § 1164 (1965). Thus, a jury might find in this case that John Stanley, as president, acted to bind the S.R.F. Management Corporation in making and delivering the promissory note to plaintiff. The evidentiary facts of the lease agreement provision giving Helen, as lessor, responsibility for capital expenditures and the loan repayment agreement item wherein $60,000 was advanced to the trust for improvements to the farms are relevant to a jury determination of this issue.

The trial court erred in granting summary judgment for the defendant.

The decision of the Court of Appeals is reversed, and this case is remanded to that court for further remand to the Superior Court, Rockingham County, for proceedings not inconsistent with this opinion.

Reversed and remanded.

STATE OF NORTH CAROLINA v. DWIGHT EARL TOOMER

No. 631A83

(Filed 5 June 1984)

1. Criminal Law § 70— tape-recorded interview with witness—failure to lay proper foundation for admissibility—prejudicial error

The trial court erred in allowing into evidence a transcription of a detective's taped interview with a prosecution witness where the State failed to lay a proper foundation for its admissibility in that (1) the witness denied that his interview with the detective was taped and the detective was never asked whether he recorded the interview with the witness, or, if he did, whether the recorder was operational and functioning properly, (2) the witness did not testify that the transcript of the interview was accurate or authentic, and (3)

there was no proof as to who reduced the recording to transcription or that anyone compared the transcript with the tape. Defense counsel's comments that "it is a tape," and that "it is from the tape," did not suffice as a stipulation to all of the foundational requirements respecting the admission into evidence of a tape recording or a transcription thereof. Further, since defendant presented evidence of an alibi which was corroborated, the description of the victim's intruder differed substantially from the description of defendant, and there was no physical evidence which tended to connect defendant to the victim's apartment or to the crime, the taped interview in which a witness admitted receiving the stolen property from defendant and in which he stated that defendant told him of his involvement in the crime, was the most damaging evidence presented implicating defendant in the commission of the offenses charged, and therefore, the erroneous admission of this evidence constituted prejudicial error entitling defendant to a new trial. G.S. 15A-14.43(a).

2. Criminal Law § 138— use of deadly weapon properly considered as aggravating factor

The trial court properly aggravated defendant's first-degree burglary sentence with the fact that he was armed with or used a deadly weapon at the time of the breaking and entering even though evidence of the use of a deadly weapon was necessary to prove an essential element of the joinable crime of first-degree sexual offense. G.S. 15A-1340.4(a)(1)o and G.S. 15A-1340.4(a)(1)i.

APPEAL by defendant from *Barnette, Judge*, at the 8 August 1983 Criminal Session of DURHAM County Superior Court.

Defendant was charged in indictments, proper in form, with first-degree burglary, first-degree sexual offense and robbery with a firearm. He entered pleas of not guilty to each of the offenses charged.

At trial, the State offered evidence tending to show the following:

On 2 September 1982, Leslie Lehmann, a medical student at George Washington University in Washington, D.C., arrived in Durham to spend the weekend with her husband, who was a resident in internal medicine at Duke University. Ms. Lehmann's husband lived in an apartment on Douglas Street in Durham and she testified that she arrived at the residence between 8:00 and 8:30 p.m. Ms. Lehmann's husband was working at the hospital and was not expected home until after midnight.

When she arrived at the apartment, Ms. Lehmann locked the door and made several telephone calls, including one to her hus-

band to inform him of her arrival. Some time after 10:30 p.m., she went into the bedroom to read and quickly fell asleep, leaving the lights and the radio on.

Ms. Lehmann testified that she was later awakened by a black man who was kneeling on the bed whispering in her ear. When she awoke, she was lying face down on her bed and a cord was around her neck. The lights had been turned out in the bedroom.

The man, whom Ms. Lehmann later identified from a photographic lineup as defendant, asked her what time her husband was coming home. She responded that her husband would be home any minute and suggested that he leave. At that point, the intruder dragged her off the bed, pushed her to a kneeling position on the floor and threatened to rape her. She testified that he then struck her on the head with a hard object. Moments later, the man pulled Ms. Lehmann to a standing position, shoved her into a storage room in the apartment and closed the door. She removed the rope from her neck and hid it behind some boxes in the storage room. She then pushed the door open slightly and noticed that the lights were still on in the living room. When she opened the door farther, the intruder came into the utility room with a gun. He pointed the weapon at her and said, "We are going outside. We are going to go to the woods. Come on, or I will kill you."

When Ms. Lehmann refused to go to the woods, the man grabbed her by the shoulders and pushed her into the living room. She testified that he rubbed his hand between her legs and inserted his finger into her vagina. She was wearing a tampon. The man asked her if she was menstruating and she replied that she was. He then inquired if she had any money. She told him that she had four dollars and that he could have it. During this conversation, the intruder stood behind Ms. Lehmann. She remembered that there was silence for a few moments after she told him about the money and when she turned around he had gone. Ms. Lehmann then went next door to her neighbor's and telephoned the police.

When the police arrived, Ms. Lehmann returned to her apartment with them. She noticed that her pocketbook, which she had left lying on a table in the living room when she had first entered

the apartment that evening, was missing. The purse contained a make-up bag and a wallet in which Ms. Lehmann carried at least ten credit cards. The police also observed a butcher knife on the couch in the living room, which Ms. Lehmann testified was in the kitchen sink when she went to bed. An examination of her bedroom revealed spots of blood on the sheet. Finally, the police noticed that a curtain cord had been cut from the kitchen window.

Within hours of the incident, Ms. Lehmann described her assailant to police as a black man in his twenties with dark skin and high cheekbones. She stated to Durham Public Safety Officer A. E. Harris that the intruder was between five feet, ten inches and six feet, two inches in height, that he had no discernible facial hair and that he wore a short-sleeve shirt, dark pants and a cap with a visor. Defendant's evidence, however, revealed that he was only five feet, five inches tall and that he had facial hair in September, 1982.

Defendant presented evidence of an alibi. His former employer, Ione Watkins, testified that defendant worked for her at the Tip Top Fish House in Durham until 8 September 1982. She testified that on 2 September 1982, defendant worked at the restaurant until shortly after 2:00 p.m. She stated that he returned to work at 10:00 a.m. on Friday, 3 September. Ms. Watkins also testified that defendant had a mustache during the first week of September, 1982.

Defendant testified that after he left the restaurant on 2 September, he went to Teresa Johnson's house on Hopkins Street in Durham. He arrived at Ms. Johnson's around 4:00 p.m. and spent the night at her residence. Defendant stated that he did not leave Ms. Johnson's until the next morning when he returned to work at the Fish House. He maintained that he did not break into Ms. Lehmann's apartment and that he did not assault her.

Teresa Johnson testified in corroboration of defendant's alibi, recalling that defendant did not leave her home from the time of his arrival at 4:00 p.m. on 2 September until his departure for work the next morning.

Roderick Smith also testified for defendant. Smith recalled that on or about 16 September 1982, he discovered a blue tote bag in an alley adjacent to the Nearly New Shop in Durham. He

testified that he looked inside the tote bag and discovered credit cards belonging to Ms. Lehmann. Smith stated that he telephoned her and informed her that he had discovered her property. Ms. Lehmann handed the telephone to her husband, Dr. Longabough. Longabough arranged to meet Smith at the Pizza Hut on Erwin Road to recover the property. Detective A. E. Harris witnessed the meeting between Smith and Longabough and the exchange of the property. He thereafter arrested Smith for extortion and accessory after the fact to first-degree sexual offense, first-degree burglary and armed robbery. Smith specifically testified that he did not acquire Ms. Lehmann's property from defendant and denied telling Detective Harris that defendant had given him the tote bag and credit cards.

The State recalled Detective Harris as a witness in rebuttal. Harris testified that he interviewed Smith at the Detective Bureau after Smith's arrest. Over defendant's objection, the assistant district attorney read to the jury a transcribed portion of this interview, although Harris was never asked if he recorded the conversation with Smith. In essence, the transcription revealed that Smith had earlier stated to Detective Harris that he received the credit cards from defendant on 15 September 1982. The transcription further indicated that Smith saw defendant again at a later date and that defendant then admitted to Smith that he had broken into some lady's house, stolen her pocketbook and beaten her.

In surrebuttal, defendant denied giving the credit cards to Smith and denied telling him that he perpetrated the burglary, the sexual assault or the robbery.

The jury found defendant guilty of first-degree burglary, first-degree sexual offense and common law robbery. Defendant received sentences of life imprisonment on the convictions of first-degree burglary and first-degree sexual offense. These sentences were to run concurrently. Defendant also received a sentence of ten years for common law robbery.

Defendant appealed the life sentences directly to this Court pursuant to G.S. 7A-27(a). On 29 December 1983, we allowed defendant's motion to bypass the Court of Appeals on the common law robbery conviction pursuant to G.S. 7A-31(b).

Rufus L. Edmisten, Attorney General, by John R. Corne, Assistant Attorney General, and Barbara P. Riley, Associate Attorney, for the State.

Adam Stein, Appellate Defender, by Lorinzo L. Joyner, Assistant Appellate Defender, for defendant-appellant.

BRANCH, Chief Justice.

[1] Defendant first contends the trial court erred by permitting the district attorney to read into evidence a transcription of Detective Harris' taped interview with Roderick Smith. Defendant objects to this evidence on the ground that the State failed to lay a proper foundation for its admissibility.

In order to insure proper authentication of a tape recording, this Court held in *State v. Lynch*, 279 N.C. 1, 181 S.E. 2d 561 (1971), that the following requirements must be met before a tape recorded statement may be admitted into evidence:

> (1) that the recorded testimony was legally obtained and otherwise competent; (2) that the mechanical device was capable of recording testimony and that it was operating properly at the time the statement was recorded; (3) that the operator was competent and operated the machine properly; (4) the identity of the recorded voices; (5) the accuracy and authenticity of the recording; (6) that defendant's entire statement was recorded and no changes, additions, or deletions have since been made; and (7) the custody and manner in which the recording has been preserved since it was made.

Id. at 17, 181 S.E. 2d at 571. *See also, State v. Griffin*, 308 N.C. 303, 302 S.E. 2d 447 (1983); *State v. Detter*, 298 N.C. 604, 260 S.E. 2d 567 (1979).

Furthermore, when a *transcription* of a tape recorded interview or conversation is sought to be admitted into evidence, additional foundational proof is required. A witness who was present when the interview was conducted must testify that it was recorded and later reduced to transcription. It must also be shown that the transcript was compared with the tape recording and that the transcript is an accurate representation of the conversation. *See State v. Poole*, 44 N.C. App. 242, 261 S.E. 2d 10 (1979), *disc. rev. denied*, 299 N.C. 739, 267 S.E. 2d 667 (1980).

It is clear that none of these foundational requirements were established in this case. Smith denied that his interview with Harris was taped and Detective Harris was never asked whether he recorded the interview with Smith or, if he did, whether the recorder was operational and functioning properly. Nor did Harris testify that the transcript of the interview was accurate or authentic. There is no proof as to who reduced the recording to transcription or that anyone compared the transcript with the tape.

The State submits, however, that defense counsel stipulated the transcription was from a tape recording of Harris' interview with Roderick Smith. This stipulation, they argue, obviated the necessity of laying a foundation for this evidence in accordance with the *Lynch* and *Poole* requirements.

The State bases its contention that defense counsel stipulated to the authenticity and accuracy of the transcription upon the following exchange which took place when the State offered the transcript into evidence:

> Q. If Your Honor please, I would request to read into the record the following conversation that occurred between Detective Harris and the witness Mr. Roderick Quincy Smith. I believe we have a stipulation from counsel that this is from a tape recording that Mr. Harris made.
>
> Mr. Vann: I stipulate it is a tape but object to his testimony.
>
> Court: Objection is overruled, [Exception No. 1], but you do stipulate it is from the tape?
>
> Mr. Vann: Yes.

"While a stipulation need not follow any particular form, its terms must be *definite and certain* in order to afford a basis for judicial decision, and it is essential that they be assented to by the parties or those representing them." *State v. Powell*, 254 N.C. 231, 234, 118 S.E. 2d 617, 619 (1961), quoting, 83 C.J.S. *Stipulations* § 24b(3) (emphasis added).

We are of the opinion that defense counsel's comments that "it is a tape," and that "it is from the tape," do not suffice as a

stipulation to all of the foundational requirements respecting the admission into evidence of a tape recording or transcription thereof. Mr. Vann's words are ambiguous at best and certainly do not make "definite and certain" the terms of the stipulation.

In reaching the conclusion that defense counsel did not stipulate to the authenticity and accuracy of the transcript, we are guided by this Court's decision in *State v. Powell, supra.* In *Powell,* the defendant was charged with driving under the influence of intoxicating liquors, second offense. The solicitor offered into evidence a record of the Recorder's Court of Carteret County. Counsel for defendant stipulated that it was an official record of that court. The solicitor then said: "The record shows the defendant was charged with driving drunk, was found guilty as charged, September 10, 1958." 254 N.C. at 233, 118 S.E. 2d at 619. Defendant made no response to the prosecutor's accusation. Our Court noted that, "[t]hereafter, no evidence was offered by the State or defendant as to whether or not defendant was the person referred to in the record, or whether or not defendant had been previously convicted on a charge of driving under the influence." *Id.* at 233-34, 118 S.E. 2d at 619.

The *Powell* Court held that notwithstanding the apparent assent of the defendant, the record did not show that the terms of the stipulation were "definite and certain." In support of this conclusion, Judge Moore reasoned:

> Defendant stipulated that the court minutes offered in evidence were an official record of the Recorder's Court of Carteret County. When the solicitor stated the contents of the record and purported to apply them to defendant, defendant remained silent. The solicitor did not state that defendant admitted the truth of the matters contained in the Recorder's Court record or that defendant stipulated that he was the person referred to in the record. The purported stipulation was not definite and certain on this phase. . . . The court inadvertently fell into error by not insisting upon a *full, complete, definite and solemn* admission and stipulation.

Id. at 234-35, 118 S.E. 2d at 620 (emphasis added).

By the same reasoning, defense counsel here merely stipulated that the transcription was from "a tape recording that Mr.

Harris made." He did not admit to the truth of the matters contained therein or even that the transcript accurately reflected the conversation on the tape. Thus, his remarks were insufficiently definite and certain to permit the State to dispense with laying the foundation for the admission of this type of evidence.

We therefore hold that the trial judge erred in permitting the district attorney to read the transcription of the purportedly tape recorded conversation to the jury in the absence of proper authentication as required by *Lynch* and *Poole*.

We next consider whether the erroneous admission into evidence of the transcript without proper authentication constitutes reversible error.

Defendant presented evidence of an alibi which was corroborated by the testimony of Teresa Johnson. The victim, Ms. Lehmann, described the intruder to police shortly after the incident as a black man in his early twenties, between five feet, ten inches and six feet, two inches tall and with no discernible facial hair. Defendant offered unrefuted evidence at trial, however, that he was five feet, five inches tall and that he had a mustache on 2 September 1982. There was no physical evidence, such as fingerprints, hair samples or clothing fibers, which tended to connect defendant to the Lehmann apartment or to the crimes committed therein. Thus, the taped interview in which Smith admitted receiving the stolen property from defendant and in which he stated that defendant told him of his involvement in the crime, was the most damaging evidence presented implicating defendant in the commission of the offenses charged.

We therefore hold that under the facts of this case, the erroneous admission of this evidence constitutes prejudicial error entitling defendant to a new trial. We are convinced that there is a reasonable possibility that had this error not been committed, the jury would have reached a different result. G.S. 15A-1443(a).

[2] Although not necessary to decision in this case since defendant will receive a new trial, judicial economy dictates that we consider defendant's third assignment of error relating to the sentencing phase of the trial. By this assignment of error, defendant contends that the trial judge erred in aggravating his first-degree burglary sentence with the fact that he was armed with or

used a deadly weapon at the time of the breaking and entering, since evidence of the use of a deadly weapon was necessary to prove an essential element of the joinable crime of first-degree sexual offense.

General Statute 15A-1340.4(a)(1) lists, *inter alia*, the following aggravating factor:

> o. The defendant has a prior conviction or convictions for criminal offenses punishable by more than 60 days' confinement. Such convictions include those occurring in North Carolina courts and courts of other states, the District of Columbia, and the United States, provided that any crime for which the defendant was convicted in a jurisdiction other than North Carolina would have been a crime if committed in this State. Such prior convictions do not include any crime that is joinable, under G.S. Chapter 15A, with the crime or crimes for which the defendant is currently being sentenced.

Defendant maintains that the trial judge violated this statutory provision when he found as an aggravating factor that defendant was armed with a deadly weapon when he committed first-degree burglary.

We are of the opinion that defendant's reliance on this statutory section is misplaced.

General Statute 15A-1340.4(a)(1)o permits evidence of previous convictions to show a past history of criminal conduct. The proscription in the statute against considering joinable crimes in aggravation of defendant's punishment under this particular section is to insure the consideration of only *past* criminal conduct. The trial judge could not, then, find as an aggravating factor under this section the fact that defendant contemporaneously committed another crime. *See State v. Lattimore*, 310 N.C. 295, 311 S.E. 2d 876 (1984). This proscription is consistent with G.S. 15A-926 which, in effect, provides as a procedural matter that joinable offenses must be tried together absent some reason for separate trial.

In further support of our conclusion that defendant's contention is without merit, we note that in *State v. Chatman*, 308 N.C. 169, 301 S.E. 2d 71 (1983), this Court impliedly approved of a

similar finding in aggravation under circumstances factually identical to those presented in instant case.

The defendant in *Chatman* was convicted of first-degree rape, first-degree sexual offense and first-degree burglary. In imposing the maximum sentence of fifty years for first-degree burglary, the trial judge found as a factor in aggravation of defendant's punishment that he "was armed with or used a deadly weapon at the time of the crime." The evidence revealed that the deadly weapon possessed by the defendant when he broke into the victim's home was a knife which he later used to threaten the victim and to force her to engage in sexual intercourse with him. The threatening use of the knife was thus one of the elements in support of defendant's convictions of first-degree rape and first-degree sexual offense.

The defendant contended on appeal that because the knife was used in the rape but was not actually used in the burglary, the trial court erred in finding in aggravation of defendant's burglary sentence that he was armed with a deadly weapon when he entered the victim's home. Justice Meyer rejected defendant's contention, finding that the challenged aggravating factor was fully supported by the evidence.

> Defendant was armed with a deadly weapon, the knife, *at the time he committed the burglary offense.* Judge Albright properly found as a factor in aggravation that defendant was armed at the time of the crime.

308 N.C. at 179-80, 301 S.E. 2d at 77. (Emphasis in original.)

Conceding that the precise question raised by defendant in this case was not decided in *Chatman*, we nevertheless are of the opinion that the above-quoted language from that case and our earlier discussion of the inapplicability of G.S. 15A-1340.4(a)(1)o to the facts here presented, is sufficient to dispose of defendant's argument that the trial court erred in finding in aggravation of his punishment for burglary that he was armed with a deadly weapon at the time of the crime. General Statute 15A-1340.4(a)(1)i specifically provides as an aggravating factor that "the defendant was armed with or used a deadly weapon at the time of the crime" and the evidence in this case unquestionably reveals that defendant was armed with a gun when he entered the victim's

kitchen window. The possession of a weapon is not an essential element of first-degree burglary and therefore the challenged aggravating factor does not violate the prohibition of G.S. 15A-1340.4(a)(1) that "[e]vidence necessary to prove an element of the offense may not be used to prove any factor in aggravation, ..."

We therefore hold that the trial judge appropriately considered in aggravation of defendant's punishment for burglary the fact that he was armed with or used a deadly weapon at the time of the crime.

For the reasons above stated, there must be a

New trial.

STATE OF NORTH CAROLINA v. MARK A. JENKINS

No. 419A83

(Filed 5 June 1984)

1. **Criminal Law § 75.4— custodial interrogation—invocation of right to counsel—admissibility of subsequent confession**

Defendant's confession made after he had previously invoked his right to counsel during custodial interrogation was admissible into evidence where the trial court's conclusions that (1) defendant initiated the conversation with the officer which resulted in the inculpatory statement and (2) defendant knowingly and intelligently waived his previously invoked right to counsel were supported by evidence and findings that after defendant had requested an attorney and questioning had ceased, defendant asked an officer to come to see him in the morning; the following morning the officer went to the jail and asked a jailer to check with defendant as to whether defendant still desired to talk with him; the jailer reported that defendant did want to talk with the officer; the officer and defendant went to an interview room where the officer again advised defendant of his rights; shortly thereafter, defendant told the officer that he wanted to talk to him "person to person," and the officer told defendant that anything he said would be recorded and used in court; defendant thereafter made a statement admitting his role in the commission of the crime; and the officer did nothing by action or threat to coerce defendant into making a statement and did not promise defendant anything in return for his statement.

2. **Criminal Law §§ 75.16, 146.1; Infants § 17— confession by juvenile—right to have parent present—absence of warning—failure to raise in trial court**

The seventeen-year-old defendant could not raise on appeal the issue of failure to suppress his confession because he was not advised of his right as a juvenile to have his parent, guardian or custodian present during interrogation in accordance with G.S. 7A-595(a) where the failure to warn in accordance with the statute was not raised in the motion to suppress and was not argued in the trial court.

3. **Constitutional Law § 63; Jury § 7— exclusion of jurors for capital punishment views—cross-section of community**

Defendant was not denied a fair determination of his guilt or innocence by a jury constituting a representative cross-section of the community when the trial court permitted challenges for cause of jurors who would be unwilling to impose the death penalty.

4. **Jury § 7.14— peremptory challenge of black veniremen**

The trial judge did not err in overruling defendant's objection to the State's use of peremptory challenges to excuse certain black veniremen where there was no evidence in the record that prospective jurors were peremptorily challenged by the State on the basis of race.

APPEAL by defendant from *Battle, Judge*, at the 11 April 1983 Criminal Session of CUMBERLAND Superior Court.

Defendant was charged in an indictment, proper in form, with first-degree murder and first-degree burglary.

The State's evidence tended to show that on 31 July 1982, the body of Ingrid Valenzuela was found in the bedroom of her home, which was located just beyond the city limits of Fayetteville, North Carolina. The screen at the front door of the dwelling had been torn or cut. There was blood on the bed where the victim was found and the walls of the bedroom were splattered with blood. Parts of a knife blade and knife handle were found under the body.

Medical testimony disclosed the presence of about two dozen stabbing or cutting wounds to the back, neck, face, chest and arm areas of the body. It was the opinion of the pathologist who examined the body that these wounds caused the victim's death.

On 29 July 1982, Johnson Freitas told one Brian Moore that he (Freitas) and Mark Jenkins were involved in the murder of Mrs. Valenzuela. Moore gave this information to Sergeant Daws of the Cumberland County Sheriff's Department. Acting pursuant

to this information, on 1 August 1982 Sergeant Daws and Detective Maxwell questioned Freitas who admitted his involvement in the murder and implicated defendant.

In substance, Johnson Freitas testified at trial that at about 11:45 p.m. on 28 July 1982, defendant came to his house and told him that they could have sex with Mrs. Valenzuela if they went to her residence. They proceeded to the Valenzuela home and while Freitas stood under a street light, defendant cut the screen out of the front door. Upon defendant's signal, Freitas went to the front door where he heard someone being hit. Shortly thereafter he entered the house where he observed defendant on Mrs. Valenzuela's bed. Defendant was sitting on Mrs. Valenzuela, holding her throat and stabbing her. Defendant told the witness to help and he complied by twisting the victim's neck. When defendant broke the knife he was using, Freitas obtained another knife from the kitchen which was also broken. Upon defendant's instruction, Freitas then brought a large twelve-inch knife from the kitchen which defendant again used to cut and stab the victim. The witness then ran from the house and was followed by defendant who was carrying a lady's pocketbook and a bloody knife. They hid the contents of the pocketbook and threw the pocketbook into the woods. Later they returned to the Valenzuela residence where they obtained the knives and wiped the fingerprints from them.

Freitas testified that he was questioned by police officers on 1 August 1982 and that he voluntarily made a statement consistent with his trial testimony. He also led the officers to the place where he and defendant had disposed of the various things taken from the Valenzuela home.

Police officers arrested defendant on 2 August 1982, at which time defendant made an inculpatory statement. We will state further facts concerning defendant's arrest and the circumstances under which he made his confession in the body of this opinion.

Defendant offered no evidence.

The jury returned verdicts of guilty of first-degree murder and misdemeanor breaking or entering.

At the sentencing hearing, the jury was unable to agree as to its sentence recommendation on the verdict of murder in the first degree and the trial judge imposed a sentence of life imprison-

ment pursuant to G.S. 15A-2000(b). On the verdict of guilty of misdemeanor breaking or entering, the trial judge imposed a sentence of not less than two years nor more than two years.

Defendant appealed the life sentence directly to this Court pursuant to G.S. 7A-27(a). We allowed defendant's motion to bypass the Court of Appeals as to the misdemeanor verdict on 13 January 1983.

Rufus L. Edmisten, Attorney General, by J. Michael Carpenter, Administrative Deputy Attorney General, and Daniel C. Higgins, Assistant Attorney General, for the State.

Mary Ann Tally and John G. Britt, Jr., for defendant-appellant.

BRANCH, Chief Justice.

[1] Defendant assigns as error the denial of his motion to suppress a custodial inculpatory statement made to police officers.

Defense counsel filed a motion to suppress on 3 December 1982 alleging that the challenged incriminatory statement was obtained from him in violation of his fifth amendment right to be free from self-incrimination and that its exclusion was required by the fourth amendment constitutional guarantee against unreasonable searches and seizures. An affidavit in support of this motion was filed on the same day. On 27 January 1983, Judge E. Lynn Johnson permitted defendant to amend his motion by adding as grounds for suppression that the incriminating statement was taken from him in violation of his right to counsel as guaranteed by the sixth amendment.

We note that defendant does not contend that the officers failed to properly warn him of his *Miranda* rights at each interrogation. Neither does he deny that he affirmatively waived these rights orally and by affixing his signature to the several written waivers. It is his position that after he had initially waived his rights, he was informed for the first time that he was being held for a homicide and at that time, by requesting an attorney, he invoked his right to remain silent. Although questioning then ceased, defendant contends that Officer Matthews reinitiated further interrogation regarding defendant's involvement in the crimes charged and thereby violated his constitutional rights.

We will therefore limit our consideration of the voir dire evidence to the questions of (1) whether defendant initiated the conversation with Officer Matthews which resulted in the inculpatory statement, and (2) if he did initiate the discussion with Officer Matthews, whether defendant knowingly and intelligently waived his previously invoked right to counsel.

In the recent case of *State v. Lang*, 309 N.C. 512, 308 S.E. 2d 317 (1983), Justice Mitchell, writing for a unanimous court, exhaustively reviewed the principles of law pertinent to decision of this assignment of error. We quote from that decision:

> In *Edwards v. Arizona*, 451 U.S. 477, *reh'g denied*, 452 U.S. 973 (1981), the Supreme Court of the United States held
>
> > that when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights. We further hold that an accused, such as Edwards, having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, *unless the accused himself initiates further communication*, exchanges, or conversations with the police.
>
> 451 U.S. 484-485 (emphasis added). The Supreme Court has more recently stated that this statement in *Edwards* established "in effect a prophylactic rule, designed to protect an accused in police custody from being badgered by police officers in the manner in which the defendant in *Edwards* was." *Oregon v. Bradshaw*, --- U.S. ---, ---, 103 S.Ct. 2830, 2834, 77 L.Ed. 2d 405, 411 (Plurality opinion) (1983). Thus, the holdings in *Edwards* and *Bradshaw* make it crucial that there be a finding of fact as to who initiated the communication between the defendant and the officers which resulted in his inculpatory statement while in custody and after he had invoked the right to have counsel present during interrogation.

Even if the communication leading to the confession was initiated by the defendant, however, the inquiry and need for

findings of fact does not end. "[T]he burden remains upon the prosecution to show that subsequent events indicated a waiver of the Fifth Amendment right to have counsel present during the interrogation." *Oregon v. Bradshaw*, --- U.S. at ---, 103 S.Ct. at 2834, 77 L.Ed. 2d at 412. This was made clear in the following footnote to the *Edwards* opinion:

> If, as frequently would occur in the course of a meeting initiated by the accused, the conversation is not wholly one-sided, it is likely that the officers will say or do something that clearly would be "interrogation." In that event, the question would be whether a valid waiver of the right to counsel and the right to silence had occurred, that is, *whether* the purported waiver was knowing and intelligent and *found to be so* under the *totality of the circumstances, including* the necessary fact that the accused, not the police, reopened the dialogue with the authorities.

451 U.S. at 486 n. 9 (emphasis added). Therefore, in cases such as this in which the defendant was subjected to custodial interrogation in the absence of counsel after invoking his right to have counsel present during interrogation, the inquiry may not end with a finding that the defendant initiated the later dialogue between himself and the police. The judge presiding must go further and make findings and conclusions establishing whether the defendant validly waived the right to counsel and to silence under the totality of the circumstances, including the circumstance that the accused reopened the dialogue with the authorities. If the presiding judge finds that the accused did not initiate the further dialogue with the authorities, however, the prophylactic rule applies and the confession must be excluded without reaching a consideration of the totality of the circumstances. *Oregon v. Bradshaw*, --- U.S. ---, 103 S.Ct. 2830, 77 L.Ed. 2d 405 (1983).

The phrase "totality of the circumstances" as used in *Edwards* and *Bradshaw* clearly includes all circumstances material to a determination of whether the defendant engaged in a knowing, intelligent and valid waiver of the right to counsel and the right to silence, including the necessary

fact that the accused reopened the dialogue with the authorities.

309 N.C. at 521-22, 308 S.E. 2d at 321-22.

In instant case, at the voir dire hearing on defendant's motion to suppress, the State offered the testimony of Sergeant Matthews who testified that he had established a friendly relationship with defendant who for sometime had been acting as an informant for the sergeant. The sergeant had successfully interceded in defendant's behalf in several criminal matters.

Sergeant Matthews testified that after defendant had requested an attorney and questioning had ceased, and just before he was carried into the booking room, defendant turned to Matthews and asked if he would come to see him. Sergeant Matthews replied, "Do you want me to?" Defendant said, "Yes." Sergeant Matthews then inquired, "When? In the morning?", and defendant replied, "Yeah."

The following morning the officer went to the jail and requested the assistant jailer, Johnny Tyndall, to ask defendant if he still wanted to talk to him. Tyndall left and came back in a few minutes and said that Mark Jenkins did want to talk to the sergeant. Thereafter, the officer and defendant went to an interview room where the officer again advised defendant of his rights. Shortly thereafter, defendant told Sergeant Matthews that he wanted to talk to him "person to person." The officer then told defendant that anything he said would be recorded and used in court. Defendant thereafter made a statement admitting his role in the commission of the crime. Sergeant Matthews testified that he did nothing by action or threat to coerce defendant into making a statement and that he did not promise defendant anything in return for his statement. The officer admitted on cross-examination that he told defendant, "It was looking bad for him," and that he (Matthews) knew there had to be some reason if he (defendant) did this.

Johnny Tyndall, the assistant jailer, testified in corroboration of Sergeant Matthews' testimony as to the events which occurred at the jail.

Detective Maxwell later took a formal statement from defendant after Sergeant Matthews had talked with him. Maxwell

also testified that he made no promises or threats to induce defendant to make a statement.

Defendant testified on voir dire that after he asked for an attorney, he never indicated to Officer Matthews that he wanted to talk to him and that the jailer never asked him if he wanted to talk to the officer. He further stated that he went to an interview room with Sergeant Matthews where he was given his rights. He admitted signing a waiver form, but testified that Matthews influenced him to make a statement by saying there was a big chance for him to be rehabilitated and that he (Matthews) could help him. Defendant also testified that after talking with Officer Matthews, he talked to Detective Maxwell after again being informed of his rights. He testified that he talked to Detective Maxwell "freely and voluntarily." He further testified that he was seventeen years old at the time of his arrest. He was given the right to make a phone call and used it to call his girl friend.

At the conclusion of the voir dire evidence, Judge Johnson found, inter alia, the following facts:

> 5. That at 11:27 p.m. the defendant was read the warrants by Detective Maxwell, and at 11:31 p.m. the defendant was read his Miranda rights by Detective Daws, which rights appear on State's Exhibit A Voir Dire which is attached to this order, incorporated herein by reference; and the Court finding that the defendant acknowledged his understanding of each right by responding "yes" and affixing his signature to that document; and that he affirmatively waived those rights by responding "yes" and affixing his signature to the document.
>
> 6. That the defendant at 11:35 p.m. invoked his right to remain silent and to have counsel and advised the detectives that he desired to consult with Attorney Carter; and that the detectives immediately ceased interviewing the defendant.
>
> 7. *That thereafter in the Booking Room, the defendant turned to Detective Matthews and asked him to come see him in the morning.*
>
> This constitutes DEFENDANT'S EXCEPTION NO. 1.

8. *That the following morning, Detective Matthews went to the jail in response to the defendant's request, but asked Sergeant Tyndall, a jailer, to check with the defendant as to whether the defendant still desired to talk to Detective Matthews, and the response was affirmative.*

This constitutes DEFENDANT'S EXCEPTION NO. 2.

9. That thereafter Detective Matthews met the defendant in an interview room in the jail and advised the defendant of his Miranda rights, which the defendant acknowledged that he understood by affixing his signature to that document which has been marked State's Exhibit E Voir Dire, a copy of which is attached to this order and incorporated herein by reference, and thereafter affirmatively waived each of his rights by affixing his signature to the same document; and the Court finding the specific rights and waiver to be as set forth on State's Exhibit E Voir Dire.

10. That the defendant thereafter gave Detective Matthews a statement.

11. That subsequently Detective Maxwell was advised of the statement given by the defendant to Detective Matthews.

12. That thereafter the defendant was taken to the Detective Division and again advised of his Miranda rights by Detective Maxwell, those rights appearing on State's Exhibit B Voir Dire, a copy of which is attached hereto and incorporated herein by reference, and defendant acknowledged each right by affixing his signature thereto and affirmatively waiving those rights by affixing his signature thereto; and the Court finding the rights and waiver to be as reflected on State's Exhibit B Voir Dire.

13. *That thereafter the defendant voluntarily gave a statement to Detective Maxwell and thereafter voluntarily accompanied detectives to recover evidence; and that both were done without coercion, promise or threat.*

This constitutes DEFENDANT'S EXCEPTION NO. 3.

Based on these findings, Judge Johnson concluded:

1. *That the defendant's privilege against self-incrimination as guaranteed by the Fifth Amendment to the Constitution of the United States as made applicable to the States by the Due Process Clause of the Fourteenth Amendment and by Article 1, Section 23, of the Constitution of North Carolina was not violated. And that the defendant's rights in respect to his Sixth Amendment rights in respect to right to counsel in the Constitution of the United States as made applicable to the States by the Due Process Clause of the Fourteenth Amendment were not violated.*

This constitutes DEFENDANT'S EXCEPTION NO. 4.

Judge Johnson thereupon denied defendant's motion to suppress.

There was ample evidence before Judge Johnson to support his findings. He resolved the conflicts in the evidence against defendant and we are bound by his findings. See *State v. Barnett*, 307 N.C. 608, 300 S.E. 2d 340 (1983); *State v. Chamberlain*, 307 N.C. 130, 297 S.E. 2d 540 (1982). These findings of fact in turn support the conclusions of law that defendant's constitutional rights were not violated.

[2] Finally, by this assignment of error, defendant for the first time on appeal contends that since he was only seventeen years old at the time he was arrested and made the inculpatory statement, he was interrogated in violation of G.S. 7A-595(a). This statute, in essence, provides that before conducting an in-custody interrogation of a juvenile, police officers must in addition to the *Miranda* warnings advise the juvenile that he may have his parent, guardian, or custodian present during the interrogation.

Defendant relies upon *State v. Fincher*, 309 N.C. 1, 305 S.E. 2d 685 (1983). There we interpreted the term "juvenile" as used in G.S. 7A-595(a) to include any person not yet eighteen years old or emancipated. In *Fincher*, we found error in the failure to warn the seventeen-year-old defendant of his rights under the statute.

We conclude, however, that in instant case, defendant is not entitled to rely upon *Fincher* to support his argument that the trial judge erred in denying his motion to suppress. This is so because the failure to warn in accordance with the statute was not raised in the motion to suppress and was not argued in the

trial court. Defendant may not, therefore, raise this issue for the first time on appeal.

When there is a motion to suppress or objection to a confession is made, counsel must specifically advise the court before a reception of voir dire evidence as to the basis for his objection or motion to suppress. *State v. Ricks*, 308 N.C. 522, 302 S.E. 2d 770 (1983); *State v. Hunter*, 305 N.C. 106, 286 S.E. 2d 535 (1982). We are of the opinion that defendant has waived the statutory privileges granted by G.S. 7A-595(a).

For the reasons stated, we hold that the trial judge properly denied defendant's motion to suppress.

[3] Defendant next contends that the trial judge erred by permitting the State to "death qualify" the jury prior to the guilt phase of the trial. He argues that permitting challenges for cause of jurors who would be unwilling to impose the death penalty denied him a fair determination of his guilt or innocence by a jury constituting a representative cross-section of the community.

This Court has consistently rejected this argument. *State v. Adcock*, 310 N.C. 1, 310 S.E. 2d 587 (1984); *State v. Bondurant*, 309 N.C. 674, 309 S.E. 2d 170 (1983); *State v. Kirkley*, 308 N.C. 196, 302 S.E. 2d 144 (1983); *State v. Avery*, 299 N.C. 126, 261 S.E. 2d 803 (1980). We do not elect to overrule these well-reasoned cases. This assignment of error is overruled.

[4] Defendant assigns as error the trial judge's action in overruling his objection to the State's use of peremptory challenges to excuse certain black veniremen.

The nature of a peremptory challenge is that it is exercised without a stated reason and without being subject to the control of the court. *Swain v. Alabama*, 380 U.S. 202 (1965); *State v. Smith*, 291 N.C. 505, 231 S.E. 2d 663 (1977).

There is no evidence in this record that prospective jurors were peremptorily challenged by the State on the basis of race. The State was exercising a statutory right granted to both the State and defendant by G.S. 15A-1217 when it exercised its peremptory challenges. We find no merit in this assignment of error.

Defendant's motions for a new trial and to set aside the verdicts appear to be formal and addressed to the trial judge's discretion. Such motions are not reviewable on appeal in the absence of abuse of discretion on the part of the trial judge and defendant has here failed to show abuse of discretion. *State v. Hamm*, 299 N.C. 519, 263 S.E. 2d 556 (1980).

Our careful examination of this record discloses no prejudicial error. The verdicts returned and the judgments imposed will not be disturbed.

No error.

WAYNE V. BROWN AND STROUT REALTY, INC. v. W. E. FULFORD, JR. (ROBERT W. KAYLOR, ADMINISTRATOR, C.T.A.)

No. 130PA83

(Filed 5 June 1984)

1. Brokers and Factors § 1— "indirect cause" of sale language in contract providing for commission—significance of

Although parties to a Real Estate Agent's Contract may include language providing for a commission if the efforts of the broker or agent prove to be an "indirect cause" of the sale, and although the parties by so providing would be contracting for recovery outside the general rules dealing with real estate contracts, such language represents a departure from the standard language of a Non-Exclusive Real Estate Agent's Contract, and under certain circumstances, such language might prove significant. However, where the language in the contract between plaintiff and defendant stated that defendant "reserve[s] the right to sell the property to a buyer secured by myself or through another agent and in such case no commission or charge shall be due you, provided such sale or transfer is not made directly or *indirectly* to or through your [Strout Realty, Inc.] prospect," and where this language was interpreted to provide that plaintiffs would be entitled to a commission if the buyer, *even one procured by the defendant-seller or another agent*, was plaintiffs' prospect, under the facts of the case, the Court did not agree with the conclusion reached by the Court of Appeals that the "indirect" language in the agreement was significant since plaintiffs' recovery had to be based on the theory that they would be the procuring cause of the sale.

2. Brokers and Factors § 6.1— triable issue as to whether plaintiffs procuring cause of sale of property

The evidence in an action for a real estate commission tended to show that a Mr. Domnick was interested in the subject property prior to 18 March

1978 when the listing agreement between plaintiffs and defendant was allegedly entered into; however, initial negotiations with the then owner Wachovia ceased in the later part of 1977; Domnick learned that defendant was interested in the property in late 1977 or early 1978; however, he did not know that defendant had an option to purchase the property until the 3 April 1978 meeting when he was so informed by plaintiffs; neither Domnick nor his partner, Dion, met defendant on 3 April 1978; both men were introduced to defendant for the first time at a meeting on 16 April 1978 arranged by plaintiff Brown, where the parties discussed the potential sale of the property and ways to finance the purchase; and the sale was eventually made to a corporation owned by Domnick and Dion. Based on these facts, plaintiffs met their burden of raising a genuine issue of material fact as to whether plaintiff Brown's efforts in arranging either of the April 1978 meetings constituted "the initiating act which [was] the procuring cause of the sale ultimately made."

APPEAL by defendant[1] from a decision of the Court of Appeals, 60 N.C. App. 499, 299 S.E. 2d 272 (1983), reversing summary judgment granted by *Preston, J.*, entered 22 September 1981 in Superior Court, WAKE County. Following the denial of defendant's petition for discretionary review, we allowed defendant's petition for reconsideration on 6 July 1983. Argued in the Supreme Court on 4 October 1983.

David R. Cockman, for plaintiff-appellee.

Everett & Cheatham, by C. W. Everett, Sr. and Robert W. Kaylor, for defendant-appellant.

FRYE, Justice.

This lawsuit evolves from an agreement entered into by plaintiff Strout Realty and the defendant whereby Strout Realty agreed to list and attempt to sell the Belvedere Plantation near Wilmington, North Carolina. In the complaint, plaintiffs Strout Realty and its agent Brown, a licensed real estate broker, alleged that due to their efforts the property in question was sold to United States Development Corporation for $1,900,000.00 thereby entitling plaintiffs to a commission of $190,000.00 or ten percent of the purchase price. The trial judge granted defendant's motion for summary judgment. The Court of Appeals reversed. For the

1. W. E. Fulford, Jr., died on 17 January 1984. Pursuant to Rule 38 of the North Carolina Rules of Appellate Procedure, substitution of parties was allowed 5 June 1984.

reasons stated herein, we modify and affirm the decision of the Court of Appeals.

The record discloses the following pertinent facts: Prior to 1978 the Belvedere Plantation was owned by Wachovia Mortgage Company. Sometime in the last quarter of 1976, a real estate investor and developer, David S. Wilson, contacted Charles M. Dahlgren, Jr., the Vice-President of Wachovia Mortgage Company, to inquire about the possible purchase of the Belvedere Plantation. The negotiations continued for several months, during which time Mr. Dahlgren was also contacted by Terrence Domnick, Wilson's partner at the time. In researching the background of Mr. Wilson, Mr. Dahlgren learned that he and Mr. Domnick were developing a large tract of land outside Clarksville, Virginia. Mr. Dahlgren concluded that Wilson and Domnick were considering a possible joint purchase of the Belvedere Plantation at that time. During the third quarter of 1977, negotiations ceased.

On 21 October 1977, Wachovia Mortgage Company entered into an option/purchase agreement with the defendant, Dr. William E. Fulford, Jr. During the term of the option, Irvin A. Staton, a representative of the plaintiff, Strout Realty, repeatedly asked for an open real estate listing on the Belvedere property. While there is some question as to whether a valid listing agreement was ever signed, we will assume, for purposes of this opinion, that the listing agreement included in the Record does in fact represent the agreement between the parties.[2]

In late 1977 or early 1978 Terrence Domnick learned from officials at Wachovia that the defendant was attempting to purchase the Belvedere Plantation. On 3 April 1978, as a result of the

2. In paragraph four of their complaint, plaintiffs alleged that "on or about 18 March 1978, plaintiff Strout Realty, Inc. and the defendant entered into a listing agreement whereby plaintiffs would list and attempt to sell the 'Belvedere Plantation. . . .'" With respect to this allegation, defendant answered that "it is admitted that the defendant executed the paper writing attached . . . except as admitted, the remaining allegations of paragraph four of the complaint are denied." The Record, however, discloses that when Mr. Staton visited the defendant for the purpose of obtaining a signed listing agreement on the property, he partially filled out a paper writing which he later discovered was never signed. In early 1979, when the defendant informed Mr. Staton of the impending sale of the property and asked if the parties had ever entered into a listing agreement, Mr. Staton believed that they had. At that time, however, Mr. Staton was unable to locate the partially completed agreement. He did find a form signed in blank with an unrelated price figure

initiative of Wayne V. Brown, a new associate at Strout Realty, a meeting took place in Raleigh between Brown, Domnick and David Dion, Domnick's partner. Brown discussed several properties with Domnick and Dion, and it was at this meeting that Domnick first learned of the defendant's option to purchase the Belvedere Plantation.

On 16 April 1978 a second meeting was held, attended by Brown, Staton, Dr. Fulford, Domnick and Dion. The parties discussed the sale and ways to finance the purchase of the Belvedere Plantation.

On 26 May 1978, Wachovia informed Dr. Fulford by letter that, pursuant to the terms of the option agreement, it would tender a fully executed deed to the subject property on 31 May 1978, in exchange for $1,185,000 representing the balance of the purchase price. Unable to meet this demand, Dr. Fulford enlisted the help of Mr. B. L. Lang. An agreement was reached between Dr. Fulford and Mr. Lang whereby the property would be purchased in Lang's name and, upon the sale of the property, each of them would be reimbursed for expenses and the profits would be shared. On 2 June 1978, a deed to the Belvedere Plantation was delivered to Mr. Lang and was recorded on that date.

Wayne Brown terminated his relationship with Strout Realty on 30 May 1978 and on 26 June 1978 he executed a thirty day exclusive listing agreement with the defendant for the sale of the Belvedere Plantation.

Ultimately, on 9 April 1979, as the result of negotiations between Lang, Dr. Fulford and Domnick, Dr. Fulford and Terrence Domnick, who was acting on behalf of United States Development Corporation, entered into an agreement for the sale of the Belvedere Plantation for a purchase price of $1,900,000.

Based on the above stated facts received by the court in the form of pleadings, depositions, interrogatories, affidavits, and ex-

which he then completed, concluding that it was intended to be the Belvedere agreement. It was not until July of 1980 that Mr. Staton found the form he had partially filled out on the Belvedere Plantation. It was unsigned. Mr. Staton disclosed this information by affidavit on 19 August 1981. On 31 August 1981, defendant moved to amend his answer (presumably that portion relating to the execution of the agreement). This motion was denied.

hibits, the trial court granted defendant's motion for summary judgment.

The Court of Appeals reversed, finding as significant the following language in the listing agreement purportedly entered into by Strout Realty and the defendant: "I [Fulford] reserve the right to sell the property to a buyer procured by myself or through another agent and in such case no commission or other charge shall be due you, provided such sale or transfer is not made directly or *indirectly* to or through your [Strout Realty, Inc.] prospect." (Emphasis added.) Based on this language, the Court of Appeals concluded that "even if plaintiffs were only an indirect cause of the sale, they would be entitled to their commission under the terms of the contract. According to plaintiff Brown's affidavit, he arranged the first meeting between Fulford and the eventual buyers of the property, which is some evidence that plaintiffs were at least an indirect cause of the sale." 60 N.C. App. at 504, 299 S.E. 2d at 275.

[1] We first note that parties to a Real Estate Agent's Contract may include language providing for a commission if the efforts of the broker or agent prove to be an "indirect cause" of the sale. By so providing, the parties would, in effect, be contracting for recovery outside our general rules as enunciated in *Realty Agency, Inc. v. Duckworth & Shelton, Inc.*, 274 N.C. 243, 162 S.E. 2d 486 (1968). Furthermore, we agree that the language in this listing agreement represents a departure from the standard language of a Non-Exclusive Real Estate Agent's Contract, and that under certain circumstances such language might, indeed, prove significant. Essentially, we interpret the language of the agreement to provide that plaintiffs would be entitled to a commission if the buyer, *even one procured by the defendant-seller or another agent*, was plaintiffs' prospect.

We do not agree, however, that the facts of this case warrant the conclusion reached by the Court of Appeals, that the "indirect" language in the agreement is significant. Plaintiffs' recovery must be based on the theory that they were the procuring cause of the sale. The essential question involved in the case before us is whether anyone can "procure a purchaser" who is already familiar with the property in question and who has previously tried to purchase that same property from a prior owner.

Thus, plaintiffs' recovery will be determined by the application of the general rules governing the right of a real estate broker to recover a commission for his services. *See Realty Agency, Inc. v. Duckworth & Shelton, Inc.*, 274 N.C. 243, 162 S.E. 2d 486.

[2] The sole issue before us then is whether the trial court erred in granting defendant's motion for summary judgment.

Pursuant to Rule 56(c) of the North Carolina Rules of Civil Procedure, summary judgment will be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law."

The law is succinctly stated in *Bone International, Inc. v. Brooks*, 304 N.C. 371, 375, 283 S.E. 2d 518, 520 (1981):

> A party moving for summary judgment may prevail if it meets the burden (1) of proving an essential element of the opposing party's claim is nonexistent, or (2) of showing through discovery that the opposing party cannot produce evidence to support an essential element of his or her claim. *Moore v. Fieldcrest Mills, Inc.*, 296 N.C. 467, 251 S.E. 2d 419 (1979); *Zimmerman v. Hogg & Allen*, 286 N.C. 24, 209 S.E. 2d 795 (1974). Generally this means that on "undisputed aspects of the opposing evidential forecast," where there is no genuine issue of fact, the moving party is entitled to judgment as a matter of law. 2 McIntosh, *North Carolina Practice and Procedure* § 1660.5, at 73 (2d ed. Supp. 1970). If the moving party meets this burden, the non-moving party must in turn either show that a genuine issue of material fact exists for trial or must provide an excuse for not doing so. *Moore v. Fieldcrest Mills, Inc.*, 296 N.C. at 470, 251 S.E. 2d at 421-22; *Zimmerman v. Hogg & Allen*, 286 N.C. at 29, 209 S.E. 2d at 798. If the moving party fails to meet his burden, summary judgment is improper regardless of whether the opponent responds. 2 McIntosh, *supra*. The goal of this procedural device is to allow penetration of an unfounded claim or defense before trial. *Id.* Thus, if there is any question as to the credibility of an affiant in a summary judgment motion or if there is a question which can be resolved only by the weight

of the evidence, summary judgment should be denied. *Moore v. Fieldcrest Mills, Inc.*, 296 N.C. at 470, 251 S.E. 2d at 422.

In the present case, the defendant, as the moving party, must prove that an essential element of plaintiffs' claim is nonexistent or show that a forecast of plaintiffs' evidence indicates an inability to prove facts giving rise at trial to all essential elements of their claim. In short, the defendant would be entitled to summary judgment if the facts irrefutably disclose that plaintiffs were not the procuring cause of the sale. *Realty Agency, Inc. v. Duckworth & Shelton, Inc.*, 274 N.C. 243, 162 S.E. 2d 486.

In *Realty Agency, Inc. v. Duckworth & Shelton, Inc.*, we set forth the principles of law applicable to the right of a real estate broker to recover a commission for his services:

> Ordinarily, a broker with whom an owner's property is listed for sale becomes entitled to his commission whenever he procures a party who actually contracts for the purchase of the property at a price acceptable to the owner. *Cromartie v. Colby*, 250 N.C. 224, 108 S.E. 2d 228; *Martin v. Holly*, 104 N.C. 36, 10 S.E. 83. If any act of the broker in pursuance of his authority to find a purchaser is the initiating act which is the procuring cause of a sale ultimately made by the owner, the owner must pay the commsision [sic] provided the case is not taken out of the rule by the contract of employment. *Trust Co. v. Goode*, 164 N.C. 19, 80 S.E. 62. The broker is the procuring cause if the sale is the direct and proximate result of his efforts or services. The term *procuring cause* refers to "a cause originating or setting in motion a series of events which, without break in their continuity, result in the accomplishment of the prime object of the employment of the broker, which may variously be a sale or exchange of the principal's property, an ultimate agreement between the principal and a prospective contracting party, or the procurement of a purchaser who is ready, willing, and able to buy on the principal's terms." 12 C.J.S. *Brokers* § 91, p. 209 (1938). *Accord*, 12 Am. Jur. 2d *Brokers* § 190 (1964).

Id. at 250-51, 162 S.E. 2d at 491.

In the instant case, the evidence, for the most part undisputed, indicates the following: Terrence Domnick was in-

terested in the subject property prior to 18 March 1978 when the listing agreement was allegedly entered into. However, initial negotiations with the then owner Wachovia ceased in the latter part of 1977. Domnick learned that defendant was interested in the property in late 1977 or early 1978. However, he did not know that defendant had an option to purchase the property until the 3 April 1978 meeting when he was so informed by plaintiffs. Neither Domnick nor his partner, Dion, met defendant on 3 April 1978. Both men were introduced to Dr. Fulford for the first time at a meeting on 16 April 1978 arranged by Mr. Brown, where the parties discussed the potential sale of the property and ways to finance the purchase. The sale was eventually made to a corporation owned by Domnick and Dion.

Based on these facts, we believe that plaintiffs have met their burden of raising a genuine issue of material fact as to whether Brown's efforts in arranging either of the April 1978 meetings constituted "the initiating act which [was] the procuring cause of the sale ultimately made." *Realty Agency, Inc. v. Duckworth & Shelton, Inc.*, 274 N.C. at 250, 162 S.E. 2d at 491.

While it is true that during 1976 Domnick had, on his own initiative, engaged in negotiations for the purchase of the property, those negotiations involved parties entirely different from those parties with whom Domnick negotiated for the final sale. Included in the original negotiations were David A. Wilson, then Domnick's partner, Charles Dahlgren, Vice-President of Wachovia Bank, and later Domnick himself. The 16 April 1978 meeting arranged by Brown included, in addition to representatives from plaintiff Realty Company, Domnick, Dion, who was then Domnick's partner, and the defendant. Final negotiations also included Lang. It is likely that the substance and terms of the earlier negotiations differed from the later ones. Furthermore, of great significance is the fact that in 1977, well before Brown's initiative in 1978, negotiations between Domnick and Wachovia had ceased.

In his affidavit, Domnick states that neither Wayne Brown nor Strout Realty contacted him "for the purpose of buying Belvedere Plantation from anyone," since he had been "interested in Belvedere Plantation on [his] own for some time prior to [his] meeting with William E. Fulford and Ben Lang." For the reasons stated above, we do not consider Domnick's prior interest in the

property determinative of the issue. Rather, if the jury should find that the plaintiffs, pursuant to their authority to find a purchaser for the Belvedere Plantation, arranged meetings with the defendant and that those meetings, or either of them, constituted the initiating act that set in motion a series of events which, without break in their continuity, resulted in the eventual sale of the property to United States Development Corporation, plaintiffs are entitled to their commission. *Id.*

We agree with the decision of the Court of Appeals that there is an issue of fact concerning Dr. Fulford's interest in the property at the time of the sale. In this respect, the Court of Appeals wrote:

> Regarding Fulford's interest in the property, it is indisputed that he had paid $165,000.00 for his option. When he assigned the option to Lang, and Lang purchased the property, Fulford paid an additional $400,000.00 and Lang paid $785,000.00. Thus, although title was in Lang's name, Fulford had invested $565,000.00. Lang obviously thought Fulford had an interest in the property. In his deposition, he said:
>
> > A deed was made from Wachovia Mortgage Company to me dated the 20th day of March, 1978. . . . We bought the property. . . . When I am talking about "we" I mean Dr. Fulford and myself. We had to get it done before 5:00. Dr. Fulford and I bought the property but it was put in my name. . . . I would get my expenses back and he would get his costs back and we would split the profit.
>
> Lang said that he offered the property to Fulford for $1,200,000.00 because Fulford already "owned part of the property." He also said "Dr. Fulford had a vested interest in this property. . . ."
>
> Although Lang held legal title, Fulford had an equitable interest. For example, had he needed to enforce his interest, it had all the factors required for a purchase money resulting trust which is defined as follows: When one person pays for land but title is taken in another, a resulting trust commensurate with his interest arises in favor of the one who furnished the consideration. *Cline v. Cline*, 297 N.C. 336, 255

S.E. 2d 399 (1979). Although Fulford strenuously argues that he never had an interest in the property, other than an option, clearly there is evidence from which the jury could find that he had an interest in the property.

60 N.C. App. at 503, 299 S.E. 2d at 274-75.

Finally, defendant contends that should this Court determine that there are sufficient issues of material fact to withstand summary judgment as against the corporate plaintiff, the uncontradicted record evidence compels that summary judgment should be entered against the plaintiff Brown. The Court of Appeals did not address this question and there is nothing of record to indicate that the question was raised or argued before the Court of Appeals. Therefore, the question is not properly before us. N.C.R.A.P., Rule 16.

The decision of the Court of Appeals is

Modified and affirmed.

STATE OF NORTH CAROLINA v. DAVID CARL MICHAEL, JR.

No. 618A83

(Filed 5 June 1984)

1. **Criminal Law § 138— failure of court to consider mitigating factor—insufficient showing**

Where the trial judge listed the mitigating factors which he found were proved by a preponderance of the evidence in compliance with G.S. 15A-1340.4(b), the mere allegation by defendant that the judge failed to consider another statutory mitigating factor, when the evidence does not compel a finding that the factor was proved by a preponderance of the evidence, is insufficient to overcome the presumption that the judge complied with the statutory mandate of G.S. 15A-1340.4(a) that he "consider" each of the statutory aggravating and mitigating factors.

2. **Criminal Law § 138— second-degree murder—sentencing hearing—extenuating relationship mitigating factor—insufficient evidence to compel finding**

In sentencing defendant for the second-degree murder of his father, the evidence presented at the sentencing hearing was insufficient to compel the trial court to find as a mitigating circumstance that the relationship between defendant and his father was "otherwise extenuating" where it showed that

defendant and his father argued during the morning hours of the day on which the murder occurred; during the afternoon of that same day, the father spanked defendant with a belt and banged his head on the corner of a bed; and later that night, defendant aimed a shotgun at his father and pulled the trigger, allegedly not knowing that the gun was loaded. G.S. 15A-1340.4(a)(2)(i).

3. **Criminal Law § 138— second-degree murder—sentencing hearing—voluntary acknowledgment of wrongdoing mitigating circumstance—insufficient evidence to compel finding**

The evidence presented at the sentencing hearing of defendant for the second-degree murder of his father did not require the trial court to find as a mitigating factor that defendant voluntarily acknowledged wrongdoing to a law enforcement officer prior to arrest or at an early stage of the criminal process where it showed that defendant was arrested shortly after telling his grandfather that he did not mean to kill his father; at no time prior to arrest did defendant acknowledge his wrongdoing to a law officer; and defendant gave a statement to the sheriff after his arrest in which he refused to admit any wrongdoing and maintained that the shooting was an accident.

4. **Criminal Law § 134.4— youthful offender—failure to make "no benefit" finding**

The trial court erred in imposing an active sentence upon a sixteen-year-old defendant for second-degree murder without either sentencing defendant as a committed youthful offender or making a "no benefit" finding on the record in accordance with G.S. 15A-1340.4(a).

5. **Criminal Law §§ 134.4, 177.1— youthful offender—absence of "no benefit" finding—resentencing not necessary**

Where the only error is the failure of the trial judge to make a "no benefit" finding in sentencing a youthful offender, resentencing is not required, and the case will be remanded for the sole purpose of a hearing to determine whether defendant should have the benefit of serving the sentence imposed as a committed youthful offender.

APPEAL of right by defendant, pursuant to G.S. 7A-27(a) (1981), from the sentence entered by the *Honorable Russell G. Walker, Judge Presiding*, at the 8 August 1983 Criminal Session of Superior Court, GUILFORD County. Heard in the Supreme Court 12 April 1984.

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

Frederick Gustave Lind and George Russell Clary, III, Assistant Public Defenders, for defendant-appellant.

FRYE, Justice.

Defendant entered a plea of guilty to murder in the second degree, after having been initially charged with murder in the

first degree. The victim was David Carl Michael, Sr., the defendant's father. After the presentation of evidence at a sentencing hearing, Judge Walker sentenced defendant to life imprisonment.

I.

Defendant seeks a new sentencing hearing and brings forward two assignments of error relating thereto. Both assignments of error allege that the trial court erred in failing to consider and find a specific mitigating factor. Our review of the trial transcript reveals that the trial court did not err in its consideration or findings of mitigating factors. However, for error which appears on the face of the record, the case must be remanded for a determination of whether defendant should have the benefit of serving his sentence as a committed youthful offender. G.S. §§ 148-49.14 and 15A-1340.4(a) (1983).

The testimony presented during the sentencing hearing disclosed that on 29 March 1983, Detective Sergeant Steven Shaver of the Guilford County Sheriff's Department responded to a call to investigate a shooting incident on Summit Avenue in Greensboro, North Carolina. Upon arrival at the scene, Detective Shaver met with some other members of the Guilford County Sheriff's Department and subsequently began to interview Fred Oates, the defendant's grandfather.

While Mr. Oates was being interviewed by the officers, defendant drove up to the residence. He was upset and crying. After embracing Mr. Oates, defendant told him that he did not mean to kill his father. In response to a question asked by Mr. Oates concerning the location of a shotgun, defendant stated that it was in the car and that he had intended to throw it in a river. At that time, defendant was placed under arrest and advised of his constitutional rights.

At approximately 3:00 a.m. on 29 March 1983, while in the custody of the Guilford County Sheriff's Department, defendant gave the following statement:

> On Sunday night, 3/27/83, at approximately 6:45 P. M. Keith Lowe, Jackie Long, and myself left my residence with the intentions of going to the coliseum to a rock show. The rock group Rush was playing at the coliseum. We stopped at McDonald's on Highway 29 to grab some food. After we left Mc-

Donald's we went to the rock show. Keith was driving. Incidentally, the van we were riding in belonged to Keith but was in Jackie's name.

While at the show I met a man I had never seen before and he gave me some Quaaludes. I didn't give him any money. There were four ludes and I took all four. After that I rejoined Keith and Jackie. We stayed there approximately three hours.

Since both my parents work third shift, I decided to go over to my cousin's residence. His name is Bobby Starsa and he lives off Highway 29 near the Frosty Mug.

Soon I noticed my mother come in and noticed that I was stoned. She then called my father and he came over and took me home. He didn't hit me, but he argued with me. I guess it was 9:30 A. M. Monday morning and I went straight to sleep. During Monday afternoon I woke up and smoked a cigarette. Later that afternoon my father spanked me with his belt. I told him that I hated him and he told me that he didn't care that much for me. Later on he grabbed me by the hair and started banging my head on the corner of the bed. My sister began crying and my mother came into the room. He soon stopped beating my head. I went to my room and stayed a while.

At 10:36 P. M. or so my mother left for work. She had asked my father to stay there with me and my sister. Daddy laid down on the couch in the den and fell asleep. I then went and got his knives and cleaned them up. I then went and got his shotgun in order to clean it. I didn't realize it was loaded. I sat down in the chair near the sofa and just pulled the trigger and shot it. Again I didn't know it was loaded. I panicked and went to my room and packed my bags and left. My sister was still asleep. I left and just rode until I decided to come back to the house.

Incidentally, before returning I called my grandfather and told him to pick my sister up.

As a result of the investigation conducted by Detective Shaver, he discovered from one of defendant's friends that on the day of the killing defendant stated that he was going to kill his

father. Additionally, Detective Shaver discovered that there was "friction" between defendant and his father which had extended over several months and that defendant had been spanked by his father on several occasions. Detective Shaver testified that the chair that defendant claimed to have been sitting in when he fired the shotgun was six feet from the sofa upon which the victim was lying.

The medical examiner's report showed that the victim suffered a very close gunshot wound to the right forehead with extensive injuries to the skull, face and brain. The medical examiner was of the opinion that the shotgun was within two inches of the victim's head when it was fired.

At the close of the sentencing hearing, Judge Walker found as an aggravating factor "that the homicide was committed after premeditation and deliberation." As mitigating factors, he found that "the defendant has no record of criminal convictions; [and] the defendant was suffering from a mental condition that was insufficient to constitute a defense but significantly reduced his culpability." However, Judge Walker found that the aggravating factor outweighed the mitigating factors and sentenced the defendant to life imprisonment, a prison sentence in excess of the presumptive term. *See* G.S. 14-17; G.S. 14-1.1(a)(3). The presumptive sentence for murder in the second degree is fifteen years. G.S. 15A-1340.4(f)(1).

II.

Defendant assigns as error the failure of the trial judge to consider and find the statutory mitigating factor that "the relationship between the defendant and the victim was otherwise extenuating." G.S. 15A-1340.4(a)(2)i. Defendant contends that the evidence which showed that his father had spanked him shortly before the killing and on several prior occasions and that "friction" existed between him and his father was uncontradicted, substantial and manifestly credible. Therefore, defendant argues that the trial court was required to find as a mitigating factor that the relationship between him and his father was "otherwise extenuating."

[1] The first question presented by defendant's assignment of error is whether the sentencing judge failed to consider the above

mentioned mitigating factor, that is, whether he weighed the evidence presented in order to determine whether the relationship between the defendant and the victim was "otherwise extenuating." G.S. 15A-1340.4(a)(2)i. While G.S. 15A-1340.4(a) requires that the sentencing judge "consider" each of the statutory aggravating and mitigating factors, G.S. 15A-1340.4(b) only requires that the judge "list in the record each matter in aggravation or mitigation that he finds proved by a preponderance of the evidence." Conversely, as stated by Judge Harry C. Martin (now Justice Martin) in *State v. Davis*, 58 N.C. App. 330, 293 S.E. 2d 658, *disc. rev. denied*, 306 N.C. 745, 295 S.E. 2d 482 (1982), there is no requirement that the sentencing judge "list in the judgment statutory factors that he considered and rejected as being unsupported by the preponderance of the evidence." *Id.* at 334, 293 S.E. 2d at 661. Judge Walker complied with the statutory mandate by listing those mitigating factors that he found were proved by a preponderance of the evidence. The mere allegation by defendant that the judge failed to consider another statutory factor, when the evidence does not compel a finding that the factor was proved by a preponderance of the evidence, is insufficient to overcome the presumption that the court below complied with the statutory mandate.

[2] The next question raised by defendant's assignment of error is whether the evidence presented at the sentencing hearing was sufficient to compel the trial court to find that the relationship between defendant and his father was "otherwise extenuating." Stated differently, the question is, can this Court conclude, after reviewing the evidence, that " 'the evidence so clearly establishes the fact in issue that no reasonable inferences to the contrary can be drawn,' and that the credibility of the evidence 'is manifest as a matter of law.' " *State v. Jones*, 309 N.C. 214, 220, 306 S.E. 2d 451, 455 (1983) (quoting *Bank v. Burnette*, 297 N.C. 524, 536-37, 256 S.E. 2d 388, 395 (1979)). Although we agree with the defendant that the evidence concerning the relationship between him and his father was uncontradicted and arguably credible, we do not believe that the evidence presented necessarily proved by a preponderance of the evidence that "the relationship between the defendant and the victim was otherwise extenuating." G.S. 15A-1340.4(a)(2)i. "[U]ncontradicted, quantitatively substantial, and credible evidence may simply fail to establish, by a preponder-

ance of the evidence, any given factor in aggravation or mitigation." *State v. Blackwelder*, 309 N.C. 410, 419, 306 S.E. 2d 783, 789 (1983).

The record evidence shows that the defendant and the victim argued during the morning hours of the day on which the murder occurred. During the afternoon of that same day, the victim spanked defendant with a belt and "started banging [his] head on the corner of the bed." After the spanking, defendant went to his room. Later that night, the defendant aimed a shotgun at his father and pulled the trigger, allegedly not knowing that the gun was loaded. As a result of the shooting, defendant's father died. This evidence does not compel a finding that "the relationship between the defendant and the victim was otherwise extenuating," i.e., the evidence concerning the father-son relationship does not necessarily lessen the seriousness of the crime committed. This assignment of error is rejected.

III.

[3] Defendant also assigns as error the failure of the trial court to consider and find as a mitigating factor that "prior to arrest or at an early stage of the criminal process, the defendant voluntarily acknowledged wrongdoing in connection with the offense to a law enforcement officer." G.S. 15A-1340.4(a)(2)l.

For the previously stated reasons, we hold that defendant has presented no evidence which establishes that the sentencing judge failed to consider the above stated mitigating factor. We also hold that the evidence presented at the sentencing hearing was insufficient to require a finding by the trial court that defendant voluntarily acknowledged wrongdoing to a law enforcement officer prior to arrest or at an early stage of the criminal process.

In *State v. Graham*, 309 N.C. 587, 308 S.E. 2d 311 (1983), this Court held that the trial court should have found as a mitigating circumstance 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." In *Graham*, this Court stated:

> We hold that if defendant's confession was made prior to the issuance of a warrant or information, or upon the return of a

> true bill of indictment or presentment, or prior to arrest, whichever comes first, he is entitled to a finding of this statutory, mitigating circumstance.

Id. at 590, 308 S.E. 2d at 314.

In the instant case, defendant was arrested shortly after telling his grandfather that he did not mean to kill his (defendant's) father. At no point in time, prior to arrest, did defendant acknowledge his wrongdoing to a law enforcement officer. Defendant's statement to the sheriff was given after his arrest, and even then, defendant refused to admit any wrongdoing. He steadfastly maintained that the shooting was an accident; however, the physical evidence strongly contradicted his version of the facts. Therefore, the trial court did not err in failing to find that, prior to arrest, defendant voluntarily acknowledged wrongdoing to a law enforcement officer. Defendant's assignment of error is rejected.

IV.

[4] Based upon our independent review of the record, we find that the trial court erred by failing to make a "no benefit" finding on the record, as is required by G.S. 15A-1340.4(a).

The defendant was sixteen years old at the time he entered his guilty plea. Therefore, since he was "under 21 years of age at the time of conviction," the trial court was required to either sentence defendant as a committed youthful offender or make a "no benefit" finding on the record, after it elected to impose an active prison term. G.S. 15A-1340.4(a). A "no benefit" finding was not made on the record in the instant case.

We recognize *State v. Lattimore*, 310 N.C. 295, 311 S.E. 2d 876 (1984); *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), where, under similar circumstances, the judgments were vacated and the cases remanded for resentencing. However, we do not feel that these cases are controlling. In none of these cases did this Court discuss or analyze why the cases were remanded for resentencing. In *Lattimore* a new sentencing hearing was necessary because of errors in the finding of aggravating and mitigating factors, without regard to the "no benefit" problem. The judge in *Bracey* found that the defendant would benefit "as a Committed Youthful Offender but that Society would not and it is the intent

of the court that defendant should serve a minimum of 2 years before eligible for Parole." 300 N.C. at 124, 277 S.E. 2d at 398. This Court vacated the judgment as being ambiguous and sarcastic. In *Rupard*, the Court vacated the judgment and remanded the case for resentencing without an analysis or discussion of the issue.

[5] Where, as here, the only error is the failure of the trial judge to make a "no benefit" finding, remand for resentencing is not required. The trial judge has heard the evidence, observed the witnesses and the defendant, heard arguments of counsel, made the required aggravating and mitigating findings, decided that the defendant should receive an active sentence rather than probation, and determined the length of the prison term. He only omitted determining in his discretion the circumstances under which the sentence should be served, whether as a regular youthful offender or as a committed youthful offender.

The case is remanded to the Superior Court, Guilford County, for the sole purpose of a hearing to determine whether defendant should have the benefit of serving the sentence imposed as a committed youthful offender. Defendant and his counsel should be present at such hearing.

Remanded.

STATE OF NORTH CAROLINA v. JOHN JOSEPH MACCIA

No. 339A83

(Filed 5 June 1984)

1. Constitutional Law § 29; Criminal Law § 61.2— nontestimonial identification procedure—failure to give 72 hours notice—failure to move to suppress prior to trial—waiver of right to contest admissibility of evidence

Although defendant's evidence tended to show that he was served with a nontestimonial identification order on August 4, 1982 after 5:30 p.m. and that the procedures were to occur at 1:00 p.m. on August 6, 1982, less than 72 hours after service of the order, defendant did not move to suppress prior to trial and, therefore, defendant waived his right to contest admissibility of evidence gathered as a result of the nontestimonial identification order. G.S. 15A-277, G.S. 15A-278, and Chapter 15A, Article 53.

2. **Criminal Law §§ 95.1, 169.3— cross-examination concerning prior acts with relation to a woman other than the rape victim—no limiting instruction requested—no objection to subsequent related questions**

Defendant waived his right to object to the cross-examination of him concerning prior acts with relation to a woman other than the rape victim in this case where defendant did not request a limiting instruction requiring the jury to consider the evidence for purposes of impeachment only, and where the prosecutor subsequently returned to the subject of the stabbing incident on cross-examination without objection from the defendant, and the defendant then undertook to explain in detail the circumstances surrounding the stabbing.

3. **Criminal Law § 134.1— completing felony sentencing form for misdemeanor offense—remanded for resentencing**

Where defendant was convicted of assault with a deadly weapon, a misdemeanor, the maximum sentence for which is two years imprisonment, although the trial court sentenced the defendant to two years, it completed a felony sentencing form and the judgment must be vacated and remanded for resentencing. G.S. 14-33.

APPEAL by the defendant from judgments of *Judge Henry L. Stevens, III* entered February 10, 1983 in Superior Court, DARE County.

The defendant was tried on two indictments, proper in form, charging him with rape and with assault with a deadly weapon inflicting serious injuries not resulting in death. The defendant pleaded not guilty to both charges. A jury found him guilty of first degree rape and assault with a deadly weapon. The trial court sentenced the defendant to life imprisonment for the rape conviction and two years for the assault conviction. The defendant appealed the rape conviction as a matter of right pursuant to G.S. 7A-27(a). On October 18, 1983, the Supreme Court allowed the defendant's motion to bypass the Court of Appeals on the assault conviction. Heard in the Supreme Court February 13, 1984.

Rufus L. Edmisten, Attorney General, by William B. Ray, Assistant Attorney General, for the State.

Vernon, Vernon, Wooten, Brown & Andrews, P.A., by Wiley P. Wooten, for the defendant appellant.

MITCHELL, Justice.

On appeal the defendant contends that the trial court erred in refusing to allow his motion to suppress certain evidence and

in allowing cross-examination of the defendant about alleged prior misconduct. We conclude that no reversible error was committed at trial, but because of an error in sentencing, we vacate the assault judgment and remand for entry of judgment and resentencing on that conviction.

The State presented evidence tending to show that on July 17, 1982, a twenty-one year old woman was raped at knifepoint on Hatteras Island in the Village of Avon. She testified that she was working on Hatteras Island for the summer. She had rented an apartment from the defendant's grandfather which was close to the site at which the rape occurred. She testified that on the evening of July 16, 1982, she attended a party on the beach, and that she left the party around midnight with a girl friend and a young man named Darren Hooper. The three walked to a shopping center in Avon, where the rape victim's girl friend left the group and went in another direction. The victim and Hooper walked to Hooper's residence where they talked outside for a few minutes. While they were talking, a man passed the couple, went down the street a short way, turned and walked past them again. After Hooper and the victim finished talking, he went inside his house and she started walking toward her apartment.

The victim testified that shortly after leaving Hooper, she entered onto an unpaved portion of the road. She was startled by the sudden appearance of a male who grabbed her arm and placed a hard pointed object against her throat. The assailant took her to some bushes and told her to remove her clothes. After she did so, he had intercourse with her. She asked her assailant whether he was the boy who lived in Benny's Landing, the area in which she also lived. The assailant answered, "I'm nobody." The victim testified that her attacker was wearing sneakers, blue jeans, a belt and no shirt. She thought that he had removed his clothes at the time of the attack. She stated that shortly after she was attacked, Darren Hooper approached the area and called her name. She began to cry, and her assailant got up and ran away naked. She, too, ran off in the direction of Hooper's home.

Hooper testified that when he and the victim parted in front of his house after the beach party, he went inside and prepared for bed. He started thinking about the man who earlier had passed them twice and decided to get up to make sure that the

victim had gotten home safely. He walked toward her apartment, and when he reached the place where she was found, he heard something in the bushes. He said he called the victim's name or "Is that you?". At that point a male jumped out of the bushes carrying a knife, slashed Hooper in the groin area and ran away. The woman then emerged from the bushes, crying and upset, and ran to Hooper's house.

The rape victim gave a description of her assailant to law enforcement officers, and both she and Hooper identified the defendant's photograph as that of the man who raped her and cut Hooper in the early morning hours of July 17, 1982. Detectives found various items of clothing and a pair of dirty white tennis shoes at the scene of the rape.

As a result of a nontestimonial identification order, the defendant's foot impressions were made in paint and ink and a cast was made of the imprint left inside the shoes found at the scene. Dr. Louise Robbins, an expert in the field of physical anthropology, testified that in her opinion the defendant's feet made the imprints inside the shoes found at the scene of the crime.

The defendant testified that he was visiting his grandfather at his house at Benny's Landing when the crime occurred. The defendant put on evidence which tended to show that the rape victim had met him before when the defendant helped her get into her apartment after the key given to her for the apartment failed to work. He testified that he was wearing shorts, flip-flops and a shirt on the night of the rape and that he had never been known to wear sneakers. He said he rarely wore a belt. He testified that he played cards with family members until about 10:30 on the night of the rape. After the card game, he had gone out to check on his mother's car which contained personal belongings. He testified that he noticed that a party was taking place on the beach and that he had gone to the party and stayed about ten minutes. He returned to his grandfather's house then and went to bed. The defendant testified that in the early morning hours of July 17, he heard someone trying to break into the house and that he woke up his grandfather and brother. The defendant and other witnesses testified that when the three went outside, they found that a screen had been removed from the house. They saw head-

lights at that time and encountered law enforcement officers investigating the rape that had occurred.

The defendant's evidence tended to show that both Hooper and the rape victim saw him on the day of the rape, and that neither indicated that the defendant was the person who had perpetrated the offenses. The shoes found at the scene were a size nine, and the defendant's evidence tended to show that he wore a size ten and a half or eleven. There was no evidence of semen present in vaginal smears taken from the victim or of a transfer of head or pubic hair from the defendant to her.

The defendant, through two assignments of error, contends his constitutional rights were violated by the trial court's denial of his motion to suppress certain evidence and by its allowance of cross-examination of the defendant concerning alleged prior acts. Having examined the record, we find no error in the guilt-innocence phase of the trial below.

[1] The defendant contends that his motion to suppress evidence obtained through nontestimonial identification procedures was improperly denied by the trial court because investigating law enforcement officers failed to comply with certain statutory requirements governing nontestimonial identification orders. The defendant claims he received inadequate notice of the procedures, resulting in violation of his constitutional right to counsel.

The General Assembly in Chapter 15A, Article 14 of the General Statutes has provided prosecutors with the opportunity to require suspects to submit to certain nontestimonial identification procedures such as fingerprinting and the measuring and testing of blood, urine, saliva, hair, handwriting and voice samples. Under Article 14, a person may be required to appear for such a procedure after a court order is served upon him. G.S. 15A-277 requires service of a copy of the order at least 72 hours in advance of the time for compliance unless the judge issuing the order determines that a delay will affect the probative value of the evidence.

An order to appear must state at what place and time the person is required to appear, grounds for suspecting the person of having committed a crime, procedures to be conducted and their approximate duration. G.S. 15A-278. The order must further state

that the person is entitled to have counsel present, that the person may request modification of the order, that the person will not be subjected to any interrogation during the procedure and that failure to appear may result in being held in contempt of court. *Id.*

The defendant's evidence tended to show that he was served with a nontestimonial identification order on August 4, 1982 after 5:30 p.m. The procedures were to occur at 1:00 p.m. on August 6, 1982, less than 72 hours after service of the order. The evidence showed that both the defendant and his mother read the order and that the defendant's mother attempted to obtain counsel for her son on August 5 and August 6, 1982. She was unable to obtain counsel in that period of time, but the defendant appeared at the ordered location at the scheduled time. The defendant contends that had he had the required 72 hours notice, he may well have been represented by counsel at the procedures.

Upon the defendant's objection to the evidence obtained through the procedures, the trial court conducted a *voir dire* hearing. The trial court determined that the defendant had full understanding of his constitutional rights at the time of the procedures, including his right to counsel, and that he freely, knowingly, and voluntarily waived those rights. Because we hold for other reasons that the defendant waived his right to contest the admissibility of the evidence, it is unnecessary to consider whether the trial court's conclusions were adequately supported by evidence.

Chapter 15A, Article 53, of the General Statutes sets forth the exclusive method for challenging evidence on the ground that its exclusion is constitutionally required. *State v. Jeffries*, 57 N.C. App. 416, 424, 291 S.E. 2d 859, 864, *cert. denied and appeal dismissed*, 306 N.C. 561, 294 S.E. 2d 374 (1982); *see also Wainwright v. Sykes*, 433 U.S. 72, *reh'g denied*, 434 U.S. 880 (1977) (stating that it is not impermissible for states to impose reasonable conditions on asserting motions to suppress evidence). The defendant has the burden of showing that he has complied with the procedural requirements of Article 53. *State v. Jeffries*, 57 N.C. App. at 424, 291 S.E. 2d at 864. In Superior Court a "defendant may move to suppress evidence *only prior to trial*" unless he falls within certain exceptions. G.S. 15A-975 (emphasis added).

When no exception to the general rule applies, failure to make a timely motion to suppress prior to trial is a waiver of any right to contest the inadmissibility of evidence on constitutional grounds. *State v. Detter*, 298 N.C. 604, 260 S.E. 2d 567 (1979). Since the defendant did not move to suppress prior to trial and no exception to the general rule applies, we hold that the defendant waived his right to contest the admissibility of evidence gathered as a result of the nontestimonial identification order.

[2] The defendant next contends the trial court erred in allowing cross-examination of him concerning prior acts with relation to a woman other than the rape victim in this case. After ascertaining that the defendant knew the woman, the prosecutor on cross-examination asked the defendant, "August 17, 1982, did you rape her?" The defendant answered that he did not and his counsel objected. The trial court sustained the objection and instructed the jury not to consider the testimony. Shortly afterward, the prosecutor asked the defendant whether, on August 7, he had stabbed that woman between the breasts. Defense counsel objected again and the trial court overruled the objection.

The defendant contends that the questions were improper as they were not intended to impeach his credibility as a witness but were directed toward pointing out similarities between the defendant's prior alleged acts and the crime for which he was being tried. In *State v. Williams*, 279 N.C. 663, 185 S.E. 2d 174 (1971), this Court stated that it is permissible for impeachment purposes to cross-examine a witness, including a criminal defendant,

> by asking disparaging questions concerning collateral matters relating to his criminal and degrading conduct. Such questions relate to matters within the knowledge of the witness, not to accusations of any kind made by others. We do not undertake here to mark the limits of such cross-examination except to say generally (1) the scope thereof is subject to the discretion of the trial judge, and (2) the questions must be asked in good faith.

Id. at 675, 185 S.E. 2d at 181 (citations omitted). Although it is true that the jury was not instructed in the present case to limit its consideration of the evidence to purposes of impeachment, it does not appear from the record that the defendant requested a limiting instruction. The admission of evidence which is compe-

tent for a restricted purpose will not be held error in the absence of a request by the defendant for limiting instructions. *State v. Montgomery*, 291 N.C. 91, 229 S.E. 2d 572 (1976); *State v. Goodson*, 273 N.C. 128, 159 S.E. 2d 310 (1968).

The defendant also contends that the cross-examination failed to satisfy standards that this Court set forth in *State v. Purcell*, 296 N.C. 728, 252 S.E. 2d 772 (1979). In *Purcell* the prosecutor asked the defendant, "You have killed somebody haven't you, Mr. Purcell?" This Court restated the *Williams* rule about impeachment relating to specific acts of criminal and degrading conduct, and then held the prosecutor's question to be improper because it did not refer to the time, place, victim or any of the circumstances of the alleged misconduct. Therefore, the question did not refer to a *particular* act of misconduct. We noted that killing in our society is not always wrong, and that since the question by its phrasing did not show that the act was wrong, the objection to it should have been sustained. *Id.*

The defendant in the case before us argues that the prosecutor's question did not by its phrasing show that the stabbing was wrong. It is true that a stabbing is not in and of itself a criminal or degrading act in our society, since a stabbing in self-defense, for example, may be justifiable. The defendant waived his objection to the question, however, when the prosecutor subsequently returned to the subject of the stabbing incident on cross-examination without objection from the defendant. The defendant then undertook to explain in detail the circumstances surrounding the stabbing. This Court has long held that when, as here, evidence is admitted over objection, and the same evidence has been previously admitted or is later admitted without objection, the benefit of the objection is lost. *State v. Corbett*, 307 N.C. 169, 297 S.E. 2d 553 (1982); *State v. Chapman*, 294 N.C. 407, 241 S.E. 2d 667 (1978); 1 Brandis on North Carolina Evidence § 30 (1982).

For the foregoing reasons, we hold that the trial court did not commit reversible error in the guilt-innocence phase of the trial. We vacate the assault judgment, however, and remand for a judgment and resentencing on the assault conviction.

[3] Although the defendant was indicted for assault with a deadly weapon inflicting serious bodily injury, a felony, the jury found

him guilty of assault with a deadly weapon, a lesser included offense and a misdemeanor. G.S. 14-33. The maximum sentence for the misdemeanor is two years imprisonment. *Id.* Although the trial court sentenced the defendant to two years, it completed a felony sentencing form. The trial court indicated on the form that the defendant was convicted of assault with intent to kill, a felony, for which a sentence of 20 years imprisonment is permissible. Because we are unable to discern whether the trial court intended to sentence the defendant for a felonious assault or for the misdemeanor for which he was convicted, we must vacate the judgment in the assault case and remand that case to the Superior Court, Dare County, for entry of judgment for assault with a deadly weapon and for resentencing.

No. 82CRS5321—Assault with a Deadly Weapon—judgment vacated and remanded for a new sentencing hearing.

No. 82CRS4950—First Degree Rape—no error.

GASTON BOARD OF REALTORS, INC., A NORTH CAROLINA CORPORATION v. CHARLES A. HARRISON

No. 514A83

(Filed 5 June 1984)

1. **Declaratory Judgment Act § 3— declaratory judgment—necessity for actual controversy**

Courts have jurisdiction to render declaratory judgments only when the pleadings and evidence disclose the existence of an actual controversy between parties having adverse interests in the matter in dispute.

2. **Declaratory Judgment Act § 3— declaratory judgment—necessity for unavoidable litigation**

Although it is not necessary that one party have an actual right of action against another to satisfy the jurisdictional requirement of an actual controversy, it is necessary that litigation appear unavoidable, and mere apprehension or the mere threat of an action or a suit is not enough.

3. **Declaratory Judgment Act § 4— declaratory judgment—absence of justiciable controversy**

Litigation between the parties did not appear unavoidable and there was thus no justiciable controversy between the parties sufficient to invoke the

court's jurisdiction under the Declaratory Judgment Act to determine whether the decision of plaintiff Board of Realtors to expel defendant, one of its members, until he repaid a deposit to prospective home buyers was lawful where defendant, in seeking a rehearing, stated in a letter that he would take whatever actions were necessary to protect himself; a provision of plaintiff's Code of Ethics stating that "each member by becoming and remaining a member, agrees not to seek review in any court of law" diminished the likelihood of defendant's taking legal action against plaintiff; and an interpleader action filed by defendant against the depositors, in which defendant paid into the office of the Clerk of Court the amount of the controversial deposit, will potentially eliminate the conflict between plaintiff and defendant.

4. Declaratory Judgment Act § 4— declaratory judgment—contract as basis for jurisdiction

Assuming that plaintiff Board of Realtor's Code of Ethics and bylaws constitute a contract with defendant member, such a contract cannot form the basis for jurisdiction in an action for a declaratory judgment absent an actual controversy about legal rights and liabilities arising under the contract.

APPEAL of right pursuant to G.S. 7A-30(2) from a decision of a divided panel of the Court of Appeals, 64 N.C. App. 29, 306 S.E. 2d 809 (1983), which affirmed a judgment entered by *Owens, Judge*, on January 28, 1982, in Superior Court, GASTON County. Heard in the Supreme Court February 13, 1984.

Mullen, Holland & Cooper, P.A., by Graham C. Mullen and William E. Moore, Jr., for the plaintiff appellee.

Lloyd T. Kelso, P.A., by Lloyd T. Kelso for the defendant appellant.

Smith, Moore, Smith, Schell & Hunter, by Richmond G. Bernhardt, Jr. and Peter J. Covington, amicus curiae for the North Carolina Association of Realtors, Inc.

Rufus L. Edmisten, Attorney General, by Harry H. Harkins, Jr., Assistant Attorney General, amicus curiae for the North Carolina Real Estate Commission.

MITCHELL, Justice.

This appeal arises out of an action taken under the Declaratory Judgment Act, G.S. 1-253 to 1-267, to determine whether the plaintiff, the Gaston County Board of Realtors, Inc., conducted lawful disciplinary proceedings against one of its members, the defendant, Charles A. Harrison. The trial court

found that the proceedings were lawful and in accordance with due process. A divided panel of the Court of Appeals affirmed. We find no actual controversy between the parties sufficient to invoke a court's jurisdiction under the Declaratory Judgment Act. Therefore, we reverse the Court of Appeals.

The Gaston Board of Realtors, Inc. [hereinafter "Board"] is a voluntary trade organization consisting of licensed real estate brokers who are also members of the state and national associations of realtors. The defendant Harrison was a member of the plaintiff Board until Larry and Phyllis Hamrick, prospective home buyers, filed a complaint against him with the Board. They contended that he improperly kept a $2,090.00 deposit that should have been returned to them. The Board arranged for a hearing before a hearing panel consisting of five members of the Board's Professional Standards Committee to determine whether Harrison had violated any Board rules. The panel made findings of fact and concluded that the defendant had violated certain portions of the organization's Code of Ethics. The hearing panel recommended that the defendant Harrison be expelled from membership in the organization until "such time as he makes full restitution to the Complainants, . . . at which time he may be automatically reinstated." In a letter to the plaintiff's Executive Secretary, the defendant petitioned for a rehearing and stated in the letter "Be advised that I plan to take such actions as are necessary to protect myself and General Homes Corporation from harm by the actions of individuals in this matter."

On September 10, 1979, the plaintiff's directors met and adopted the hearing panel's decision but ruled that the defendant would be *suspended* pending the outcome of a judicial determination of whether the plaintiff had violated the defendant's rights. The plaintiff Board subsequently filed the complaint in this action, seeking a declaratory judgment that its disciplinary proceedings were in accordance with due process. In the complaint the plaintiff stated that an actual controversy exists between the parties in that the defendant Harrison "has threatened to sue the plaintiff, its officers, directors, members, or some of them for damages in the event the plaintiff expels the defendant."

Before trial the Board made a motion for summary judgment. Harrison opposed the motion and moved to dismiss the action on

the ground that there was no actual justiciable controversy between the parties sufficient to invoke the court's jurisdiction. The trial court denied the motions of both parties.

On January 25, 1982, the trial court heard evidence and ruled that the Board had properly conducted its disciplinary proceedings against Harrison. The trial court found as a fact that the plaintiff Board had brought the action for declaratory judgment "because the defendant had threatened action against the people involved in the disciplinary process." The trial court, in a conclusion of law, concluded that a controversy existed between the parties which was justiciable under the Declaratory Judgment Act. The defendant appealed to the North Carolina Court of Appeals.

The Court of Appeals held that the trial court properly refused to dismiss the action for lack of a justiciable controversy. The majority held the controversy between the parties to be real and present, and found that the defendant's threat to take action was substantial evidence that litigation appeared unavoidable. The majority held that the procedure conducted by the Board was lawful and comported with due process. Judge Johnson, in dissent, expressed doubt about the sufficiency of the controversy to confer jurisdiction upon the courts and concluded that the trial court failed to conduct a proper judicial review of the Board's decision.

[1] We need not consider the merits of this action because we conclude there was no actual controversy sufficient to invoke the jurisdiction of the courts under our Declaratory Judgment Act. The authority of our courts to render declaratory judgments is set forth in G.S. 1-253:

> Courts of record within their respective jurisdictions shall have power to declare rights, status, and other legal relations, whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect; and such declarations shall have the force and effect of a final judgment or decree.

While the statute does not expressly so provide, this Court has held on a number of occasions that Courts have jurisdiction to render declaratory judgments only when the pleadings and evidence disclose the existence of an actual controversy between parties having adverse interests in the matter in dispute. *Adams v. North Carolina Dept. of Natural and Economic Resources,* 295 N.C. 683, 249 S.E. 2d 402 (1978); *North Carolina Consumers Power, Inc. v. Duke Power Co.,* 285 N.C. 434, 206 S.E. 2d 178 (1974); *Lide v. Mears,* 231 N.C. 111, 56 S.E. 2d 404 (1949).

We have described an actual controversy as a "jurisdictional prerequisite" for a proceeding under the Declaratory Judgment Act, the purpose of which is to "preserve inviolate the ancient and sound juridic concept that the inherent function of judicial tribunals is to adjudicate genuine controversies between antagonistic litigants with respect to their rights, status or other legal relations." *Adams v. North Carolina Dept. of Natural and Economic Resources,* 295 N.C. at 703, 249 S.E. 2d at 414 (quoting *Lide v. Mears,* 231 N.C. at 118, 56 S.E. 2d at 409). In *Town of Tryon v. Duke Power Co.,* 222 N.C. 200, 22 S.E. 2d 450 (1942) this Court acknowledged that, although the actual controversy rule may be difficult to apply in some cases and the definition of a "controversy" must depend on the facts of each case, "[a] mere difference of opinion between the parties" does not constitute a controversy within the meaning of the Declaratory Judgment Act. *Id.* at 205, 22 S.E. 2d at 453.

[2] Although it is not necessary that one party have an actual right of action against another to satisfy the jurisdictional requirement of an actual controversy, it is necessary that litigation appear unavoidable. *North Carolina Consumers Power, Inc. v. Duke Power Co.,* 285 N.C. 434, 206 S.E. 2d 178. Mere apprehension or the mere threat of an action or a suit is not enough. *Newman Machine Co. v. Newman,* 2 N.C. App. 491, 163 S.E. 2d 279 (1968), *rev'd on other grounds,* 275 N.C. 189, 166 S.E. 2d 63 (1969). Thus the Declaratory Judgment Act does not "require the court to give a purely advisory opinion which the parties might, so to speak, put on ice to be used if and when occasion might arise." *Town of Tryon v. Power Co.,* 222 N.C. at 204, 22 S.E. 2d at 453 (1942).

When the record shows that there is no basis for declaratory relief, or the complaint does not allege an actual, genuine existing

controversy, a motion for dismissal under G.S. 1A-1, Rule 12(b)(6) will be granted. *Kirkman v. Kirkman*, 42 N.C. App. 173, 256 S.E. 2d 264, *cert. denied*, 298 N.C. 297, 259 S.E. 2d 300 (1979). Having examined the evidence and pleadings in the case at hand to determine whether there is an actual controversy sufficient to confer jurisdiction under the Declaratory Judgment Act, we hold that there is not. The Court of Appeals erred in affirming the trial court's exercise of jurisdiction.

The plaintiff Board submits that Harrison has shown by his actions and words that litigation will inevitably result if a declaratory judgment is not rendered. The Board and the majority opinion in the Court of Appeals point to evidence that Harrison stated in a letter to the Board that he would "take such actions as are necessary to protect myself . . . from harm by the actions of individuals involved in this matter." The Court of Appeals also found the controversy to be real and present because of the plaintiff Board's stated intention to expel the defendant Harrison as soon as the legality of the Board's proceeding is established.

In addition, the Board urges this Court to consider its action as one seeking construction of a contract under G.S. 1-254. That provision of the Declaratory Judgment Act establishes the right to seek declaratory judgments concerning the construction of contracts and written instruments. The Board maintains that a contract between the Board and its members is formed by the Code of Ethics and the bylaws of the group. *See Bright Belt Warehouse Association v. Tobacco Planters Warehouse, Inc.*, 231 N.C. 142, 56 S.E. 2d 391 (1949).

[3] After a review of the evidence and the pleadings of the parties, we conclude that litigation between the parties does not appear unavoidable and that the controversy between them is not therefore actual, genuine and existing. It is true that the defendant in seeking a rehearing before the Board stated in a letter that he would take whatever actions necessary to protect himself. That statement does not in and of itself point to unavoidable litigation and the existence of an actual controversy. Although the defendant did not specify what action he intended to take to protect his interests, he never mentioned filing a lawsuit. Even if the defendant had directly threatened to sue the Board, a mere

threat to sue is not enough to establish an actual controversy. *Newman Machine Co. v. Newman*, 2 N.C. App. 491, 163 S.E. 2d 279 (1968), *rev'd on other grounds*, 275 N.C. 189, 166 S.E. 2d 63 (1969).

In fact when questioned at trial about the statement in his letter, the defendant Harrison stated that he had indeed intended to take action to protect himself,

> and that's what I'm doing right now on this witness stand. I have not sued them but I'm certainly not going to let them walk over me if I can help it. I have no reason to sue them and the Code of Ethics prohibits me from doing so. The only thing I wanted was a fair hearing.

As indicated in Harrison's testimony, the plaintiff's Code of Ethics, Section 20(i), states that "[a] decision of the Directors is final and each member by becoming and remaining a member, agrees not to seek review in any court of law." Since both Harrison and the Board were aware of the Code provision, and since Harrison sought to retain membership in the organization, the provision undoubtedly diminished the likelihood of Harrison's taking legal action against the Board.

In fact, the conflict between the Board and Harrison may never ripen into an actual controversy, since there is at least a likelihood that the settlement of the dispute between Harrison and the Hamricks may also settle the differences between Harrison and the Board. The record shows that Harrison, prior to the trial court hearing in this case, filed an interpleader action against the Hamricks involving the possible breach of his contract with the couple. He deposited the Hamricks' deposit with the Clerk of Superior Court, Gaston County, to await the outcome of the action. If the interpleader action results in the return of the $2,090.00 to the Hamricks, it is probable that the condition set by the Board for reinstatement of the defendant—restitution of the deposit—will be satisfied. Since Harrison seeks reinstatement, such a result potentially would eliminate the conflict between him and the Board.

[4] The Board is not aided by its contention that jurisdiction exists by virtue of the "contract" between the parties. In *Bright Belt Warehouse Association v. Tobacco Planters Warehouse, Inc.*,

231 N.C. 142, 56 S.E. 2d 391 (1949), this Court held that the charter and bylaws of an association may constitute a contract between the organization and its members wherein members are deemed to have consented to all reasonable regulations and rules of the organization. Assuming *arguendo* that the plaintiff Board's Code of Ethics and bylaws do constitute a contract with the defendant, such a contract cannot form the basis for jurisdiction in an action for a declaratory judgment absent *an actual controversy* about legal rights and liabilities *arising under the contract. See Nationwide Mutual Insurance Co. v. Roberts,* 261 N.C. 285, 134 S.E. 2d 654 (1964).

Neither party in this case has questioned the validity or interpretation of the contract or its provisions. Nor has either party raised questions about rights or liabilities under the contract. Instead the Board has sought a determination that its decision to expel the defendant was lawful and that the decision if carried out will not give rise to a cause of action in the defendant. Since there is no controversy about rights and duties under the contract, there is no basis for declaratory judgment under this theory. Although the Board has shown reasonable caution in seeking to have its procedure declared sound before taking the serious step of expelling the defendant, the Declaratory Judgment Act, in the words of Justice Ervin, "does not license litigants to fish in judicial ponds for legal advice." *Lide v. Mears,* 231 N.C. at 117, 56 S.E. 2d at 409 (1949).

We hold that the Court of Appeals erred in affirming the trial court's refusal to dismiss the plaintiff Board's action pursuant to Rule 12(b)(6). The decision of the Court of Appeals is reversed, and this case is remanded to that Court for its remand to the Superior Court, Gaston County, for further proceedings consistent with this opinion.

Reversed and remanded.

STATE OF NORTH CAROLINA v. ALEXANDER WHITE

No. 154A83

(Filed 5 June 1984)

1. Criminal Law § 15.1— denial of motion for change of venue—no error

The trial court did not abuse its discretion in denying defendant's motion for a change of venue or in the alternative a special jury venire, and for an individual *voir dire* of the jury on the grounds of "undue, prejudicial and inflammatory publicity concerning the defendant and matters inadmissible at trial, the widespread reputation of the prosecuting witness in the small community of Burgaw and the general occurrence of conversation among the population about the alleged crimes." The two local newspapers each printed *one* story about the crimes, both appearing five months prior to trial; defendant did not contend in his brief that these articles were inflammatory or not factual; although the State conceded that there was pervasive word-of-mouth publicity in Pender County regarding the crime, defendant called thirteen witnesses, none of whom testified that the defendant could not get a fair trial in Pender County; and mere exposure to publicity concerning a case, be it through mass media or general conversation, does not of itself render a prospective juror biased or establish that he has preconceived opinions about the case.

2. Constitutional Law § 62— denial of individual voir dire of prospective jurors—no abuse of discretion

The trial court did not abuse its discretion in denying an individual *voir dire* of prospective jurors in a prosecution for first-degree rape where the venue hearing evidence failed to support the claim of identifiable prejudice and where all jurors selected to hear defendant's case affirmatively stated that they had no preconceived opinions about the case and could give defendant a fair trial based only on evidence presented in court.

3. Criminal Law § 66.20— in-court identification—findings on voir dire supported by evidence

The trial court's findings on *voir dire* to determine the competency and admissibility of the prosecuting witness' in-court identification, where the prosecuting witness had previously failed to make a positive identification of the defendant during a photographic or physical lineup, were supported by competent evidence, and were conclusive on appeal.

4. Searches and Seizures § 11— search and seizure of vehicle proper

A trial court properly found that the stop and detention of defendant did not violate any of defendant's constitutional rights, and that the search incident to the arrest was valid where the evidence tended to show that a police sergeant on routine patrol observed defendant parking in a no parking area; the sergeant drove past defendant and made eye contact with him; the officer was of the opinion that the defendant was intoxicated and he drove to a position where he could observe defendant and possibly follow him to determine whether he was in fact intoxicated; defendant drove away followed by the of-

ficer; when defendant failed to respond to the blue light, the sergeant used his siren to stop him; defendant did not have his operator's license; and since the vehicle was stolen, defendant presented no evidence showing any legitimate property or possessory interest in the automobile.

APPEAL by defendant from a judgment of *Judge Elbert S. Peel, Jr.*, entered at the 13 December 1982 Criminal Session of PENDER Superior Court, imposing a life sentence. Defendant's motion to bypass the Court of Appeals in the companion cases in which a lesser sentence was given, was allowed 18 October 1983.

On 7 June 1982, Lena McKoy, a seventy-nine-year-old widow, lived alone near Burgaw, North Carolina. That Sunday evening when she went to bed, all of the windows and doors to her house were locked. At about dawn, she awoke to find a black male standing over her pointing a pistol in her face. He asked her for "the rest of her money." The man had broken a kitchen window to gain entry and had apparently already removed the cash from her pocketbook. Upon being forced out of bed with the gun still in her face, Mrs. McKoy retrieved an envelope from a chest of drawers in her bedroom and gave it to the intruder. The envelope had "Cooperative Savings and Loan" printed on it and contained seven to eight hundred dollars cash in twenty dollar bills.

After putting that money in his pocket, the man began to beat Mrs. McKoy about her face and head with his fists. He tied her up with a telephone cord and a cord from an electric dryer and then he began to choke her with his hands and beat her on the shoulders. During this time, he also grabbed her wedding ring off her finger. The assailant donned a pair of Mrs. McKoy's working gloves, which were adorned with a floral pattern, and ransacked her house. He returned, hit her again, re-tied her with some stockings as she lay on her back on the floor and then raped her. After intercourse, he pulled two mattresses over the woman and left.

Mrs. McKoy eventually managed to free herself and run out to the highway for help. She later discovered that, in addition to the money and ring taken, a toaster oven and some silver coins were missing. Mrs. McKoy was hospitalized for two weeks for serious injuries including a broken jaw, bronchial tube damage and pain which persisted to the day of the trial.

On 12 June 1982, defendant was stopped in the vehicle he was driving by the police. Defendant was arrested and placed in custody after it was discovered that he was driving without a license. Moments later, a routine check revealed that the vehicle was stolen. A subsequent search of defendant's person disclosed his possession of over four hundred dollars cash in twenty dollar bills. A search of the vehicle resulted in the discovery of a black shaving kit containing a gun and a pair of white gloves with flowers on them.

The next day members of the Pender County Sheriff's Department questioned defendant's friend, Patricia Frederick, about certain items missing from Mrs. McKoy's house. She admitted knowing the whereabouts of a toaster oven and assisted them in retrieving it. Subsequently, defendant was indicted and tried upon charges of first-degree rape, robbery with a dangerous weapon, felonious breaking or entering and larceny and assault inflicting serious injury.

At trial, Mrs. McKoy identified the gloves and toaster oven as her own. She also made an in-court identification of defendant as her assailant. According to an investigator from the Sheriff's Department, however, this was the first time Mrs. McKoy had positively identified the defendant as the criminal perpetrator, as compared to unsuccessful or ambiguous pretrial physical and photographic lineups.

Other evidence adduced at trial by the State showed that defendant's fingerprints were on a Cooperative Savings and Loan envelope found under the mattresses on Mrs. McKoy's bedroom floor, and that his tennis shoes "could have made" the footwear impression on another envelope found on her floor. A forensic serologist also testified that semen found on Mrs. McKoy's underwear matched defendant's blood group type, as well as that of thirty-one percent of the male population.

Defendant presented no evidence. The jury found defendant guilty as charged in all cases, and the trial court sentenced him to life imprisonment, plus a consecutive term of forty years.

Rufus L. Edmisten, Attorney General, by Harry H. Harkins, Jr., Assistant Attorney General, for the State.

James L. Nelson and Mary E. Lee, for defendant appellant.

COPELAND, Justice.

Defendant first contends that the trial court's erroneous denial of his motions for a change of venue or in the alternative a special jury venire, and for an individual *voir dire* of the jury prejudiced his right to a fair trial by an impartial jury.

[1] Defendant filed a pretrial motion for a change of venue based upon the grounds of "undue, prejudicial and inflammatory publicity concerning the defendant and matters inadmissible at trial, the widespread reputation of the prosecuting witness in the small community of Burgaw and the general occurrence of conversation among the population about the alleged crimes." Defendant's motion for a special jury venire was made orally. At the evidentiary hearing, defendant elicited testimony from thirteen witnesses.

Recently, this Court has considered cases raising the issue of when pretrial publicity requires a change of venue or special venire. *State v. Corbett*, 309 N.C. 382, 307 S.E. 2d 139 (1983); *State v. Jerrett*, 309 N.C. 239, 307 S.E. 2d 339 (1983); *State v. Richardson*, 308 N.C. 470, 302 S.E. 2d 799 (1983). Decisions on a motion for a change of venue, or for a special venire, remain within the sound discretion of the trial judge and will not be disturbed unless a gross abuse of discretion is shown. *Corbett*, 309 N.C. at 396, 307 S.E. 2d at 148. This Court has consistently enunciated the well-established rule that the defendant bears the burden of proving that pretrial publicity precludes him from receiving a fair and impartial trial. *Id.; Jerrett* at 251, 307 S.E. 2d at 347. The defendant "must establish that prospective jurors in his case were reasonably likely to base their verdict upon conclusions induced by outside influences rather than upon conclusions induced solely by evidence and arguments presented in court." (Citations omitted.) *Corbett* at 396, 307 S.E. 2d at 148.

At the pretrial hearing on the venue and venire motions, defendant elicited testimony which tended to support the following facts. The area in which the victim lived was a rural traditional community. She and her family were "well known" and "highly regarded." Two articles concerning the arrest of the defendant were published in the two local weekly newspapers. A great deal of conversation and concern had been generated as a result of the criminal incidents. In short, the defendant contends that not only did substantial adverse emotions and opinions exist

in the community against the accused due to the "inflammatory and heinous nature of the alleged crime," but also there had been "unusual and pervasive word-of-mouth publicity about the incident."

We have carefully reviewed the transcript of the hearing on the venue and venire motions and conclude that the trial court did not abuse its discretion in denying defendant's motions. With regard to the pretrial media publicity, we note that the two local newspapers each printed *one* story about the crime, both appearing five months prior to trial. Defendant does not contend in his brief that these articles were inflammatory or not factual, and since we do not have those articles before us, we must presume them to be non-prejudicial publicity. Further, the State concedes that there existed pervasive word-of-mouth publicity in Pender County regarding this crime. However, in the instant case, defendant called thirteen witnesses, none of whom testified that the defendant could not get a fair trial in Pender County. Mere exposure to publicity concerning a case, be it through mass media or general conversation, does not of itself render a prospective juror biased or establish that he has preconceived opinions about the case. *See: Irvin v. Dowd*, 366 U.S. 717, 6 L.Ed. 2d 751 (1961). We believe the evidence adduced at the pretrial hearing did not support defendant's contention that he could not receive a fair trial.

[2] Defendant also challenges the trial court's refusal to allow an individual *voir dire* of prospective jurors in light of the testimony of the witnesses at the venue hearing. Based upon our holding above that the venue hearing evidence failed to support the claim of identifiable prejudice, we conclude that the trial court did not abuse its discretion in denying an individual *voir dire* of the prospective jurors. Furthermore, the record of the *voir dire* proceedings reveals that of the 42 prospective jurors examined, only nine knew or knew of Mrs. McKoy or her family. No person who knew the victim or her family was seated on the jury. Three jurors had heard nothing about the case. Five other jurors had only read an article in the paper. One juror had discussed the article with his wife, while another juror was vaguely familiar with the case through the newspaper article and her relatives who knew the victim. Two jurors were not questioned at all regarding their exposure to publicity about the case. But the

most significant factor is that each juror selected to hear defendant's case affirmatively stated that they had no preconceived opinions about the case and could give defendant a fair trial based only on evidence presented in court. In sum, defendant has failed to show how he was actually prejudiced by the jury selection process. Defendant's first assignment of error is overruled.

[3] In defendant's next assignment of error, he argues that the trial court erred in denying his motion to suppress or limit the victim's in-court identification testimony. This motion was premised upon the fact that Mrs. McKoy had previously failed to make a positive identification of the defendant during either a photographic or physical lineup.

Judge Peel conducted a thorough *voir dire* hearing and made detailed findings of facts. In accordance with the standard to determine reliability of an identification, as enunciated in *State v. Clark*, 301 N.C. 176, 270 S.E. 2d 425 (1980), Judge Peel found that the victim had ample time, lighting and vision to carefully observe her assailant. Mrs. McKoy unequivocally testified that her identification was based on her observation of the perpetrator on the morning of 7 June 1982. The trial court concluded, based on its findings of fact, that Mrs. McKoy's in-court identification was of independent origin and was properly admissible. When, as in the case *sub judice*, the trial court's findings are supported by competent evidence, they are conclusive on appeal. *State v. Tann*, 302 N.C. 89, 273 S.E. 2d 720 (1981). We find no error in the introduction of the identification evidence.

[4] Defendant finally asserts that the evidence seized from his person and from the vehicle which he was driving should have been excluded at trial, because the searches violated his Fourth Amendment rights. After a duly conducted *voir dire* hearing at trial, Judge Peel concluded that the searches were lawful and reasonable, and that the items obtained as a result of the searches were properly admissible into evidence. We agree with the trial court's conclusions.

First, defendant claims that he was illegally and unconstitutionally stopped, and subsequently arrested for not having his operator's license, without "sufficient sustaining probable cause on the officer's part to believe he had committed a crime." Based on the evidence presented, the trial court found in pertinent part,

certain facts which led to defendant's arrest. On the day in question, a Wallace Police Department Sergeant, with 12 years of experience, was on routine patrol. Upon observing the defendant parking in a no parking area, the sergeant drove past defendant and made eye contact with him. The officer was of the opinion that the defendant "appeared to be highly intoxicated according to the way he looked," thereupon, he drove off to a position where he could observe defendant and possibly follow him to determine whether he was in fact intoxicated. Defendant drove away followed by the officer. When defendant failed to respond to the blue light, the sergeant used his siren to stop him. Judge Peel concluded that, at this point, the officer "had an articulable and reasonable suspicion that the defendant was violating the law in his presence." This conclusion complies with the standard mandated by the United States Supreme Court in *Terry v. Ohio*, 392 U.S. 1, 20 L.Ed. 2d 889 (1968). We agree that the stop and detention did not violate any of the defendant's constitutional rights, and that *a fortiori*, the search incident to the arrest was valid.

Defendant also challenges the search of the vehicle by law enforcement officers without a warrant. The record discloses that the vehicle in question was in fact stolen. Defendant presented no evidence showing any legitimate property or possessory interest in the automobile. The law is well settled in this jurisdiction that one has no standing to "object to a search or seizure of the premises or property of another." *State v. Greenwood*, 301 N.C. 705, 707, 273 S.E. 2d 438, 440 (1980); *State v. Jones*, 299 N.C. 298, 261 S.E. 2d 860 (1980); *State v. Taylor*, 298 N.C. 405, 259 S.E. 2d 502 (1979). This principle follows the Supreme Court's interpretations of the Fourth Amendment set forth in *Rakas v. Illinois*, 439 U.S. 128, 58 L.Ed. 2d 387 (1978).

We believe that the defendant had no legitimate expectations of privacy in the stolen vehicle; therefore, this assignment of error is overruled.

This defendant received a trial free from prejudicial error.

No error.

W. R. ALLEN AND WIFE, ANNETTE ALLEN v. ROY LEE DUVALL, MELBA JEAN DUVALL, AND CHARLIE BYRD DUVALL

No. 437PA83

(Filed 5 June 1984)

1. **Easements § 4.1— reservation of easement—sufficiency of description**

When an easement is created by deed, either by express grant or by reservation, the description thereof must either be certain in itself or capable of being reduced to a certainty by a recurrence to something extrinsic to which it refers. There must be language in the deed sufficient to serve as a pointer or a guide to the ascertainment of the location of the land.

2. **Easements § 4.1— grant or reservation of easement—sufficiency of description**

An alleged grant or reservation of an easement will be void and ineffectual only when there is such an uncertainty appearing on the face of the instrument itself that the court—reading the language in the light of all the facts and circumstances referred to in the instrument—is yet unable to derive therefrom the intention of the parties as to what land was to be conveyed.

3. **Easements § 4.1— reservation of easement in deed—sufficiency of description**

Language in a 1914 deed reserving "a right of way for a road for wagons and all purposes, beginning at G. L. Allen's line and running up on East side of creek over this land; also a right of way for road to be kept open from the above road out to the Beaverdam Road near Alston's Chapel, or schoolhouse" contained only a latent ambiguity and was sufficient to create two easements by reservation since the description was capable of being rendered certain by reference to something extrinsic (the preexisting roads). Further, the use of the roads in question by plaintiffs' predecessors in title, acquiesced in by defendants' predecessors in title of the servient estate, sufficiently located the roads on the ground, which is deemed to be that which was intended by the reservation of the easements.

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

ON discretionary review, pursuant to N.C.G.S. 7A-31, of the decision of the Court of Appeals, 63 N.C. App. 342, 304 S.E. 2d 789 (1983), setting aside the judgment in favor of plaintiffs by *Thornburg, J.*, 4 January 1982 Session of Superior Court, JACKSON County. Judgment filed 11 February 1982, out of session, in HAYWOOD County. Heard in the Supreme Court 11 April 1984.

This is an action for slander of title in which plaintiffs seek damages and the establishment of two easements across defendants' land for the benefit of plaintiffs' real property. The parties own adjacent tracts of land in a Haywood County valley near Canton.

Evidence for the plaintiffs tended to show that two easements were created by express reservation pursuant to the following language in a 1914 deed to defendants' predecessor in title:

> Reserving however a right of way for a road for wagons and all purposes, beginning at G. L. Allen's line and running up on East side of creek over this land; also a right of way for road to be kept open from the above road out to the Beaverdam Road near Alston's Chapel, or schoolhouse.

The deed to the defendants Duvall contains the following reference to the 1914 easements:

> Subject to road rights of way set out in Deed dated October 7, 1914, from R. G. White and wife to W. S. McCracken registered in Deed Book 43, page 401. . . .

Concerning the first right-of-way described in the 1914 language above, plaintiff W. R. Allen testified:

> Yes, there is a road on my property. From Beaverdam Creek, it runs from the Allen line [not to be confused with the property line of the plaintiffs Allen] all the way through Mr. Duvall's property on up into mine.
>
> . . . .
>
> The roadway that I have located and described has always been used by me to get into my property. . . . I do not have any other means of access to my property.

There was further testimony to the effect that both roads had been in existence since before 1914, one following the course described across defendants' property, with another road running off the first road to the Beaverdam Road. A surveyor testified as to a survey he had made of the roads as shown by plaintiffs' evidence. A map of the roads was offered into evidence.

In June 1980, the Allens contracted to sell their land to Mr. Bud Mehaffey for $25,000. Mehaffey thereupon paid plaintiffs $12,000 but held back $13,000 when he was told by defendant Roy Lee Duvall that there was no right-of-way across the Duvall land, nor would there be any.

Defendant Roy Duvall testified that he had informed Mehaffey that plaintiffs did not have an easement, explaining: "I had a lawyer to abstract my deed when I bought it and he didn't say that Mr. Allen had a right-of-way." Duvall further testified that he had put a gate across the road, which he has used "as against the world."

Judge Thornburg, sitting without a jury, found that there is a recognizable roadway across defendants' property. He concluded that plaintiffs are entitled to the claimed easements. He further found that defendant Roy Lee Duvall had made a false statement to Bud Mehaffey about the easements in question; Duvall knew it was false; the statement was made maliciously. The trial judge awarded damages to plaintiffs of $4,674.87, which represented interest at 13 percent on $13,000 annualized from the date Mehaffey refused to pay this remainder of the purchase price on the Allen property.

The Court of Appeals found that the description in defendants' chain of title was insufficient to create an easement by reservation and remanded the case for a new trial on the questions of whether the evidence may have been sufficient to establish either an easement by prescription or an easement by way of necessity.

Erwin, Winner & Smathers, P.A., by Patrick U. Smathers, for plaintiff appellants.

Redmond, Stevens, Loftin & Currie, by Thomas R. West, for defendant appellees.

MARTIN, Justice.

We granted discretionary review in this case to consider the single question: Was the language quoted above in the 7 October 1914 deed to W. S. McCracken, predecessor in title to defendants, sufficient as a matter of law to create by express reservation the appurtenant easements claimed by plaintiffs?

We hold that it was sufficient and reverse the decision of the Court of Appeals and remand this case for reinstatement of the judgment of the trial court.

The Court of Appeals based its opinion upon the premise that this Court's opinion in *Borders v. Yarbrough*, 237 N.C. 540, 75 S.E. 2d 541 (1953), was overruled by *Oliver v. Ernul*, 277 N.C. 591, 178 S.E. 2d 393 (1971). In so doing, the Court of Appeals erred. *Oliver* did not overrule *Borders*, either expressly or by implication.

In *Oliver* the paperwriting in question failed to create an easement because the description was uncertain in itself and was not capable of being reduced to certainty as it did not refer to anything extrinsic. The grantees in *Oliver* attempted to create an easement for a road, and although a road existed prior to the attempted grant, no reference to it was made in the paper. The description being vague and indefinite, it was patently ambiguous and void for uncertainty.

On the other hand, the description in *Borders*, while indefinite, expressly referred to a preexisting sewer line (for which the easement was created) across the land of the servient estate. The description in *Borders*, therefore, was capable of being rendered to a certainty by a recurrence to something extrinsic (the preexisting sewer line) to which it referred. *Oliver v. Ernul*, *supra*.

Oliver and *Borders* are not inconsistent, and we reaffirm the holdings in both opinions. Further, since *Oliver*, 1971, this Court has relied upon and cited with approval *Borders v. Yarbrough*, *supra*, in *Yount v. Lowe*, 288 N.C. 90, 215 S.E. 2d 563 (1975); *Hensley v. Ramsey*, 283 N.C. 714, 199 S.E. 2d 1 (1973); and *Builders Supplies Co. v. Gainey*, 282 N.C. 261, 192 S.E. 2d 449 (1972). The Court of Appeals itself has cited and relied upon *Borders* in *Hanes v. Kennon*, 46 N.C. App. 597, 265 S.E. 2d 488 (1980); *Adams v. Severt*, 40 N.C. App. 247, 252 S.E. 2d 276 (1979); *Prentice v. Roberts*, 32 N.C. App. 379, 232 S.E. 2d 286, *disc. rev. denied*, 292 N.C. 730 (1977), all after *Oliver* was filed in 1971.

We hold that the result in this appeal is controlled by *Borders v. Yarbrough*, *supra*.

> "With reference to the manner of grant, the rule is that in describing an easement, all that is required is a description which identifies the land that is the subject of the easement and expresses the intention of the parties. No set form or

particular words are necessary to grant an easement. As a general rule, any words clearly showing the intention to grant an easement which is by law grantable are sufficient. In easements, as in deeds generally, the intention of the parties is determined by a fair interpretation of the grant." 17 Am. Jur., Easements, Sec. 25.

. . . .

It is stated in 110 A.L.R., Annotation . . . "where the grant of an easement of way does not definitely locate it, it has been consistently held that a reasonable and convenient way for all parties is thereby implied, in view of all the circumstances" . . . "It is a settled rule that where there is no express agreement with respect to the location of a way granted but not located, the practical location and user of a reasonable way by the grantee, acquiesced in by the grantor or owner of the servient estate, sufficiently locates the way, which will be deemed to be that which was intended by the grant."

237 N.C. at 542, 75 S.E. 2d at 543.

[1] When an easement is created by deed, either by express grant or by reservation, the description thereof "must either be certain in itself or capable of being reduced to a certainty by a recurrence to something extrinsic to which it refers. . . . *There must be language in the deed sufficient to serve as a pointer or a guide to the ascertainment of the location of the land.*" *Thompson v. Umberger*, 221 N.C. 178, 180, 19 S.E. 2d 484, 485 (1942) (and cases cited therein) (emphasis ours). *See Oliver v. Ernul, supra*, 277 N.C. 591, 178 S.E. 2d 393.

[2] It is to be stressed that an alleged grant or reservation of an easement will be void and ineffectual only when there is such an uncertainty appearing on the face of the instrument itself that the court—reading the language in the light of all the facts and circumstances *referred to in the instrument*—is yet unable to derive therefrom the intention of the parties as to what land was to be conveyed. *Thompson v. Umberger, supra.*

[3] In the case at bar, the language of reservation in the 1914 deed was clearly sufficient to create the two easements in question:

> [A] right of way for a road for wagons and all purposes, beginning at G. L. Allen's line and running up on East side of creek over this land; also a right of way for road to be kept open from the above road out to the Beaverdam Road near Alston's Chapel, or schoolhouse.

The requisite intent to reserve the two rights-of-way is plain and unmistakable. The reservation of the easement refers to "a road for wagons and all purposes" and to "a right of way for a road to be kept open from the above road out to the Beaverdam Road." The evidence showed that these two roads were being used across the property in question at the time of the reservation.

Plaintiffs introduced surveys, photographs, and maps enabling the trier of fact to conclude that recognizable roadways exist and follow identifiable courses and distances. To establish the existence of the road prior to the 1914 reservation, the plaintiffs produced the testimony of four witnesses between the ages of seventy-six and eighty-four. Having grown up on or near the land in question, these men identified plaintiffs' exhibits above as the same roads referred to in the 1914 deed.

> [Referring to a map of the first right-of-way.]
>
> Q. Did you ever drive on the road?
>
> A. Oh yes, I used to deliver groceries up there at that house. . . . I drove on that road ever since 1913. I've been up and down it ever since 1913. I've driven a horse and wagon and buggy and Ford automobile and a Rio truck. I've been up there in everything about you can move on.
>
> . . . .
>
> [The second right-of-way.]
>
> Now I'm going to hand you what's been marked Plaintiffs' Exhibits 28 and 29 and ask you if that is a picture of the road that led to Austins' Chapel.
>
> A. Yes, that's where they crossed the creek and went up. Yes, used to carry water out of that spring to the schoolhouse to school there. That road is different from the one to

> Mr. Allen's tract of land, it runs up to the left around the barn and up by the spring. . . .
>
> Everybody used the road going to the left, Dawson Chapel Road at that time, was a main road up through there. . . . It was open for wagons, buggies and anything. The kids would come to school using that road. The road going to Mr. Allen's property I'd say, it's 12, 15 feet. Two cars could pass on it. You'd have to pull off if you met anybody.
>
> . . . .
>
> Had to use Alston's Chapel Road, use to be the only road there was, had to go that way to get to Beaverdam. I passed people on the road into the Allen property, they would sometimes be walking, in a buggy, and a T Model Ford, or some of them had automobiles.

The law endeavors to give effect to the intention of the parties, whenever that can be done consistently with rational construction. 2 Thompson, *Real Property* § 332 (1980). When the terms used in the deed leave it uncertain what property is intended to be embraced in it, parol evidence is admissible to fit the description to the land—never to create description. *Thompson v. Umberger, supra*, 221 N.C. 178, 19 S.E. 2d 484; *Self Help Corp. v. Brinkley*, 215 N.C. 615, 2 S.E. 2d 889 (1939). When, as here, the ambiguity in the description is not patent but latent—referring to something extrinsic by which identification might be made—the reservation will not be held to be void for uncertainty. *Oliver v. Ernul, supra*, 277 N.C. 591, 178 S.E. 2d 393; *Thompson v. Umberger, supra*. The use of the roads in question by plaintiffs' predecessors in title, acquiesced in by defendants' predecessors in title of the servient estate, sufficiently locates the roads on the ground, which is deemed to be that which was intended by the reservation of the easements. *Borders v. Yarbrough, supra*, 237 N.C. 540, 75 S.E. 2d 541.

The decision of the Court of Appeals is reversed, and the case is remanded to that court for further remand to the Superior Court, Haywood County, for reinstatement of the judgment rendered therein.

Reversed and remanded.

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

STATE OF NORTH CAROLINA v. CLARENCE WATSON

No. 51A84

(Filed 5 June 1984)

1. **Criminal Law § 138— aggravating circumstance that offense was especially heinous, atrocious, or cruel—properly considered**

In a prosecution in which defendant was convicted of the second-degree murder of his wife, the trial court properly considered that the offense was especially heinous, atrocious, or cruel where the evidence tended to show a total of ten bullets were fired into the victim's body; there was ample evidence that the victim was not killed by the first shots; she managed to move from room to room in the house leaving a trail of blood behind her, clearly undergoing fear and pain in the process; death was not instantaneous; and the evidence fully supported a finding that the victim suffered a degree of pain and psychological suffering not normally present in every murder. G.S. 15A-1340.4(a)(1)f.

2. **Criminal Law § 138— failure to find in mitigation that defendant was suffering from a mental condition—no error**

There was no error in the trial court's failure to find in mitigation that defendant was suffering from a mental condition, insufficient to constitute a defense, but significantly reducing his culpability where the evidence was both conflicting and inconclusive with respect to any connection between the murder and defendant's alleged mental problems accompanying military duty in Vietnam 15 years earlier.

3. **Criminal Law § 138— failure to find as mitigating factor that defendant acted under strong provocation—no error**

In a prosecution for the murder of defendant's wife, the trial court did not err in failing to find in mitigation that the defendant acted under strong provocation or that the relationship between the defendant and the victim was otherwise extenuating since a relationship between husband and wife, including marital difficulties in the past, is not sufficient, standing alone, to support a finding of this mitigating factor, and since the only evidence of "provocation" in this case was defendant's learning of the victim's decision to leave the marital home and his finding a cigarette butt in an ashtray, ostensibly indicating that someone other than the defendant or his wife had at some point visited the house.

4. Criminal Law § 138— finding aggravating factor outweighed mitigating factors—no error

There was no abuse of discretion in the trial judge sentencing defendant to life imprisonment where he weighed the aggravating factor that the murder was especially heinous, atrocious, or cruel, against two mitigating factors: that defendant voluntarily acknowledged wrongdoing, and that defendant has been a person of good character.

BEFORE *Tillery, J.*, at the 25 July 1983 Criminal Session of Superior Court, NEW HANOVER County, defendant was convicted of the second degree murder of his wife and sentenced to life imprisonment. He appeals pursuant to Rule 4(d) of the North Carolina Rules of Appellate Procedure. Heard in the Supreme Court 9 May 1984.

The issues raised on appeal concern the trial court's application of the Fair Sentencing Act, G.S. § 15A-1340.4. Specifically defendant contends that the trial judge erred in finding in aggravation that the offense was especially heinous, atrocious, or cruel, G.S. § 15A-1340.4(a)(1)f. Defendant also assigns as error the trial judge's failure to find in mitigation that defendant was suffering from a mental condition insufficient to constitute a defense but which significantly reduced his culpability for the offense, G.S. § 15A-1340.4(a)(2)d; and that defendant acted under strong provocation, or the relationship between the defendant and the victim was otherwise extenuating, G.S. § 15A-1340.4(a)(2)i. Finally, defendant contends that the trial judge abused his discretion in finding that the aggravating factor outweighed the mitigating factors and in sentencing the defendant to life imprisonment. We find no error.

Rufus L. Edmisten, Attorney General, by Kaye R. Webb, Assistant Attorney General, for the State.

W. Alex Fonvielle, Jr., and Kenneth B. Hatcher, Attorneys for defendant-appellant.

MEYER, Justice.

The evidence at trial disclosed the following pertinent facts: The defendant and his wife, Ann Watson, were having marital difficulties. Defendant believed that his wife had been seeing other men. On 18 February 1983, Ann Watson was in the process of moving out of the marital home. She had not informed the defend-

ant of her decision. Defendant, however, became suspicious when he saw his wife driving down the street. He followed her to her new apartment and confronted her. They returned to their home. Upon their arrival at the house, defendant noticed a cigarette butt in an ashtray and smelled smoke. His wife did not smoke, and defendant became upset. According to defendant's testimony at trial, his wife held a gun on him and stated, "You are not going to hit me again." (Apparently defendant had assaulted his wife on one previous occasion.) Defendant and his wife struggled and the defendant took possession of the gun. The physical evidence disclosed that defendant then pursued his wife from one room to another in the house, shooting her as he did so. After emptying the gun of bullets, the defendant reloaded the gun and continued to shoot. A total of ten bullets were fired into Ann Watson's body. Bloodstains were discovered in several rooms of the house. Shortly after the murder, defendant turned himself in to law enforcement authorities. He gave them a statement. He was indicted for first degree murder.

At trial defendant offered the testimony of Dr. Charles E. Smith, a forensic psychiatrist. Dr. Smith testified that defendant suffered from "post traumatic stress disorder." The State offered the testimony of Dr. Bob Rollins, who specifically rejected the diagnosis of "post traumatic stress disorder." The evidence disclosed that defendant served in Vietnam, and that in 1967, as a member of the United States Marine Corps, he was diagnosed as suffering from schizophrenia. There was no evidence that, following his return from Vietnam, he was treated for any mental illness. Defendant testified on his own behalf. His trial testimony was in many respects inconsistent with his earlier statements. Following the presentation of evidence at trial, the trial judge submitted the case to the jury on the theories of first and second degree murder, voluntary manslaughter or not guilty. The jury found defendant guilty of second degree murder. Defendant assigns no error to the guilt phase of his trial.

[1] Defendant first contends that the trial judge erred in finding in aggravation that the offense was especially heinous, atrocious, or cruel. In a well-organized argument, defendant first directs our attention to the fact that the jury rejected the charge of first degree murder thereby negating the element of premeditation and deliberation. Although his argument is not entirely clear on

this issue, defendant seems to suggest that the trial judge therefore improperly considered that the murder was "intentional"; that is, committed with premeditation and deliberation. Furthermore, defendant argues that the trial court was not permitted to consider the multiplicity of shots in aggravation because the State was unable to prove which shot was fatal. Therefore, reasons defendant, proof of every shot was necessary to establish that one of the shots killed the victim. Based on this argument, defendant contends that the trial court erred in using evidence necessary to prove elements of the offense.

As his second argument on this issue defendant contends that the trial judge abused his discretion in finding that the preponderance of the evidence established this factor. He states: "Here the preponderance of the evidence is that during a domestic argument several shots were fired hitting the victim resulting in her death. The Defendant argues that under the circumstances the number, timing and location of the shots was not unusual and that the evidence does not establish an intent to be particularly vicious." While finding these arguments intriguing, we reject them outright. We reject defendant's argument that the trial judge erroneously considered (if he did consider) the multiplicity of wounds. There is ample evidence that the victim was not killed by the first shots. She managed to move from room to room in the house leaving a trail of blood behind her, clearly undergoing fear and pain in the process. Death was not instantaneous. *See State v. Blackwelder*, 309 N.C. 410, 306 S.E. 2d 783 (1983). We also reject defendant's argument that there should be some relevance attached to his allegation that he did not intend his victim to suffer or intend that the murder be "vicious." Proof that a defendant intended to inflict unnecessary pain upon his victim is certainly appropriately considered in determining whether an offense is especially cruel. Such proof, however, is not necessary. G.S. § 15A-1340.4(a)(1)f is stated in the disjunctive—"The offense was especially heinous, atrocious, *or* cruel." (Emphasis added.) Thus an equally appropriate focus in determining the existence of this factor is whether the victim suffered unusual physical pain or mental anguish. Here the evidence fully supports a finding that the victim suffered a degree of physical pain and psychological suffering not normally present in every murder. This assignment of error is overruled.

[2] Defendant contends that the trial judge erred in failing to find in mitigation that defendant was suffering from a mental condition, insufficient to constitute a defense, but significantly reducing his culpability. He points out that in 1967 he was diagnosed as suffering from schizophrenia and he directs our attention to the testimony of Dr. Charles Smith, "an internationally recognized leader in the field of Forensic Psychiatry." He also argues that "[t]he evidence clearly shows as is evidenced by the decision of the jury [in its verdict of second rather than first degree murder] that the acts of the Defendant resulted from 'heat of Passion' in response to other provocation."

The evidence, as gleaned from Dr. Smith's testimony, disclosed that defendant was, in fact, treated in May 1967 for a mental disorder because he was preoccupied with hatred and fear of all "slant eyed people." There was also evidence that in April 1967 defendant was treated at the Orthopedic Department of the Yokosuka Naval Hospital for "moderate bilateral pesplanus" (flat feet) based on a report which stated "Complains frequently and is of no use to command here in RVN"; "Has easiest jobs in company area. Please survey 'EPTP' (either treat or evacuate)." He told Dr. Smith that since returning from Vietnam in 1967, he had been "afraid of other people." He was "afraid of shooting" although he qualified as a rifleman or sharpshooter while in the Marine Corps. His mental problems in 1967 supposedly began following a particularly brutal encounter with the enemy. Although he related this experience to Dr. Smith, reference to it does not appear in the 1967 report.[1]

Upon his return to the United States in 1967, defendant recovered from this acute psychotic episode. However, it was Dr. Smith's belief that defendant was left with a "residual reaction"—a "post traumatic stress disorder" which would affect defendant's "judgment," "perception," "feelings," "awareness" and possibly his "intentions." According to Dr. Smith, the defendant had "a

1. At trial defendant testified concerning his Vietnam experience: "Well, we went in certain villages and some tunnels and, say, flushed out the enemy, but after we got in there, instead of really flushing the enemy out we would go and take captives and take it on our own to more or less, I'd say, torture them . . . and we was just doing what the Vietnamese were doing to us, more or less."

reoccurrence of the original traumatic experience, in the context of the dispute with his wife, a marital dispute."

The State argues that, in light of Dr. Rollins's testimony, the evidence was conflicting as to defendant's mental condition. Dr. Rollins, the State's rebuttal witness, testified that defendant did not suffer from post traumatic stress disorder. Rather, defendant had told him "I don't think [combat in Vietnam] affected me that much; I was about the same as before. I got them to pull me out because of my feet. I went to a hospital, and it was a psychiatric hospital, I guess, I don't have any idea."

We do not believe, based on this testimony, that the trial judge was required to find that the defendant proved by a preponderance of evidence that, at the time of the murder, he was suffering from a mental condition as contemplated by G.S. § 1340.4(a)(2)d. The evidence is both conflicting and inconclusive with respect to any connection between the murder and defendant's alleged mental problems fifteen years earlier. Finally, we find no merit in defendant's argument that he acted in the "heat of passion," a fact which he contends should have been considered as some evidence of his allegedly impaired mental condition. The jury found the defendant guilty of second degree murder rather than voluntary manslaughter, thereby rejecting defendant's theory that he acted in the heat of passion.

[3] Defendant next contends that the trial judge erred in failing to find in mitigation that the defendant acted under strong provocation or the relationship between the defendant and the victim was otherwise extenuating. He bases his contention on the fact that there was evidence at trial of the parties' marital difficulties, particularly defendant's belief that his wife was involved with other men. The testimony of the victim's sister and her sister's boyfriend tended to dispel many of defendant's allegations of his wife's infidelity.

The victim's past indiscretions, if in fact they ever took place, may be some evidence of an extenuating relationship between the parties. We decline to hold, however, that a relationship between husband and wife, including marital difficulties in the past, is sufficient, standing alone, to support a finding of this mitigating factor. It appears from the Record that defendant's actions on the day of the murder were "provoked" by his learning of her deci-

sion to leave the marital home and by his finding a cigarette butt in an ashtray, ostensibly indicating that someone other than the defendant or his wife had at some point visited the house. This evidence is insufficient to prove by a preponderance of the evidence that defendant acted under *strong* provocation. This assignment of error is overruled.

[4] Finally defendant contends that the trial judge erred in finding that the aggravating factor outweighed the mitigating factors and by imposing a sentence in excess of the presumptive. On this issue it bears repeating that:

> Upon a finding by the preponderance of the evidence that aggravating factors outweigh mitigating factors, the question of whether to increase the sentence above the presumptive term, and if so, to what extent, remains within the trial judge's discretion. *State v. Davis, supra*, 58 N.C. App. 330, 293 S.E. 2d 658 (1982).
>
> The discretionary task of weighing mitigating and aggravating factors is not a simple matter of mathematics. For example, three factors of one kind do not automatically and of necessity outweigh one factor of another kind. The number of factors found is only one consideration in determining which factors outweigh others. The court may very properly emphasize one factor more than another in a particular case. The balance struck by the trial judge will not be disturbed if there is support in the record for his determination.

State v. Melton, 307 N.C. at 380, 298 S.E. 2d at 680.

Here, as in his previous arguments, defendant focuses on the fact that the murder arose out of a domestic dispute "where the victim's lack of love for the Defendant and egregiously unfaithful behavior were thrown in the Defendant's face"; that "the affront to the Defendant's dignity by infidelity, weigh much more closely in the balance with a multiple shot killing"; and that "[d]eath may have resulted from the anger of the struggles not as a specifically intended result."

This evidence, including the possibility that defendant may have murdered his wife in a jealous rage, possibly influenced the jury's decision to find defendant guilty of second rather than first degree murder. We have held, however, that this evidence formed

an insufficient basis upon which to find any factor in mitigation. The trial judge weighed one aggravating factor: that the murder was especially heinous, atrocious, or cruel, against two mitigating factors: that defendant voluntarily acknowledged wrongdoing; and that defendant has been a person of good character. The trial judge did not abuse his discretion in sentencing the defendant to life imprisonment.

No error.

JAMES B. CURL, JR., BY AND THROUGH HIS GUARDIAN AD LITEM, FRED CURL, JUDY C. CARPENTER CUMMINGS, PATTY C. THURSTON, AND VICKI C. JOHNSON v. WALTER JACK KEY AND WIFE, MARGARET KEY, WILLIAM C. RAY, TRUSTEE, AND W. MARCUS SHORT

No. 533PA83

(Filed 5 June 1984)

1. Cancellation and Rescission of Instruments § 2.2— action to set aside deed— confidential relationship—failure to apply correct law

In an action to set aside a deed conveying plaintiffs' family home on the ground that defendant stood in a confidential relationship to plaintiffs and exerted undue influence upon them in obtaining the deed, the evidence established that a confidential or fiduciary relationship existed between plaintiffs and defendant at the time the deed was executed, and the trial court erred in failing to apply the law applicable to confidential relationships to defendant's actions, where the evidence showed that plaintiffs inherited the family home after their father died and lived there with the common-law wife of deceased; defendant had been the best friend of plaintiffs' father and plaintiffs had been closely acquainted with defendant all their lives; plaintiffs trusted and relied on defendant; and after plaintiffs' father died, defendant lived for some time in the house with plaintiffs.

2. Deeds § 8.1— consideration—forbearance to bring personal injury action

An alleged forbearance to bring a personal injury action against plaintiffs did not constitute consideration for the execution of a deed by plaintiffs conveying their family home to defendant where defendant did not release his claim against plaintiffs either orally or in writing, and where defendant has in fact instituted an action for personal injuries against plaintiffs.

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

ON discretionary review of the decision of the Court of Appeals, reported at 64 N.C. App. 139, 306 S.E. 2d 818 (1983), affirming judgment in favor of defendants filed 27 August 1982 by *John, J.*, District Court, GUILFORD County. Heard in the Supreme Court 13 March 1984.

This action was instituted on 29 November 1978 by the children of James Curl, Sr. to set aside a deed dated 14 September 1977 conveying their family home to the defendants Key. The plaintiffs alleged that Jack Key stood in a confidential relationship to them and exerted undue influence upon them in obtaining the deed. On 4 January 1980, the plaintiffs James B. Curl, Jr. and Vicki C. Johnson moved for summary judgment on the grounds that they were infants at the time they signed the deed. On 22 December 1980, Judge Alexander-Ralston ruled in their favor. The deed to the defendants Key, as well as a deed of trust dated 14 September 1977 conveying the same property from the Keys to defendants Ray and Short, was set aside as to the interests of James B. Curl, Jr. and Vicki C. Johnson. This judgment was not appealed, and these two plaintiffs are not before this Court. On 24 March 1982, the trial court entered judgment against the remaining plaintiffs. The Court of Appeals affirmed.

Adams, Kleemeier, Hagan, Hannah & Fouts, by Walter L. Hannah and John P. Daniel, for plaintiff appellants.

H. Marshall Simpson for defendant appellees.

MARTIN, Justice.

The proper standard for review in this case is set forth in the Court of Appeals opinion: "Findings of fact made by the court in a nonjury trial have the force and effect of a jury verdict and are conclusive on appeal *if there is evidence to support them,* although the evidence might have supported findings to the contrary." 64 N.C. App. at 141-42, 306 S.E. 2d at 820 (emphasis added).

In his role as fact finder, Judge John made, inter alia, the following findings:

> 11. The Court finds further that all grantors who executed the deed hereinabove referred to did so *freely and*

voluntarily and with a full knowledge and understanding of the consequences of their actions. The Court finds that W. Marcus Short *fully explained the effect of the execution of the deed to all grantors* and the Court finds as a fact that *no facts were concealed by any defendant* from the plaintiffs-grantors. The Court also finds that there was *no undue influence exercised by any defendant on any plaintiff-grantor* in the execution of the deed.

12. That the deed signed by the plaintiffs not only recited consideration, but *there was actual consideration for the conveyance* by plaintiffs-grantors in the forbearance by Walter Jack Key from instituting suit against all owners of the property to recover his damages.

13. The Court also finds that there was *no confidential or fiduciary relationship existing between the plaintiffs and the defendants,* and all parties acted in good faith in the execution of the deed. It is further found that there was no attempt by either defendant to deceive *or to breach any fiduciary or confidential obligation owed to the plaintiffs-grantors,* nor was there *any inequality of bargaining power.*

(Emphases added.)

[1] This appeal turns upon the question of whether there is evidence to support finding 13 above. Our review of the transcript leads us to the conclusion that the finding (actually a conclusion of law) is unsupported by the evidence. All the evidence tended to show that a confidential or fiduciary relationship did exist between the plaintiffs and defendant Jack Key at the time the deed was executed. In part, the plaintiffs' evidence disclosed:

After James B. Curl, Sr. died intestate in December 1975, his children inherited the family home in rural Guilford County. Living alone on the property after his death, the plaintiffs and Lottie Curl, common-law wife of the deceased, were subjected to harassment, threats, and occasional physical abuse from various "outsiders," relatives with whom they did not get along. The situation is summarized in the words of James Curl, Jr.: "Well, a bunch of people was coming down there beating on us, bossing us, just taking over the house. . . ." At the time of these events, the Curl children were 16, 17, 18, and 21 years of age, respectively.

The plaintiffs had been closely acquainted with Jack Key all of their lives. Known to them as "Uncle Jack," Key had been their father's best friend. They continued to regard him as "a special friend of the family." Key offered to help plaintiffs with their problems in dealing with harassment from outsiders, claiming he could keep troublemakers away if each of the plaintiffs would sign a paper—"a peace paper giving him the right to kick anybody off the land that come there causing any disturbance." Lottie Curl testified that Key would "have the rights 'cause he'd be a man person. He said he could take care of it better than a woman. We was giving him the rights to help us out to have peace. He said we'd live happy, y'all can live happily after we sign these papers."

It was only later, when she went to pay taxes on the property, that Lottie Curl first learned the truth about the "peace paper" they had each signed:

> [A]nd the lady that I went in front of—I don't know her name—she said, honey, said you don't have a place to pay taxes on. I said what are you talking about? She said you sold your place to Mr. Jack Key. I said for heaven's sake, I haven't sold anything. She said, well, I'm sorry, Honey, the deed, the paper is here stating you sold your property. So she wouldn't let me pay no taxes.

Concerning the actual signing of the deed, each of the signatories recalled signing only "a blank piece of paper with six lines." Other than the parties, there were no witnesses present. Attorney Marcus Short prepared the deed, which was signed in his office. When Short attempted to explain the procedure, he was silenced by defendant Key who, having transported plaintiffs to the lawyer's office himself, claimed "we done talked it all over, explained it to each other, and we all know what we're going through with."

Jack Key told them they had signed a "peace paper" at Mr. Short's office. Judy Curl Cummings, who was about twenty years old when the deed was signed, testified that Jack Key was a good friend of the family's. She trusted Jack Key.

James Curl, Jr., who was about fifteen years old when the deed was signed, testified that he had known Jack Key as a friend and relied upon him for as long as he could remember.

The plaintiffs had confidence in Jack Key; he was their friend; they all trusted him and believed that he wanted to help them live in peace in their home.

Jack Key himself testified that he had known the Curl family for years. Mr. Curl had taught him to lay brick and they worked together. After Mr. Curl died, Jack Key lived for some time in the house with Lottie Curl and the children. He was a friend of the family's.

We note that prior to the commencement of the trial, Judge John granted defense counsel's motion to have all the witnesses excluded from the courtroom. Thereupon, seven witnesses testified for the plaintiffs, rendering with virtual unanimity the foregoing summary of the evidence.

Evidence for the appellees tended to show that defendant Key lived for a period of time in the plaintiffs' family home and while there was seriously injured as he descended the stairs to the basement. He thereafter informed plaintiffs that they were responsible for his injuries. According to Key, they resisted his demands for damages but later "volunteered" to convey their house to him in settlement of his claim.

Defendant Key testified, concerning the occasion of the execution of the deed, that attorney Short explained to plaintiffs and their stepmother that by signing the deed they would be conveying their house to Key in settlement of his claim for injuries sustained in July 1976, and the plaintiffs and Ms. Curl agreed that this was their desire. Thereupon, they executed a deed for their home to Key and his wife. The Keys shortly thereafter executed a deed of trust to William C. Ray, as trustee, to secure a $4,000 promissory note to Mr. Short in payment of his attorney's fees.

None of appellees' evidence contradicts the conclusion that there was a fiduciary or confidential relationship between plaintiffs and Jack Key.

The trial court erred in finding that no fiduciary or confidential relationship existed between plaintiffs and Jack Key. Because of this error by the trial court, it failed to apply the proper law to the facts of this transaction. The applicable law is as stated by Justice Lake:

> Where a transferee of property stands in a confidential or fiduciary relationship to the transferor, it is the duty of the transferee to exercise the utmost good faith in the transaction and to disclose to the transferor all material facts relating thereto and his failure to do constitutes fraud. . . . Such a relationship "exists in all cases where there has been a special confidence reposed in one who in equity and good conscience is bound to act in good faith and with due regard to the interests of the one reposing confidence." . . . Intent to deceive is not an essential element of such constructive fraud. . . . Any transaction between persons so situated is "watched with extreme jealousy and solicitude; and if there is found the slightest trace of undue influence or unfair advantage, redress will be given to the injured party."

Link v. Link, 278 N.C. 181, 192, 179 S.E. 2d 697, 704 (1971) (citations omitted). The trial court failed to apply this standard to defendant Jack Key's conduct. For this error, there must be a new trial.

[2] Defendants also argue that the alleged release of Jack Key's personal injury claim constituted consideration to plaintiffs for the execution of the deed. With respect to this, attorney Short testified as follows:

> Q. Did you execute, have Mr. Key execute a release to these people in settlement of this matter?
>
> A. I did not.
>
> Q. Did you advise them that Mr. Key could still turn around and sue them again even though they had conveyed this property without a release?
>
> A. I didn't advise them of that, no.

The issue of the alleged release was neither disclosed to plaintiffs nor discussed with them. At no time did anyone suggest that the plaintiffs retain an attorney to advise them in this regard. Nor did Mr. Short discuss the issue of possession of the property—"that they would have to leave after they conveyed or anything like that." Key did not release his claim, either orally or in writing.

We hold that the evidence fails to support the conclusion of the trial court that forbearance to bring the suit constituted consideration for the execution of the deed. In fact, counsel conceded at oral argument that a suit for personal injuries against plaintiffs has been instituted by Jack Key.

At the heart of the matter is the universal principle that reality of assent is essential to the validity of a deed. A party must not only be mentally competent; he must exercise his will freely and understandingly. 25 Am. Jur. 2d *Duress and Undue Influence* § 40 (1966). Undue influence is the exercise of an improper influence over the mind and will of another to such an extent that the action is not that of a free agent. *Lee v. Ledbetter*, 229 N.C. 330, 49 S.E. 2d 634 (1948). It is the unfair persuasion of a party who is under the domination of the person exercising the persuasion or who by virtue of the relation between them is justified in assuming that that person will not act in a manner inconsistent with his welfare. Restatement (Second) of Contracts § 177(1) (1981). Confidential relationships are not limited to a purely legal setting but may be found to exist in situations which are moral, social, domestic, or merely personal. *Abbitt v. Gregory*, 201 N.C. 577, 160 S.E. 896 (1931). It is equally well settled that "[a] course of dealing between persons so situated is watched with extreme jealousy and solicitude; and if there is found the slightest trace of undue influence or unfair advantage, redress will be given to the injured party." *Rhodes v. Jones*, 232 N.C. 547, 548, 61 S.E. 2d 725, 726 (1950). *See McNeill v. McNeill*, 223 N.C. 178, 25 S.E. 2d 615 (1943).

Plaintiffs are entitled to a new trial. The decision of the Court of Appeals is reversed and the case is remanded to that court for further remand to the superior court for a new trial.

Reversed and remanded.

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

STATE OF NORTH CAROLINA v. JOSEPH CLIFTON TAYLOR

No. 232A83

(Filed 5 June 1984)

1. **Indictment and Warrant § 7.1— inherent authority of trial judge to reopen court prior to final adjournment**

Prior to *final adjournment* of a term of court, the trial judge has the inherent authority to reopen court following a recess or adjournment without the assistance of the sheriff. Therefore, defendant's position that the indictment in this case was not returned in open court because the sheriff failed to recite "Oyez, Oyez, Oyez," to announce that court was formally open was without merit where court recessed, the grand jury completed its work shortly thereafter, and the trial judge went back to the courtroom to accept the indictments.

2. **Bills of Discovery § 6— denial of motion for sanctions as a result of State's failure to comply with discovery—no error**

The trial court did not err in refusing to exclude certain photographs as a sanction for the State's failure to comply with discovery where the district attorney learned of the photographs and a clump of hair found at the crime scene after jury selection began, defense counsel was given the opportunity to examine the photographs prior to the opening of court the following day, and the court properly exercised its discretion in admitting the photographs and excluding evidence of the clump of hair. G.S. 15A-910.

APPEAL by defendant from *Beaty, Judge*, at the 10 January 1983 Session of CASWELL County Superior Court.

Defendant was tried upon a bill of indictment charging him with first-degree murder. He entered a plea of not guilty to the offense charged.

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

The jury returned a verdict of guilty of first-degree murder. The State stipulated that the evidence presented at trial did not support the existence of aggravating factors sufficient to justify consideration of the death penalty as an appropriate punishment. Thus, the trial judge imposed a sentence of life imprisonment.

Defendant appealed directly to this Court as a matter of right pursuant to G.S. 7A-27(a).

Rufus L. Edmisten, Attorney General, by Charles H. Hobgood, Associate Attorney, for the State.

Mark Galloway and W. Osmond Smith, P.C., for defendant-appellant.

BRANCH, Chief Justice.

[1] By his first assignment of error, defendant contends the trial court erred in failing to grant his motion to dismiss the indictment on the ground that it was not returned in open court.

General Statute 15A-628(c) provides, in pertinent part, that "[b]ills of indictment submitted by the prosecutor to the grand jury, whether found to be true bills or not, must be returned by the foreman of the grand jury to the presiding judge in open court."

Defendant takes the position that the indictment was not here returned in open court because the sheriff failed to recite "Oyez, Oyez, Oyez," to announce that court was formally open.

At the hearing on defendant's motion to dismiss the indictment, the foreman of the grand jury, Charles Crisp, testified that the grand jury completed its work shortly after 5:00 p.m. on 27 September 1982 and that he went into the courtroom to look for the judge. Crisp was informed that the judge was in his chambers and he therefore took the bills of indictment to him there.

Crisp's testimony was that

> he [Judge Lupton] said he couldn't accept them unless it was in open court. So he said, "Go back to the courtroom, I'll be there in a little bit." So we came back to the courtroom and waited and he came in and reopened court, and I approached the bench and handed him the bills of indictment. And then it was—he told me that I'd have to go back to the grand jury room with the bills of indictment, inform the grand jury what had taken place; and then I brought the bills of indictment back and presented them to him and he took them and that was it.

Connie Stedman, Assistant Clerk of Superior Court for Caswell County, testified that she served as recording clerk on 27 September 1982. She stated that 27 September was the first day of a criminal session and that court recessed that day around 5:00 p.m. She made an entry in the court minutes as follows: "Court takes a recess until 9:30 a.m., 9-28-1982." Court had not adjourned for the week.

Mrs. Stedman was later called back into the courtroom and she noted in the record that "Charles Crisp, Foreman of the Grand Jury, returned bills of indictment. Court reopens."

After hearing this evidence, the trial judge apparently denied defendant's motion to dismiss the indictment, although the record does not reflect his ruling. Furthermore, the judge did not make findings of fact, but since there was no conflict in the evidence, this failure does not constitute prejudicial error. *State v. Richardson*, 295 N.C. 309, 245 S.E. 2d 754 (1978).

We are of the opinion that defendant's hypertechnical argument that court was not reopened because the sheriff failed to recite the familiar litany, "Oyez, Oyez, Oyez," to formally declare the opening of court is without merit.

It has long been held that a term of court remains open until final adjournment. In *State v. Martin*, 24 N.C. 101 (1841), this Court explained that:

> The term of a court is in legal contemplation as one day; and although it may be open many days, all its acts refer to its commencement, with the particular exceptions in which the law may direct certain acts to be done on certain other days. It is seldom necessary that the day of any proceeding should appear in making up the record, distinct from that of the beginning of each term, although a minute may be kept of each day's doings. Nor is it necessary that there should be adjournments from day to day, after the term is once opened by the judge; nor, if there should be, that they should be recorded, in order to preserve the authority of the court to perform its functions. The court may, in fact, not adjourn during the whole term, but be always open; though, for the convenience of suitors, an hour of a particular day, or of the next day, may be given them for their attendance. If the

> record states the time of doing an act, as the statement is unnecessary, so it is harmless surplusage, unless the day be beyond the period to which the term legally extends.

Id. at 122.

Furthermore, there are numerous cases in this jurisdiction which stand for the proposition that the trial judge has the inherent authority to control trial proceedings and to extend a term of court if, in his discretion, it is necessary for the prompt and efficient administration of justice. *See* McIntosh, North Carolina Practice and Procedure § 103 (2d ed. 1956) and cases cited therein.

Since the trial court has the inherent authority to control trial proceedings and to extend the term, it logically follows that he also has the authority to himself reopen court. We agree with the State that:

> It would serve no useful purpose and impose a needless technicality to hold that court cannot be opened without a Sheriff formally announcing that court is open. A Sheriff or bailiff is present in court to assist the judge as a public crier and to keep order, which he does at the direction of the judge. There is no reason why the judge, if necessary, cannot himself do that which he directs the Sheriff to do.

State's Brief at 5-6.

We hold that prior to *final adjournment* of a term of court, the trial judge has the inherent authority to reopen court following a recess or adjournment without the assistance of the sheriff. Therefore, the indictment in instant case was returned in open court as required by G.S. 15A-628(c) and the trial court correctly denied defendant's motion to dismiss.

[2] Defendant next contends the trial court erred in ruling on defendant's motion for sanctions made as a result of the State's failure to comply with discovery.

The facts necessary for an adequate understanding of this assignment of error are as follows:

Judge Robert A. Collier entered a pretrial order on 15 December 1982 requiring the State to provide defendant with all

discovery to which he was statutorily entitled. On 10 January 1983, the district attorney inquired of defense counsel as to whether the State had complied with all of defendant's requests for discovery. Counsel for defendant at that time indicated that each of defendant's discovery requests had been fulfilled.

This case came on for trial on 10 January 1983. Jury selection began at 2:00 p.m. During a recess at approximately 3:30 p.m., the district attorney was informed of the existence of photographs of the crime scene and physical evidence consisting of a clump of hair located near the body of the deceased. Apparently, the district attorney was surprised to discover this evidence because police officers had earlier told him that there were no photographs or physical evidence. Defense counsel was informed of the existence of this evidence before the jury was impaneled and on Tuesday, January 11, was given an opportunity to examine the photographs prior to the opening of court. When court convened at 9:30 a.m., defendant moved that the photographs and physical evidence be excluded.

Judge Beaty made findings of fact to the effect that defendant had made a timely motion for discovery which had been granted; that prior to the impaneling of the jury, defendant was aware of the existence of the evidence; and that on 11 January, the State made the photographs and physical evidence available to defendant. Judge Beaty then ruled that:

> Pursuant to 15A, Section 910, the Court will give the defendant an opportunity to examine the photographs of the crime scene; however, the Court will prohibit the State from introducing those photographs that indicate a clump of hair as presented by the State to the Court; and further, the Court will prohibit the State from introducing and using as a part of this case any physical evidence of any clumps of hair which it may have discovered and did discover on this date, January 11, 1983.
>
> I'm allowing the State to use all photographs except the one indicating the clump of hair and prohibiting the State from producing the clump of hair. All other photographs may be introduced by the State once the defendant has had an opportunity to examine them.

While defendant's position on this issue is not entirely clear, it seems that he is objecting to the trial court's failure to impose a stricter sanction upon the State for its failure to comply with the pretrial discovery order issued by Judge Collier.

General Statute 15A-910 provides that upon failure of a party to comply with an order pursuant to Article 48 (Discovery in the Superior Court), the trial court, in addition to exercising its contempt powers, may

(1) Order the party to permit the discovery or inspection, or

(2) Grant a continuance or recess, or

(3) Prohibit the party from introducing evidence not disclosed, or

(3a) Declare a mistrial, or

(3b) Dismiss the charge, with or without prejudice, or

(4) Enter other appropriate orders.

We have held that while the statute provides for several possible curative actions, the trial court is not required to impose any sanctions. *State v. Alston*, 307 N.C. 321, 298 S.E. 2d 631 (1983). "Which sanction, if any, is the appropriate response to a party's failure to comply with a discovery order is entirely within the sound discretion of the trial court. The decision of the trial court will not be reversed absent a showing of abuse of that discretion." *Id.* at 330, 298 S.E. 2d at 639. *See also, State v. Detter*, 298 N.C. 604, 260 S.E. 2d 567 (1979); *State v. Jones*, 295 N.C. 345, 245 S.E. 2d 711 (1978); *State v. Thomas*, 291 N.C. 687, 231 S.E. 2d 585 (1977).

Our review of the record in instant case reveals that the trial judge properly exercised his discretion in permitting the State to introduce into evidence certain photographs and in refusing to admit either photographic or physical evidence of the clump of hair.

We further note that the State fully complied with the trial court's order.

Only one photograph was admitted into evidence. This single photo was a picture of the decedent which was taken at the hospital and it was properly admitted for the purpose of illustrating

testimony of witnesses who described the victim's body and wounds. No photographs depicting the clump of hair were admitted and the clump of hair itself was not exhibited to the jury. Although testimony was given by witnesses that a clump of hair was seen near the victim's car, testimony of witnesses describing what they saw did not violate the trial court's order. Furthermore, defendant did not object to this testimony at trial and therefore may not rely on its admission as a basis for error on appeal. *See* Brandis on North Carolina Evidence § 27 (2d rev. ed. 1982) and cases cited therein.

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

No error.

STATE OF NORTH CAROLINA v. LARRY JAMES ATKINS

No. 85A84

(Filed 5 June 1984)

1. **Criminal Law § 138— heinous, atrocious, or cruel aggravating factor**

In an inquiry regarding the applicability of the heinous, atrocious, or cruel aggravating factor, the focus should be on whether the facts of the case disclosed excessive brutality, or physical pain, psychological suffering, or dehumanizing aspects not normally present in that offense.

2. **Criminal Law § 138— especially heinous, atrocious, or cruel aggravating factor—comparison of crime to like crimes**

In determining whether a particular offense is especially heinous, atrocious, or cruel, the criminal act being considered must be compared to like criminal offenses.

3. **Criminal Law § 138— second-degree sexual offense—especially heinous, atrocious, or cruel aggravating factor**

Since anal intercourse, or any other sexual act specified in G.S. 14-27.5(a)(1), when relied on for conviction, constitutes an essential element of a second-degree sex offense, proof of such a sexual act forcibly committed, standing alone, is never enough to make a sex offense especially heinous, atrocious, or cruel.

4. Criminal Law § 138— sexual offense—insufficient evidence of heinous, atrocious or cruel aggravating circumstance

The evidence was insufficient to support the sentencing judge's finding that defendant's second-degree sexual offense was especially heinous, atrocious, or cruel where it showed that defendant's conviction was based upon the victim's testimony that defendant forcibly and against her will engaged in anal intercourse with her; fissures observed by a physician around the victim's anus could have been caused by the body's natural waste elimination process and thus did not constitute significant injury; and defendant used a pillow over the back of the victim's head only to prevent her from observing him and not in an effort to smother or otherwise harm her.

DEFENDANT appeals a decision by a divided panel of the Court of Appeals, 66 N.C. App. 67, 310 S.E. 2d 629 (1984), finding no error in a sentence imposed by *Judge James D. Llewellyn* at the 18 October 1982 Criminal Session of WAYNE County Superior Court.

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

Adam Stein, Appellate Defender, and James A. Wynn, Jr., Assistant Appellate Defender, for defendant appellant.

EXUM, Justice.

The sole issue raised in this appeal is the propriety of the sentencing judge's finding that defendant's second degree sexual offense was especially heinous, atrocious, or cruel. *See* N.C. Gen. Stat. § 15A-1340.4(a)(1)f. We conclude there is no evidence to support this finding, reverse the decision of the Court of Appeals, and remand for a new sentencing hearing.

I.

On 21 May 1983 the victim retired for the evening to the bedroom in her apartment. At approximately 6:20 the next morning, she was awakened by the force of another person sitting down on the edge of her bed. As she began to scream, the intruder attempted to cover her mouth and told her that he would hurt her if she did not keep quiet. The two struggled briefly. The intruder eventually succeeded in turning the victim over onto her stomach. He placed a sheet over her and a pillow over the back of her head. He then engaged in anal intercourse with her and left.

After he left the victim went to the apartment of a neighbor who called the police.

At trial the victim identified defendant as her assailant. Defendant was convicted by a jury of felonious breaking and entering and second degree sexual offense. Upon defendant's conviction Judge Llewellyn sentenced him to two consecutive prison terms of eight and sixteen years for the breaking and entering and second degree sexual offenses respectively. The presumptive sentence for a second degree sex offense, a Class D felony, is twelve years. N.C. Gen. Stat. § 14-27.5(b) and 15A-1340.4(b).

On defendant's appeal, the Court of Appeals found no error in either the guilt or sentencing phases of defendant's trial. Judge Eagles dissented, however, as to that court's determination that the evidence supported the trial judge's finding that the sex offense was especially heinous, atrocious, or cruel. Defendant appeals the decision of the Court of Appeals on that issue as a matter of right. N.C. R. App. P. 16(b).

II.

[1, 2] We are again called upon to analyze the meaning and explicate the perimeters of the aggravating factor that an offense is especially heinous, atrocious, or cruel. We have previously explained that in an inquiry regarding the applicability of this aggravating factor, "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*." *State v. Blackwelder*, 309 N.C. 410, 414, 306 S.E. 2d 783, 786 (1983). As this standard suggests, in determining whether a particular offense is especially heinous, atrocious, or cruel, the criminal act being considered must be compared to like criminal offenses.

For example, in determining whether a particular manslaughter is especially heinous, atrocious, or cruel, a sentencing court should compare the facts before it with facts "normally present" in other manslaughters. We have affirmed a trial court's determination that the voluntary manslaughter of an infant was especially heinous, atrocious, or cruel when the victim "was beaten to death—struck against a bedpost with such force that it shattered his cast and crushed his skull. . . . His injuries were

multiple, and death was not immediate." *State v. Ahearn*, 307 N.C. 584, 606-07, 300 S.E. 2d 689, 703 (1983). We have also used the *Blackwelder* standard to affirm the trial court's determination that a first degree murder, accomplished by beating the victim to death with sticks, was especially heinous, atrocious, or cruel. In that case, "[t]he victim's skull was crushed and fractured in several places. The orb of one eye was driven into the brain. In spite of the continued blows to his head and the severity of the wounds, the victim lingered and remained in a semi-conscious state for over twelve hours." *State v. Benbow*, 309 N.C. 538, 545, 308 S.E. 2d 647, 651 (1983). *Blackwelder* and its progeny indicate that a determination of whether a particular offense is especially heinous, atrocious, or cruel hinges on a comparison of the facts involved in that offense with facts normally attributable to other like offenses.

[3] A person commits a second degree sexual offense by engaging in a sexual act with another person by force and against the will of that other person. N.C. Gen. Stat. § 14-27.5(a)(1). A sexual act "means cunnilingus, fellatio, analingus, or anal intercourse, but does not include vaginal intercourse [and] also means the penetration, however slight, by any object into the genital or anal opening of another person's body [except] for accepted medical purposes." N.C. Gen. Stat. § 14-27.1(4). In deciding whether a particular second degree sex offense is especially heinous, atrocious or cruel, the facts should be compared with facts which are normally present in any second degree sex offense, however the offense may be committed. But since anal intercourse, or any other sexual act specified in the statute, when it is relied on for conviction, constitutes an essential element of a second degree sex offense, it is clear that proof of such a sexual act forcibly committed, standing alone, is never enough to make a sex offense especially heinous, atrocious, or cruel. This is so because "[e]vidence necessary to prove an element of the offense may not be used to prove any factor in aggravation." N.C. Gen. Stat. § 15A-1340.4(a)(1).

[4] In the instant case, the jury convicted defendant of second degree sexual offense based upon the victim's testimony that defendant forcibly and against her will engaged in anal intercourse with her. Anal intercourse requires penetration of the anal opening of the victim by the penis of a male. *See State v. Lucas*,

302 N.C. 342, 275 S.E. 2d 433 (1981). The penetration must be forcibly committed for it to constitute a second degree sex offense.

The question is whether there are here circumstances in evidence in addition to the fact of forcible anal penetration by defendant's penis which would support the aggravating factor as it was defined in *Blackwelder*. A majority of the Court of Appeals characterized what it considered to be such circumstances as follows:

> Unquestionably, the prosecutrix's anus was mutilated as the record shows that the prosecutrix sustained several small fissures in the skin around her anus and one fairly large fissure at the posterior wall of the anus. The placement of the pillow over the prosecutrix's head, thereby adding to the prosecutrix's ordeal, was an activity not normally present in a sexual offense. The prosecutrix could have smothered to death. Finally, the sentencing judge was best able to judge the demeanor of the victim.

State v. Atkins, 66 N.C. App. at 71, 310 S.E. 2d at 632.

It is true that Dr. Robert L. Smith, the physician who examined the victim, testified: "The rectal examination showed several small fissures or breaks in the skin around the anus, with one fairly large fissure at the posterior wall of the anus. The rectal exam with the finger revealed no masses or internal trauma." But on cross-examination he concluded that it was possible for the fissures he observed to have been caused by the body's natural waste elimination process. We view this concession as evidence that the fissures observed by Dr. Smith did not constitute significant injury. This was the only evidence characterizing the physical condition of the victim's body after the attack. The Court of Appeals may have correctly observed that placing a pillow over the victim's head is not an activity normally present in a sex offense case. But the victim's testimony, which was the sole evidence on this issue, indicated that defendant used the pillow over the back of her head only to prevent her from observing him, not in an effort to smother or otherwise harm her.

The anal fissures described by Dr. Smith are hardly more than evidence that the anal intercourse was forcible. Defendant did not use the pillow to further harm the victim but to shield

him from her sight. Although more serious anal injury even in an anal intercourse sex offense case or the use of a pillow or other device for the purpose of inflicting additional physical harm or psychological terror might call for a different result, we conclude the facts here do not "disclose *excessive* brutality, or physical pain, psychological suffering, or dehumanizing aspects *not normally present in*" second degree sex offenses within the meaning of the *Blackwelder* standard.

Finally, the Court of Appeals' determination that "the sentencing judge was best able to judge the demeanor of the victim" is of no aid in determining whether this sexual offense could be found especially heinous, atrocious, or cruel. Accepting all of the state's evidence as true, we are still unable to conclude that it was sufficient to support such a finding.

Our review of the entire record leads us to conclude that the trial judge erred in finding the second degree sexual offense here committed was especially heinous, atrocious, or cruel. We reverse the decision of the Court of Appeals on that issue and remand the matter to the Court of Appeals for further remand for resentencing to Wayne County Superior Court. *See State v. Ahearn*, 307 N.C. 584, 300 S.E. 2d 689 (1983).

Reversed and remanded.

RICHARD LEE HOLIDAY v. LAWRENCE M. CUTCHIN, M.D.

No. 430PA83

(Filed 5 June 1984)

Witnesses § 5.2— character evidence offered by defendant physician improperly allowed

Character evidence offered by defendant physician was inadmissible for the reason that it was not limited to the doctor's reputation where a witness testified to his opinion of defendant based on his personal knowledge rather than what he knew, if anything, about defendant's reputation.

ON discretionary review of a decision of the Court of Appeals, 63 N.C. App. 369, 305 S.E. 2d 45 (1983), which, on plaintiff's appeal from a jury verdict for defendant and judgment entered

thereon by *Judge Winberry*, presiding at the 24 August 1981 Civil Session of PITT County Superior Court, ordered a new trial.

McLeod & Senter, P.A., by Joe McLeod and William L. Senter for plaintiff appellee.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, by James D. Blount, Jr., Susan M. Parker and Nigle B. Barrow, Jr. for defendant appellant.

EXUM, Justice.

This is a medical malpractice claim. The sole issue raised is the admissibility of character evidence offered by defendant physician to bolster his credibility as a witness. The Court of Appeals, in an opinion by Judge Becton, concurred in by Judges Arnold and Hill, concluded that admission of this evidence was error entitling plaintiff to a new trial. We allowed defendant's petition for further review. We now affirm.

I.

On 1 April 1979 Richard Lee Holiday, plaintiff, entered the Edgecombe General Hospital emergency room complaining of pain in his left foot and leg. Dr. Lawrence Cutchin, defendant, was on call in the emergency room and took Holiday's medical history. Holiday indicated that his pain began either while or after he had played basketball two days earlier. Dr. Cutchin examined Holiday by manipulating his left leg and foot. Both appeared normal in color and temperature. An x-ray revealed no injury to a bone. Dr. Cutchin did not, by his own admission, check for a pulse in the patient's foot or leg. Dr. Cutchin diagnosed Holiday's condition as a muscle strain. He gave Holiday some medication for pain and instructed him to apply heat to his leg. Holiday then left the emergency room.

Two days later, Holiday returned to the emergency room. Dr. James Kelsh examined him and found his leg cold and the skin pale. When Dr. Kelsh could find no peripheral pulse he concluded Holiday had developed a blood clot. After Holiday was transferred to Pitt County Memorial Hospital, doctors unsuccessfully attempted to remove the clot. Subsequently, Holiday's left leg was amputated below the knee. Eventually additional clots developed and his leg was amputated above the knee.

Holiday filed this medical malpractice action, alleging negligence by Dr. Cutchin in his diagnosis and treatment. At trial, a number of medical experts testified concerning the relevant standard of care owed by Dr. Cutchin and whether he complied with it. Dr. Cutchin testified in his own behalf and was cross-examined. Dr. Cutchin then offered character evidence purportedly to rehabilitate his credibility.

The Court of Appeals concluded that since the credibility of Dr. Cutchin had not been impeached, admission of character evidence was error warranting a new trial. Assuming, without deciding, that Dr. Cutchin was impeached, we conclude the character evidence was inadmissible because it was not limited to testimony about Dr. Cutchin's reputation.

II.

We begin our analysis by noting the general rule in this state that evidence of character is inadmissible in a civil action. *Jeffries v. Harris*, 10 N.C. (3 Hawks) 105, 105 (1824). This rule was authoritatively expressed in *McRae v. Lilly*, 23 N.C. (1 Ire.) 118, 120 (1840), where the Court noted that character evidence was inadmissible "unless the character of the party [was] put directly in issue by the nature of the proceeding. . . ." The character of a defendant physician in a medical malpractice action is irrelevant to the ultimate issue of whether the physician acted negligently. Such evidence tempts the jury to base its decision on emotion and to reward good people or punish bad people, rather than to render a verdict based upon the facts before them. *See* 1 Brandis on North Carolina Evidence § 103 at 385 (2d ed. 1982). The use of character evidence by a party to a civil action "might move the jury to follow the principles of poetic justice rather than rules of law." *Creech v. Creech*, 222 N.C. 656, 664, 24 S.E. 2d 642, 648 (1943).

Recognized exceptions to this rule of inadmissibility exist. One such exception concerns the use of character evidence to impeach the credibility of a party-witness in a civil action. *See Warlick v. White*, 76 N.C. 175, 176-77 (1877). Just as such evidence may be used to impeach, it may also be used to rehabilitate an impeached witness. "In whatever way the credit of the witness may be impaired, it may be restored or strengthened by . . . evidence tending to insure confidence in his veracity and in the truthful-

ness of his testimony." *Jones v. Jones*, 80 N.C. 246, 250 (1879). Thus, as a corollary to the exception that character evidence may be used to impeach a party-witness, an exception exists permitting the use of character evidence to corroborate or rehabilitate an impeached party-witness. "Where a party testifies *and the credibility of his testimony is challenged*, testimony that his general character is good is competent and proper evidence for consideration upon the truthfulness of his testimony." *Lorbacher v. Talley*, 256 N.C. 258, 260, 123 S.E. 2d 477, 479 (1962) (emphasis added). The important limitation upon the use of character evidence to corroborate or rehabilitate a party-witness is that the credibility of that party-witness must be challenged before the character evidence becomes admissible. "Until the credibility of a party who has testified in his own behalf has been impeached by imputations of his bias, inconsistencies in his statements, or otherwise, his good character may not be proved to corroborate his testimony." *State v. Johnson*, 282 N.C. 1, 26, 191 S.E. 2d 641, 658 (1972).

III.

The Court of Appeals concluded the credibility of Dr. Cutchin's testimony was not impeached; therefore the character evidence offered by him was inadmissible. We pass without deciding whether Dr. Cutchin's credibility was impeached because even if it was, the character evidence offered by Dr. Cutchin was inadmissible for the reason that it was not limited to Dr. Cutchin's reputation.

Under present North Carolina practice, when character is only collaterally in issue, as it is when offered either to impeach or rehabilitate a witness, proof by witnesses other than the person whose character is in question may only be by evidence of reputation. *State v. Taylor*, 309 N.C. 570, 308 S.E. 2d 302 (1983); *State v. Cox*, 303 N.C. 75, 277 S.E. 2d 376 (1981); *State v. Grundler*, 251 N.C. 177, 111 S.E. 2d 1 (1959), *cert. denied*, 362 U.S. 917 (1960). Unlike proof of character when character is directly in issue, proof of character to impeach or rehabilitate may not be by opinion evidence or evidence of specific acts of the person whose character is in question. *See* 1 Brandis on North Carolina Evidence § 113 at 419-20 (2d ed. 1982). Where character testimony is offered to prove another person's credibility as a witness, the

testimony must be limited to that person's reputation. *Taylor*, 309 N.C. 570, 308 S.E. 2d 302; *State v. Abernathy*, 295 N.C. 147, 244 S.E. 2d 373 (1978).

Defendant's character witness testified as follows:

Q. Dr. Wilkerson, are you personally acquainted with Dr. Lawrence Cutchin?

A. Yes, sir.

Q. Do you know his general character and reputation?

MR. MCLEOD: Objection.

THE COURT: Overruled.

Q. Do you know his general character and reputation?

A. Yes, sir.

Q. What is it?

MR. MCLEOD: Objection.

THE COURT: Overruled.

A. I have known Dr. Cutchin since he was a resident in Chapel Hill and since his starting practice in Tarboro. And he's not only a fine physician but also a public spirited individual who has done many things to help the health care of people in eastern North Carolina, particularly in his county.

MR. MCLEOD: Objection. Not responsive.

THE COURT: Denied.

Q. Go ahead.

A. I have also known him socially, and he's come to some social events here in Greenville and I have met him at State Medical Society meetings and other medical meetings, and have found him to be interested in the subject matter at hand but the welfare and health of people of eastern North Carolina but he had a fine spirit in trying to provide for that welfare.

MR. MCLEOD: Move to strike.

THE COURT: Denied.

Defendant's character witness did not testify as to defendant's reputation. Dr. Wilkerson testified to his opinion of defendant based on his personal knowledge rather than what he knew, if anything, about defendant's reputation. He described defendant as "not only a fine physician but also a public spirited individual" and as a person "interested in the subject matter at hand [concerns of the State Medical Society] and (sic) the welfare and health of the people of eastern North Carolina. . . ." These references reflected Dr. Wilkerson's opinion of defendant rather than defendant's reputation. Furthermore, Dr. Wilkerson stated that defendant "has done many things to help the health care of people in eastern North Carolina, particularly in his county." This statement deals, albeit generally, with defendant's specific acts, an impermissible area of inquiry during the direct examination of a character witness.

This case was hard fought and the evidence conflicting on the question of whether Dr. Cutchin's conduct comported with the applicable standard of care. We cannot say, therefore, that the error in admitting this character testimony was harmless. There is here the danger that the jury was unduly tempted to find for Dr. Cutchin on the issue of his negligence simply because they believed the inadmissible opinion testimony about his public spiritedness, things he had done for the people of eastern North Carolina and his interest in providing for their welfare.

For the reasons given herein, the decision of the Court of Appeals remanding this case for a new trial is

Affirmed.

STATE OF NORTH CAROLINA v. JOHNNY ROBERT COLBERT

No. 67A84

(Filed 5 June 1984)

1. **Constitutional Law § 43; Jury § 6— jury selection—right to counsel**

Defendant's right to counsel extends to the entire trial. This is especially true at critical stages of the proceeding, and selection of the jury is a critical stage of the trial.

2. **Constitutional Law § 43; Jury § 6— right to counsel during entire jury voir dire**

It is essential that counsel be present during the entire jury voir dire so that he may intelligently exercise defendant's right to peremptory challenges.

3. **Constitutional Law § 43; Jury § 6— right to counsel—absence of counsel during State's questioning of jurors**

Defendant's right to counsel was violated during the jury selection process when his counsel was not present during the State's questioning of the jurors, and such constitutional error was prejudicial to defendant. Sixth Amendment to the U.S. Const.; Art. I, § 23 of the N.C. Constitution; G.S. 15A-1443(b).

APPEAL by defendant, pursuant to N.C.G.S. 7A-30(2), from a decision of the Court of Appeals (*Judges Whichard* and *Hedrick* concurring, *Judge Becton* dissenting) reported in 65 N.C. App. 762, 310 S.E. 2d 145 (1984), which found no error in the judgment entered by *Rousseau, J.*, at the 15 February 1982 Session of Superior Court, WILKES County. Heard in the Supreme Court 8 May 1984.

Rufus L. Edmisten, Attorney General, by Ann Reed, Special Deputy Attorney General, for the State.

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

MARTIN, Justice.

This appeal is before us upon the single issue of whether defendant's right to counsel was violated during the jury selection process. We find that it was and that defendant is entitled to a new trial. We accordingly reverse the Court of Appeals.

Defendant was tried and convicted on a proper bill of indictment charging him with felonious possession of marijuana. A voir

dire hearing on defendant's motion to suppress was conducted on the day before the jury trial commenced. The transcript discloses that Mr. Bill Allen of Yadkinville was present, representing defendant at this hearing. It does not disclose at what time court recessed for the day or when the hearing was completed. Although the record is not crystal clear, the following evidently occurred the morning after the voir dire hearing:

MR. CAMERON: Your Honor, on page 20 of the calendar, we are calling for trial, 81CRS8291, Johnny Colbert.

COURT: Have you seen Mr. Allen this morning?

MR. CAMERON: No, sir.

COURT: Mr. Colbert?

MR. COLBERT: No, sir.

COURT: Mr. Cameron, you say you called his office and told him to be here?

MR. CAMERON: Yes.

COURT: Let the record show Mr. Allen was in Court at 5:00 o'clock yesterday and he was advised this would be the next case for trial.

We will proceed with the selection of the jury in his absence.

[AFTER TWELVE JURORS WERE CALLED]

COURT: The next case we are calling is Johnny Robert Colbert—State of North Carolina versus Johnny Robert Colbert, wherein, Mr. Colbert is charged with possession of marijuana on the 3rd day of November, 1981. Mr. Cameron will be prosecuting on behalf of the State. Bill Allen represents Mr. Colbert. I understand he is in Yadkin County and I understand he is on his way. I will let Mr. Cameron start selecting you and when Mr. Allen gets here, he will start selecting you.

[MR. ALLEN COMES INTO COURT SHORTLY THEREAFTER]

COURT: Mr. Allen, we started about fifteen or twenty minutes ago selecting a jury. I assume you had a little difficulty getting here from Elkin?

MR. ALLEN: Yes, Your Honor.

COURT: Are you ready to proceed?

MR. ALLEN: Yes.

COURT: The State has passed the jury in the box.

[WHEREUPON MR. ALLEN SELECTS A JURY]

[JURY DULY EMPANELLED AT 10:20 A.M., WEDNESDAY MORNING, FEBRUARY 17th, 1982]

We note that defendant did not object to the foregoing procedure; however, he does bring the alleged error forward by assignment of error and argument in briefs before the Court of Appeals and this Court.

[1] The right to counsel is one of the most closely guarded of all trial rights. *State v. Thacker*, 301 N.C. 348, 271 S.E. 2d 252 (1980). "Waiver of counsel may not be presumed from a silent record." *State v. Morris*, 275 N.C. 50, 59, 165 S.E. 2d 245, 251 (1969). *Accord Carnley v. Cochran*, 369 U.S. 506, 8 L.Ed. 2d 70 (1962). Defendant's right to counsel extends to the entire trial. *Powell v. Alabama*, 287 U.S. 45, 77 L.Ed. 158 (1932). This is especially true at critical stages of the proceeding. This Court has held that selection of the jury is a critical stage of the trial. *State v. Hayes*, 291 N.C. 293, 230 S.E. 2d 146 (1976).

[2] It is essential that counsel be present during the entire jury voir dire so that he may intelligently exercise defendant's right to peremptory challenges. The peremptory challenge is one of defendant's most valuable rights. *Pointer v. United States*, 151 U.S. 396, 38 L.Ed. 208 (1894). As said by Blackstone, the prisoner is allowed an arbitrary and capricious species of challenge, without showing any cause at all. It is necessary in order to prevent unaccountable prejudices from the bare looks and gestures of another. 4 W. Blackstone, *Commentaries* *353.

In *State v. Perry*, 277 N.C. 174, 177, 176 S.E. 2d 729, 731 (1970), Justice Higgins, speaking for the Court, stated: "Each defendant is entitled to full opportunity to face the prospective

jurors, make diligent inquiry into their fitness to serve, and to exercise his right to challenge those who are objectionable to him." Of necessity, and by constitutional guaranty, this includes the assistance of counsel for this purpose. Ordinarily, without the aid of counsel, the right to jury voir dire becomes an empty and meaningless phrase.

[3] Here, defendant's counsel did not observe any of the state's questioning of the jurors. Of course, defendant's counsel could, and perhaps did, excuse one or more of the jurors passed by the state. But in so doing he was acting at least partially in the dark as he knew nothing of what had transpired in his absence. This does not comport with the right to counsel guaranteed by the state and federal constitutions. U.S. Const. amend. VI; N.C. Const. art. I, § 23.

N.C.G.S. 15A-1443(b) provides that constitutional error is prejudicial unless it is found by the appellate court to be harmless beyond a reasonable doubt. No satisfactory showing has been made to this Court that this constitutional violation was harmless beyond a reasonable doubt. The indications are to the contrary. Furthermore, in federal constitutional issues, which defendant asserts here, the standards of the United States Supreme Court apply in determining harmless error. *Chapman v. California*, 386 U.S. 18, 17 L.Ed. 2d 705 (1967). That Court has held that some constitutional rights are so basic to a fair trial that their infraction can never be treated as harmless error. *Id.* Among these is the right to counsel. *Gideon v. Wainwright*, 372 U.S. 335, 9 L.Ed. 2d 799 (1963). *Cf. Strickland v. Washington*, 44 CCH S.Ct. Bull. B2515 (14 May 1984) (ineffective assistance of counsel).

While commending the efforts of the earnest trial judge to utilize valuable court time, and noting the apparently unexplained tardiness of counsel we are compelled to grant defendant a new trial.

The decision of the Court of Appeals is reversed, and the cause is remanded to that court for further remand to the Superior court, Wilkes County, for a new trial.

Reversed and remanded.

STATE OF NORTH CAROLINA v. TONY LEVET SMITH

No. 32PA84

(Filed 5 June 1984)

Criminal Law § 111.1— identification instructions—sufficient

The trial court gave adequate identification instructions in a prosecution for robbery with a dangerous weapon where the only eyewitness to the crime testified that he recognized the defendant from having seen him both in the store and on the street on prior occasions; his identification of the defendant did not occur after the offense was committed nor was it even based merely on a brief observance at the scene of the crime; and the requested instructions of the defendant were inapplicable under the facts of the case.

WE allowed discretionary review from the Court of Appeals (*Phillips, J.*, concurred in by *Hill, J.* and *Johnson, J.*), which granted a new trial from *Lewis, J.*, from judgment entered 14 May 1982 in Superior Court, MECKLENBURG County. Defendant had been convicted of robbery with a dangerous weapon and received the presumptive sentence of fourteen years.

The State's evidence tended to show that on 16 February 1982 the defendant and another man entered Kennan Street Grocery in Charlotte with a sawed-off .12 gauge shotgun. Both men had scarves tied around their heads below the nose. Defendant also had on a toboggan. Two employees, Hugh Houston and Patricia Roseboro, were the store's only occupants at that time. Shortly thereafter defendant hit Mr. Houston in the head with the shotgun, knocking him down. When the victim tried to get up, defendant hit him again with the shotgun, breaking his arm.

Soon thereafter, Mr. Houston gave defendant approximately $250.00 in money from the store. The defendant and his accomplice left.

The record discloses that the defendant was no stranger to Mr. Houston. On direct examination, Mr. Houston testified:

Q. Mr. Houston, let's go back to the time when you first saw the defendant Smith and the other fellow come in, what was your first reaction, when you saw those two come in the store?

A. My first reaction, I was surprised. I thought maybe they might have been playing.

Q. Why did you think that?

A. Because I knowed he knowed me and I knowed him.

Q. Had you seen Defendant Tony Smith before?

A. Yes, plenty times.

Q. Where?

A. In the store and on the street too.

Subsequently, Mr. Houston identified defendant from photographs, in a lineup and also in court.

Defendant offered no evidence on his own behalf.

The Court of Appeals granted a new trial on the theory that the court's instructions as to identification were insufficient.

Additional facts pertinent to the decision will be related in the opinion.

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

Malcolm Ray Hunter, Jr., Assistant Appellate Defender, for the defendant.

COPELAND, Justice.

We believe that Judge Lewis correctly instructed the jury under the facts and circumstances of this case. The sole contention on appeal was that the trial judge incorrectly charged the jury regarding the State's identification testimony and incorrectly refused to give instructions requested by the defendant.

Judge Lewis gave the following identification instructions:

> In appraising the identification testimony of any witness, Members of the Jury, I suggest to you that you may consider the capacity and adequate opportunity the witness Houston had to observe the defendant. Second, whether or not the identification made by the witness subsequent to the offense was a product of his own recollection. Third, you should also

> consider the credibility of each identification witness in the same way as any other witness as you consider whether the witness has the capacity and opportunity to make a reliable observation on the matter of identification covering his testimony. You may also consider whether or not on some other occasion, he, the witness, was able to make an identification of the defendant. As I instructed you, the State has the burden of proof and this extends to every element of the crime charged, including the burden of proving beyond a reasonable doubt the identity of Mr. Smith as being the perpetrator.

In our opinion this was an adequate instruction under the circumstances of this case and in substance comported with defendant's request.

The facts disclose here that Mr. Hugh Houston was the only eyewitness to the crime who testified. His testimony was to the effect that he recognized the defendant from having seen him both in the store and on the street on prior occasions. His identification of the defendant did not occur after the offense was committed, nor was it even based merely upon a brief observance at the scene of the crime, as in the usual case. Thus, Judge Lewis was not required to give the requested instructions, since it was inapplicable under the facts of this case.

It seems to us that the decision of the Court of Appeals appears almost in direct conflict with two decisions of our Court. In *State v. Silhan*, 302 N.C. 223, 252, 275 S.E. 2d 450, 472 (1981), a unanimous opinion by Justice Exum, we affirmed a conviction in a detailed and lengthy opinion. In *Silhan*, defendant had also requested special instructions on the issue of identification. Our Court held that the instructions given by Judge Fountain at trial had adequately conveyed the substance of the defendant's request. We held that there was no error in failing to give the defendant's request in its exact form. The instructions of Judge Fountain consisted of a single paragraph.

A similar result was reached in *State v. Green*, 305 N.C. 463, 477, 290 S.E. 2d 625 (1982). We held in *Green* as follows:

> The instruction clearly emphasized the importance of proper identification of the defendant and emphasized that the

burden of proving such identity beyond a reasonable doubt was on the State. Read contextually, the charge adequately explained to the jury the various factors they should consider in evaluating the testimony of witnesses. The instructions given by the Trial Court adequately conveyed the substance of defendant's proper request; no further instructions were necessary.

We note that the State erroneously contends that defendant has waived his right to appellate review on this issue by failing to object to the instruction given in a timely manner. The record reveals that defense counsel submitted a written request for particular instructions prior to the jury arguments, which the court denied. Defendant is not required by either Rule 10(b)(2) of the North Carolina Rules of Appellate Procedure or Rule 21 of the General Rules of Practice for the Superior and District Courts, to repeat his objection to the jury instructions, after the fact, in order to properly preserve his exception for appellate review. *See: Wall v. Stout*, 310 N.C. 184, 311 S.E. 2d 571 (1984).

The trial court summarized in detail the defendant's contentions. The jury was specifically told the perpetrator of the offense was wearing a mask. When these instructions are read as a whole and considered in context, it appears obvious to us that Judge Lewis fairly advised the jury of every element of the offense and provided a correct statement of the law on every subordinate feature requested. We believe that is all that was required of the capable trial judge.

The Court of Appeals speaks of the possibility of misidentification. Theoretically that is always a possibility. From a practical standpoint, we do not believe that anything further was required from Judge Lewis in this instance. It is well settled in this State that the trial judge is not required to charge the jury in the *exact* language requested by the defendant. A charge which conveys the substance of the requested instructions is sufficient. *State v. Monk*, 291 N.C. 37, 54, 229 S.E. 2d 163 (1976).

Accordingly, the opinion of the Court of Appeals is reversed and the judgment of Judge Lewis reinstated.

Reversed and remanded.

STATE OF NORTH CAROLINA v. JAMES LEROY PAYNE

No. 600A83

(Filed 5 June 1984)

1. **Criminal Law § 138— aggravating circumstance that murder especially heinous, atrocious, or cruel—supported by evidence**

In a prosecution for murder, the aggravating circumstance that the murder was especially heinous, atrocious, or cruel was supported by the evidence where the evidence tended to show that the victim was brutally beaten, kicked and "body slammed" into the floor; his injuries were extensive and he suffered continuous and extreme pain as a result; the brutality of the beating inflicted upon the victim by the defendant and his co-defendants was reflected in the physical pain that the victim endured during the two and one-half months prior to his death. G.S. 15A-1340.4(a)(1)f.

2. **Criminal Law § 138— aggravating circumstance that defendant induced others to participate in the robbery and conspiracy—supported by evidence**

The evidence supported the aggravating circumstance that defendant induced others to participate in a robbery and conspiracy where the evidence tended to show that defendant conceded that it was his idea to rob the victim, and that he did grab the victim first; two of defendant's co-conspirators corroborated defendant's testimony; it was the defendant who focused on the victim as a target; and the evidence disclosed that defendant assumed a position of leadership during the course of the robbery as well as later when the money was distributed. G.S. 15A-1340.4(a)(1)a.

APPEAL by defendant from *Collier, J.*, at the 29 August 1983 Criminal Session of Superior Court, SURRY County. Following pleas of guilty to charges of common law robbery, conspiracy to commit common law robbery, and second degree murder, defendant was sentenced to a term of life imprisonment for second degree murder and to two consecutive ten year terms of imprisonment on the charges of robbery and conspiracy. He appeals 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 robbery and conspiracy convictions on 2 February 1984. Heard in the Supreme Court 10 May 1984.

By this appeal defendant challenges, under the Fair Sentencing Act, the trial court's finding of two aggravating factors: that the offense was especially heinous, atrocious, or cruel, G.S. § 15A-1340.4(a)(1)f; and that the defendant induced others to participate in the commission of the offense or occupied a position of

leadership or dominance of other participants. G.S. § 15A-1340.4 (a)(1)a. We find no error.

Rufus L. Edmisten, Attorney General, by Evelyn M. Coman, Assistant Attorney General, for the State.

Stephen G. Royster, Attorney for defendant-appellant.

MEYER, Justice.

Evidence at the sentencing hearing tended to show that on 30 September 1982 Santford Rucker, Andre McLeod, James Shuff and the defendant entered D'Amico's Grocery located on N.C. 103 near the Flatrock Community of Surry County. The defendant held the victim, sixty-eight year old Tullio D'Amico, while Rucker attempted to take the victim's wallet, and Shuff took money from the cash register. The defendant, with the assistance of McLeod, beat and kicked Mr. D'Amico. The defendant later divided the money, giving approximately $90.00 to McLeod and Shuff and, without the knowledge of McLeod or Shuff, keeping approximately $555.00 for himself and a similar amount for Rucker. According to both Rucker and McLeod, it was defendant's idea to rob Mr. D'Amico.

Dr. Scharyj, the examining pathologist, testified that following the victim's death on 14 December 1982, he performed an autopsy. It was Dr. Scharyj's opinion that the victim had died as a result of complications connected directly to the trauma from injuries he suffered from the beating. These injuries included fractured ribs, a fractured sternum, a broken leg (requiring amputation prior to death), injury to the gallbladder (requiring removal prior to death), and damage to the liver. There was testimony that the victim suffered considerable pain, particularly due to the injuries to his chest.

Defendant's grandmother testified that the defendant's parents lived somewhere in New York; that defendant had lived with her since he was approximately eleven years old; and that defendant had helped her care for her son who was blind. She further testified that she traded at D'Amico's Grocery and that Mr. D'Amico had recently given her five dollars to give to the defendant to buy cigarettes and drinks while defendant was incarcerated on unrelated burglary and attempted rape charges.

Based on this evidence, the trial judge found no mitigating factors. On each of his convictions for second degree murder, robbery and conspiracy, the trial judge found in aggravation that the victim was very old; that defendant committed the offense while on pretrial release; and that defendant has a prior conviction or convictions. Defendant does not assign error to these findings. Additionally, the trial judge found as a factor in aggravation that the second degree murder was especially heinous, atrocious, or cruel; and that, with respect to the robbery and conspiracy, the defendant induced others to participate in the commission of these offenses. These findings form the basis of defendant's appeal.

[1] On the first issue, whether the murder of Mr. D'Amico was especially heinous, atrocious, or cruel, defendant seems to argue that the victim's suffering was as much due to his pre-existing health problems as due to the injuries he suffered from the beating; that unlike *State v. Blackwelder*, 309 N.C. 410, 306 S.E. 2d 783 (1983), there was no mutilation; and that defendant did not intend to inflict blows sufficient to cause the victim's death. We do not find defendant's arguments persuasive.

The evidence amply supports a finding that the murder of Mr. D'Amico involved excessive brutality and physical pain not normally found in every murder. *See State v. Blackwelder*, 309 N.C. 410, 306 S.E. 2d 783. Distinguishing this murder was the fact that the victim was brutally beaten, kicked and "body slammed" into the floor. His injuries were extensive and he suffered continuous and extreme pain as a result. *See State v. Benbow*, 309 N.C. 538, 308 S.E. 2d 647 (1983). Death was not immediate. *See id.* The brutality of the beating inflicted upon Mr. D'Amico by the defendant and his co-defendants is reflected in the physical pain that he endured during the two and one-half months prior to his death. This further supports the finding that the murder was especially heinous, atrocious, or cruel. This assignment of error is overruled.

[2] Defendant next contends that the evidence does not support a finding that he induced others to participate in the robbery and conspiracy. Defendant concedes that it was his idea to rob Mr. D'Amico, and that he "did grab Mr. D'Amico first." Both Rucker and McLeod so testified. Thus, it was the defendant who focused

on the victim as a target. A close reading of the evidence discloses that he assumed a position of leadership during the course of the robbery as well as later when the money was distributed. This evidence fully supports the trial court's finding that defendant induced the others to participate or occupied a position of leadership.[1] *See State v. Lattimore*, 310 N.C. 295, 311 S.E. 2d 876 (1984).

No error.

THELMA FREEMAN v. SCM CORPORATION

No. 81A84

(Filed 5 June 1984)

Master and Servant § 87— plaintiff covered by Workers' Compensation Act—civil action precluded

Where plaintiff was covered by and subject to the provisions of the Workers' Compensation Act, her rights and remedies against defendant employer were determined by the Act and she was required to pursue them in the Industrial Commission and could not, in lieu of this avenue of recovery, institute a common law action against the employer in the civil courts of this State based on alleged gross negligence and intentional acts.

APPEAL by plaintiff from a decision of a divided panel of the Court of Appeals, 66 N.C. App. 341, 311 S.E. 2d 75 (1984), affirming judgment entered by *Seay, Judge*, at the 10 January 1983 Session of MOORE County Superior Court.

Plaintiff, an employee of defendant SCM Corporation, was working on a molding machine on 14 October 1980 when she noticed that the machine was malfunctioning. She reported the problem to her supervisor and requested permission to turn off the machine. The supervisor ordered plaintiff to continue oper-

1. Defendant cites this Court to *State v. Ahearn*, 307 N.C. 584, 300 S.E. 2d 689 (1983), which suggested that where factors are listed in the disjunctive, trial judges should eliminate those portions inapplicable to the particular case. He argues that the trial judge erred in failing to indicate whether the defendant induced others to participate or occupied a position of leadership. We do not consider the trial judge's oversight significant in that the evidence would support both aspects of this factor.

ating the machine. On subsequent occasions, plaintiff repeated her fears that the machine was not functioning properly but was consistently told to continue with her work. Plaintiff was later struck in the face by a pressure bolt which blew out of the machine.

Plaintiff sought and recovered workers' compensation benefits for injury to her nose, back, neck and shoulder. The Commission approved a lump sum payment on 19 November 1980.

On 26 October 1982, plaintiff filed this action, alleging that her injuries were caused by the gross, willful and wanton negligence and by the intentional acts of defendant. Plaintiff further alleged that her injuries did not result from an "accident" within the meaning of the Workers' Compensation Act and, therefore, her claim was not barred by the exclusivity provisions of G.S. 97-10.1. Defendant alleged lack of subject matter jurisdiction and moved to dismiss pursuant to Rule 12(b)(1) of the Rules of Civil Procedure. The trial court granted defendant's motion and plaintiff appealed to the Court of Appeals.

In an opinion written by Judge Arnold, Judge Johnson concurring and Judge Phillips dissenting, the Court of Appeals held that since plaintiff had been compensated through the payment of workers' compensation benefits, she was precluded from maintaining this separate action against her employer for additional compensation.

Plaintiff appealed to this Court as a matter of right pursuant to G.S. 7A-30(2) on 17 February 1984.

Pollock, Fullenwider, Cunningham & Patterson, P.A., by Bruce T. Cunningham, Jr., for plaintiff-appellant.

William D. Sabiston, Jr., for defendant-appellee.

Golding, Crews, Meekins, Gordon & Gray, by James P. Crews, and Weinstein, Sturges, Odom, Groves, Bigger, Jonas & Campbell, P.A., for Radiator Specialty Company, Amicus Curiae.

PER CURIAM.

After reviewing the record and briefs, and hearing oral argument on the question presented, we conclude that the result reached by the majority below is correct. Plaintiff's remedies under the Workers' Compensation Act are exclusive and she is

therefore precluded from recovering against her employer in this independent negligence action. The trial court properly granted defendant's motion to dismiss for lack of subject matter jurisdiction.

Writing for the majority in the Court of Appeals, Judge Arnold explained: "Having already *selected* one avenue of recovery, plaintiff is precluded from maintaining a tort action." 66 N.C. App. at 343-44, 311 S.E. 2d at 77 (1984) (emphasis added).

We wish to make it abundantly clear that in fact plaintiff had no "selection" as to the appropriate avenue of recovery for her injuries.

General Statute 97-10.1 provides that:

> If the employee and the employer are subject to and have complied with the provisions of this Article, then the rights and remedies herein granted to the employee, his dependents, next of kin, or personal representative shall exclude all other rights and remedies of the employee, his dependents, next of kin, or representative as against the employer at common law or otherwise on account of such injury or death.

Since plaintiff was here covered by and subject to the provisions of the Workers' Compensation Act, her rights and remedies against defendant employer were determined by the Act and she was required to pursue them in the North Carolina Industrial Commission. *See, e.g., Bryant v. Dougherty,* 267 N.C. 545, 148 S.E. 2d 548 (1966); *McCune v. Rhodes-Rhyne Mfg. Co.,* 217 N.C. 351, 8 S.E. 2d 219 (1940). She could not, in lieu of this avenue of recovery, institute a common law action against her employer in the civil courts of this State.

The decision of the Court of Appeals is modified to the extent that it may imply that plaintiff was free to elect the forum in which to pursue her legal remedies against defendant. In all other respects, the decision of the Court of Appeals is affirmed.

Modified and affirmed.

DORIS ANN BURROW, EMPLOYEE-PLAINTIFF v. HANES HOSIERY, INC., EMPLOYER, AETNA LIFE AND CASUALTY INSURANCE COMPANY, CARRIER-DEFENDANTS

No. 121A84

(Filed 5 June 1984)

PLAINTIFF appeals as a matter of right pursuant to G.S. 7A-30(2) from the decision of the Court of Appeals, 66 N.C. App. 418, 311 S.E. 2d 30 (1984), one judge dissenting, which reversed the Opinion and Award of the Industrial Commission.

Harper, Wood and Brown, by William Z. Wood, Jr., for plaintiff-appellant.

Womble, Carlyle, Sandridge & Rice, by Keith W. Vaughan, for defendant-appellees.

PER CURIAM.

The opinion of the Court of Appeals contains a thorough statement of the relevant facts of this case. The Court of Appeals concluded that neither the evidence which had been presented by the plaintiff at two prior hearings nor the findings of fact contained in the Opinion and Award of the Full Commission supported a finding of a "change of condition" occurring after the plaintiff's final award of permanent partial disability compensation. Therefore, the Court of Appeals reversed the Full Commission's award of temporary total disability compensation.

After carefully reviewing the record and briefs filed in this case, and hearing the oral arguments of counsel for both parties, we have concluded that the analysis, the reasoning, and the result reached by the majority of the panel of the Court of Appeals is correct in all respects. Therefore, we affirm the decision of the Court of Appeals.

Affirmed.

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

In re Forrest

IN THE MATTER OF THE ESTATE OF STELLA T. FORREST

No. 93A84

(Filed 5 June 1984)

APPEAL by the caveator, pursuant to N.C.G.S. 7A-30(2), from a decision of the Court of Appeals (*Judges Johnson* and *Arnold* concurring, *Judge Phillips* dissenting) reported in 66 N.C. App. 222, 311 S.E. 2d 341 (1984), which reversed in part and affirmed in part the judgment entered by *Clark, J.*, at the 23 August 1982 Civil Session of Superior Court, ORANGE County. Heard in the Supreme Court 11 May 1984.

Maxwell, Freeman, Beason and Morano, P.A., by Robert A. Beason and Mark R. Morano, for appellant.

Josiah S. Murray, III and Newsom, Graham, Hedrick, Bryson, Kennon & Faison, by Joel M. Craig, for appellees.

PER CURIAM.

The decision of the Court of Appeals is affirmed. The case is remanded to that Court for further remand to the Superior Court, Orange County, for the submission of the issue of *devisavit vel non* to a jury upon peremptory instructions.

Affirmed.

STATE OF NORTH CAROLINA v. MELVIN BELL

No. 8A84

(Filed 5 June 1984)

APPEAL of right by the State from a decision of a divided panel of the Court of Appeals, 65 N.C. App. 234, 309 S.E. 2d 464 (1983), which reversed and vacated the judgment entered by *Tillery, Judge*, on 4 December 1981 in Superior Court, NEW HANOVER County. Heard in the Supreme Court 9 May 1984.

Rufus L. Edmisten, Attorney General, by John R. B. Matthis, Special Deputy Attorney General and James C. Gulick, Assistant Attorney General, for the State.

Adam Stein, Appellate Defender, by Malcom Ray Hunter, Jr., Assistant Appellate Defender, for the defendant appellee.

PER CURIAM.

Affirmed.

State v. Moore

STATE OF NORTH CAROLINA	)	
	)	
v.	)	ORDER
	)	
ROY ALTON MOORE	)	

No. 590P83

(Filed 5 June 1984)

THIS matter is before the Court for consideration of defendant's Petition for Writ of Certiorari to review the Order of the Superior Court dated 22 February 1983 denying defendant's motion for appropriate relief.

The Petition is allowed for the sole purpose of entering the following Order:

> The Order of the Superior Court, Greene County, entered 22 February 1983, indicated that defendant's parole eligibility is governed by the provisions of G.S. 148-15 as that statute appeared on March 24, 1976, and that the provisions of G.S. 148-58 as applied to this defendant, provide that he will be eligible for parole in ten years. It appears from defendant's petition and from the Order of Superior Court, filed herein on 22 February 1983, that defendant was convicted in the Superior Court, Greene County, for the offenses of second degree rape, burglary, armed robbery and kidnapping in Case Nos. 76-CR-272, 274A, 273 and 274, respectively; that defendant's sentences included three life sentences in addition to a term of years for the armed robbery conviction.
>
> N.C. Gen. Stat. § 148-15 was repealed in 1943 and was not in effect on 24 March 1976 at the time defendant was sentenced. Effective 8 April 1974, G.S. 148-58 was amended to provide that, "any prisoner serving sentence for life shall be eligible for such consideration when he has served 20 years of his sentence." *See* Session Laws 1973, 2nd Sess., c. 1201, s. 5. The Act was effective upon ratification (8 April 1974) and applied to "all offenses hereafter committed." Although repealed by Session Laws 1977, c. 711, s. 33, the provisions of G.S. 148-58 relating to parole eligibility continued to apply to "persons sentenced before July 1, 1978." Since defendant's offenses occurred after 8 April 1974 and he was sentenced in

1976 "before July 1, 1978," the 20 year parole eligibility rule applied to him under both Session Laws. Therefore, the Order providing that defendant will be eligible for parole in ten years is in error.

The Order entered by the Superior Court, Greene County, dated 22 February 1983, denying defendant's motion for appropriate relief is hereby VACATED and the cause is REMANDED to the Superior Court, Greene County, for a new hearing on petitioner's motion for appropriate relief.

By order of the Court in Conference, this 5th day of June, 1984.

FRYE, J.
For the Court

STATE OF NORTH CAROLINA)
)
v.)
) ORDER
)
ELLIS JAMES LUKER, III)

No. 21P84

(Filed 5 June 1984)

DEFENDANT'S petition for further review is allowed for the purpose of entering the following order:

The opinion of the Court of Appeals is correct insofar as it determines that defendant was actually denied his Sixth Amendment right to counsel for the presentation of his evidence and closing arguments at his trial. On the authority of *State v. Colbert*, 311 N.C. 283, 316 S.E. 2d 79 (1984), we conclude the Court of Appeals erred in concluding that such denial did not result in reversible error. *Cf. Strickland v. Washington*, --- U.S. ---, 35 Crim. L. Rep. 3066 (14 May 1984); *United States v. Cronic*, --- U.S. ---, 35 Crim. L. Rep. 3061 (14 May 1984). The decision of the Court of Appeals concluding that there was no error in defendant's trial is, therefore, reversed, and it is

ORDERED that defendant be given a new trial.

By order of the Court in Conference this 5th day of June 1984.

FRYE, J.

For the Court

AMENDMENT
NORTH CAROLINA SUPREME COURT
LIBRARY RULES

Pursuant to Section 7A-13(d) of the General Statutes of North Carolina, the following amendment to the Supreme Court Library Rules as promulgated December 20, 1967 (275 N.C. 729) and amended November 28, 1972 (281 N.C. 772), April 14, 1975 (286 N.C. 731), July 24, 1980 (299 N.C. 745), July 19, 1982 (305 N.C. 784), and November 8, 1983 (309 N.C. 829) has been approved by the Library Committee and hereby is promulgated:

Section 1. Appendix I, Official Register, State of North Carolina, is amended by the following addition:

(11) The State President of the Department of Community Colleges.

Section 2. This amendment shall become effective June 21, 1984.

This the 21st day of June, 1984.

Frances H. Hall
Librarian

APPROVED:
James G. Exum, Jr.
Chairman, For the Library Committee

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

ADAMS v. NELSEN

No. 166PA84.

Case below: 67 N.C. App. 284.

Petition by defendants for discretionary review under G.S. 7A-31 allowed 5 June 1984.

BAILEY v. SMOKY MOUNTAIN ENTERPRISES

No. 621P83.

Case below: 65 N.C. App. 134.

Petition by defendants for discretionary review under G.S. 7A-31 denied 5 June 1984.

BERGER v. BERGER

No. 201P84.

Case below: 67 N.C. App. 591.

Petition by defendant for discretionary review under G.S. 7A-31 denied 5 June 1984.

BURWELL v. GRIFFIN

No. 215P84.

Case below: 67 N.C. App. 198.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 5 June 1984. Motion by defendant to dismiss the appeal for lack of substantial constitutional question allowed 5 June 1984.

CABARRUS BANK & TRUST COMPANY v. CHANDLER

No. 497P83.

Case below: 63 N.C. App. 724.

Petition by defendant for discretionary review under G.S. 7A-31 denied 5 June 1984.

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

CLIFFORD v. RIVER BEND PLANTATION

No. 199A84.

Case below: 67 N.C. App. 438.

Petition by plaintiffs for discretionary review under G.S. 7A-31 denied as to additional issues 5 June 1984.

ELKS v. BRADSHAW

No. 179P84.

Case below: 67 N.C. App. 197.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 5 June 1984.

FAUGHT v. FAUGHT

No. 205P84.

Case below: 67 N.C. App. 37.

Petition by defendant for discretionary review under G.S. 7A-31 denied 5 June 1984.

GOODWIN v. GOLDSBORO BOARD OF EDUCATION

No. 197P84.

Case below: 67 N.C. App. 243.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 5 June 1984.

HICKS v. BROWN SHOE CO.

No. 527P83.

Case below: 64 N.C. App. 144.

Petition by defendant for discretionary review under G.S. 7A-31 denied 5 June 1984.

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

HUDSON v. HUDSON

No. 244P84.

Case below: 67 N.C. App. 763.

Petition by defendant for discretionary review under G.S. 7A-31 denied 22 May 1984.

IN RE DUNLAP

No. 45P84.

Case below: 66 N.C. App. 152.

Petition by New Hanover County and New Hanover County Board of Education for discretionary review under G.S. 7A-31 denied 5 June 1984. Motion by respondent to dismiss appeal for lack of substantial constitutional question allowed 5 June 1984.

MIMS v. MIMS

No. 63P84.

Case below: 65 N.C. App. 725.

Petition by defendant for discretionary review under G.S. 7A-31 denied 5 June 1984.

N.C. STATE BAR v. BRASWELL

No. 198P84.

Case below: 67 N.C. App. 456.

Petition by defendant for discretionary review under G.S. 7A-31 denied 5 June 1984. Defendant's notice of appeal dismissed 5 June 1984.

NORMILE v. MILLER AND SEGAL v. MILLER

No. 487PA83.

Case below: 63 N.C. App. 689.

Petition by plaintiffs for discretionary review under G.S. 7A-31 allowed 5 June 1984.

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

RAMSEY v. N.C. DEPT. OF TRANSPORTATION

No. 206P84.

Case below: 67 N.C. App. 716.

Petition by defendant for discretionary review under G.S. 7A-31 denied 5 June 1984. Motion by Attorney General to dismiss appeal for lack of significant public interest allowed 5 June 1984.

ROBINSON v. COMR. MOTOR VEH.

No. 567P83.

Case below: 64 N.C. App. 620.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 5 June 1984. Attorney General's motion to dismiss appeal for lack of substantial constitutional question allowed 5 June 1984.

SALVATION ARMY v. WELFARE

No. 409P83.

Case below: 63 N.C. App. 156.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 5 June 1984.

SOUTH CAROLINA INS. CO. v. SMITH

No. 236P84.

Case below: 67 N.C. App. 632.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 5 June 1984.

STATE v. BARTON

No. 595P83.

Case below: 64 N.C. App. 731.

Petition by defendant for discretionary review under G.S. 7A-31 denied 5 June 1984. Attorney General's motion to dismiss appeal allowed 5 June 1984.

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

STATE v. COOPER

No. 164P84.

Case below: 67 N.C. App. 358.

Petition by defendant for discretionary review under G.S. 7A-31 denied 5 June 1984.

STATE v. DINUNNO

No. 163P84.

Case below: 67 N.C. App. 316.

Petition by Attorney General for discretionary review under G.S. 7A-31 and petition for writ of supersedeas and temporary stay denied 5 June 1984.

STATE v. FOREHAND

No. 143P84.

Case below: 67 N.C. App. 148.

Petition by Attorney General and Intervenor (Realty Corporation) for discretionary review under G.S. 7A-31 denied 5 June 1984.

STATE v. HARRIS

No. 177P84.

Case below: 67 N.C. App. 97.

Petition by defendant for discretionary review under G.S. 7A-31 denied 5 June 1984. Motion by Attorney General to dismiss appeal for lack of substantial constitutional question allowed 5 June 1984.

STATE v. LITTLE

No. 183P84.

Case below: 67 N.C. App. 128.

Petition by defendants for discretionary review under G.S. 7A-31 denied 5 June 1984.

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

STATE v. McINTYRE

No. 52P84.

Case below: 65 N.C. App. 807.

Petition by defendant for discretionary review under G.S. 7A-31 denied 5 June 1984. Motion by Attorney General to dismiss appeal for lack of substantial constitutional question allowed 5 June 1984.

STATE v. MILLER

No. 214P84.

Case below: 64 N.C. App. 390.

Petition by defendant for writ of certiorari to North Carolina Court of Appeals denied 5 June 1984.

STATE v. MURRELL

No. 100P84.

Case below: 65 N.C. App. 429.

Petition by defendant for writ of certiorari to North Carolina Court of Appeals denied 5 June 1984.

STATE v. TALLEY

No. 576P83.

Case below: 64 N.C. App. 622.

Petition by defendant for discretionary review under G.S. 7A-31 denied 5 June 1984.

STATE v. WILLIAMS

No. 306P84.

Case below: 67 N.C. App. 519.

Petition by defendant for writ of certiorari to North Carolina Court of Appeals and petition for writ of supersedeas denied 19 June 1984.

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

VANCE TRUCKING CO. v. PHILLIPS

No. 170P84.

Case below: 66 N.C. App. 269.

Petition by Phillips and Kemp Associates for discretionary review under G.S. 7A-31 denied 5 June 1984.

WACHOVIA BANK & TRUST v. DAVIS

No. 494P83.

Case below: 63 N.C. App. 789.

Petition by defendants for discretionary review under G.S. 7A-31 denied 5 June 1984.

WACHOVIA BANK & TRUST CO. v. GROSE

No. 543P83.

Case below: 64 N.C. App. 289.

Petition by defendant for discretionary review under G.S. 7A-31 denied 5 June 1984.

WEST v. WEST

No. 6P84.

Case below: 67 N.C. App. 358.

Petition by defendant for discretionary review under G.S. 7A-31 denied 5 June 1984.

WHITE v. WHITE

No. 559PA83.

Case below: 64 N.C. App. 432.

Petition by defendant for discretionary review under G.S. 7A-31 allowed 5 June 1984.

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

WILKINSON v. WEYERHAEUSER CORP.

No. 180P84.

Case below: 67 N.C. App. 154.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 5 June 1984.

WRIGHT v. COUNTY OF MACON

No. 581P83.

Case below: 64 N.C. App. 718.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 5 June 1984.

AMERICAN MOTORS SALES CORPORATION AND HUBERT VICKERS D/B/A 421 MOTOR SALES, PETITIONERS v. ELBERT L. PETERS, COMMISSIONER OF MOTOR VEHICLES, RESPONDENT, AND JAMES WILSON PENNELL D/B/A PENNELL MOTOR COMPANY, INTERVENOR

Nos. 555A82 and 130PA82

(Filed 6 July 1984)

1. **Monopolies § 2— characteristics of a monopoly**

The distinctive characteristics of a monopoly are (1) control of so large a portion of the market of a certain commodity that (2) competition is stifled, (3) freedom of commerce is restricted and (4) the monopolist controls prices.

2. **Automobiles and Other Vehicles § 5; Monopolies § 2— prohibition of additional Jeep franchise—no creation of monopoly**

The Commissioner of Motor Vehicles' prohibition of an additional American Motors Jeep franchise in the North Wilkesboro market area pursuant to G.S. 20-305(5) did not operate to stifle competition or allow undue control of prices by either American Motors or its existing franchisee in the selling of American Motors Jeeps and, therefore, did not create a monopoly in violation of Art. I, § 34 of the N. C. Constitution.

3. **Automobiles and Other Vehicles § 5; Monopolies § 2— prohibition of additional motor vehicle franchise—constitutionality of statute**

The statute authorizing the Commissioner of Motor Vehicles to prevent additional franchises for a particular line-make of motor vehicle in a given trade area when such a franchise already exists, G.S. 20-305(5), does not on its face create and perpetuate monopolies in violation of Art. I, § 35 of the N. C. Constitution since the statute essentially protects franchisees from abuses of vertical integration and is not on its face designed to lessen competition or increase prices.

4. **Automobiles and Other Vehicles § 5— enjoining additional motor vehicle franchises—no authority by Commissioner of Motor Vehicles**

The Commissioner of Motor Vehicles exceeded his authority in enjoining future practices of American Motors and its additional franchisees in a trade area, since the Commissioner is not authorized by G.S. 20-301(t) to issue injunctions but is authorized to seek injunctions only through normal judicial channels. However, the Commissioner was authorized by the statute to deny a motor vehicle manufacturer the privilege of franchising an additional line-make dealer if he determined that the market in the given trade area would not support it, and the Commissioner was thus authorized to invalidate or revoke such a franchise already in effect.

5. **Automobiles and Other Vehicles § 5— grant of new motor vehicle franchise—written notice to present franchisee**

Ample evidence supported a determination by the Commissioner of Motor Vehicles that a Jeep franchisee in a certain trade area received no written

notice from American Motors of its intent to grant a new Jeep franchise in the trade area as required by G.S. 20-305(5).

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

APPEAL by petitioners in No. 555A82 from a decision of a divided panel of the Court of Appeals, 58 N.C. App. 684, 294 S.E. 2d 764 (1982), affirming an order by *Judge Robert Hobgood*, presiding in WAKE Superior Court, entered on 24 March 1981. On petition for review before determination by the Court of Appeals in No. 130PA82 of an order of *Judge Bailey*, presiding at the 19 October 1981 Civil Session of WAKE Superior Court.

Womble, Carlyle, Sandridge & Rice by William F. Womble, Jr. and James M. Stanley, Jr., for petitioner appellants.

Rufus L. Edmisten, Attorney General, by William W. Melvin, Deputy Attorney General, for respondent appellee.

White and Crumpler by Craig B. Wheaton, for intervenor appellee.

Johnson, Gamble & Shearon by Samuel H. Johnson and Richard J. Vinegar, for amicus curiae North Carolina Automobile Dealers Association.

EXUM, Justice.

After a hearing held pursuant to N.C. Gen. Stat. § 20-305(5) (1978),[1] the Commissioner of Motor Vehicles concluded that the North Wilkesboro market area for American Motors Jeeps would

1. This statute provided that no manufacturer of motor vehicles may:

"grant an additional franchise for a particular line-make of motor vehicle in a trade area already served by a dealer or dealers in that line-make unless the franchisor first advised in writing such other dealers in the line-make in the trade area; provided that no such additional franchise may be established in the trade area if the Commissioner has determined, if requested by any party within 30 days after receipt of the franchisor's notice of intention to establish the additional franchise, and after a hearing on the matter, that there is reasonable evidence that after the grant of the new franchise, the market will not support all of the dealerships in that line-make in the trade area; trade areas are those areas specified in the franchise agreement or determined by the Motor Vehicle Dealers' Advisory Board . . . ."

It is the above version of this statute which governs this case. The statute was amended, effective 7 August 1983; but the amended version does "not affect pending litigation." 1983 N.C. Sess. Laws, c. 704, § 25. *See* N.C. Gen. Stat. § 20-305(5) (1983).

not support two dealerships and, further, that American Motors did not comply with the statute's notice requirements. The Commissioner, therefore, revoked an American Motors Jeep dealership franchise for this area to Herbert Vickers, d/b/a 421 Motor Sales (Vickers), since James Pennell, d/b/a Pennell Motor Company (Pennell), was already so franchised in this area. The Commissioner also enjoined Vickers "against further advertising, promoting or trading in new AMC Jeeps." He enjoined American Motors from granting "AMC Jeep franchises in the North Wilkesboro . . . trade area without first complying" with the statute.

The principal question before us is whether the statute violates the Anti-monopoly Clause of the North Carolina Constitution, Article I, Section 34. We hold that it does not. We also hold that the Commissioner's determination that Pennell had not been "advised in writing" by American Motors of its intention to grant another Jeep dealership franchise in Pennell's market area was correctly sustained by the lower courts. We hold further that the Commissioner has no authority to grant injunctive relief.

In Case No. 130PA82, Pennell, on 13 November 1979, petitioned the Motor Vehicles Commissioner, alleging its franchise from American Motors as a Jeep dealer, its knowledge "after extensive inquiries" that American Motors had granted a like franchise in Pennell's market area to Vickers and its lack of notice from American Motors that it intended to grant this franchise. Pennell prayed for a hearing pursuant to N.C. Gen. Stat. § 20-305(5), invalidation of the Vickers franchise, and injunctions prohibiting Vickers and American Motors from, respectively, "advertising, promoting or trading in AMC Jeeps in Wilkes County" and "any further purported grants of AMC Jeep franchises in the Wilkes County area." After a hearing the Commissioner made findings[2] which supported his conclusion that the "Jeep market

2. He found:

"18. The North Wilkesboro, North Carolina Market Area includes the towns of Boomer, Elkin, Ferguson, Glade Valley, Hays, Jonesville, Laurel Springs, McGrady, Millers Creek, Moravian Falls, North Wilkesboro, Piney Creek, Purlear, Roaring Gap, Roaring River, Ronda, Scottville, Sparta, State Road, Thurmond, Traphill, Whitehead, Wilbar and Wilkesboro, which area comprises all of Wilkes County as well as portions of Surry and Alleghany counties.

19. There were 58 Jeep registrations in Wilkes County in the period from August 1978 to July 1979. There were 35 Jeep registrations in Wilkes County

will not support all of the Jeep dealerships [Pennell and Vickers] in the North Wilkesboro . . . trade area."

After the Commissioner's order, dated 9 March 1981, the decretal portions of which are as set out above, American Motors and Vickers petitioned pursuant to N.C. Gen. Stat. § 150A-43 for judicial review in Wake Superior Court. Judge Bailey on 22 October 1981 affirmed the Commissioner's order on the sole ground that "the required written notice, pursuant to G.S. 20-305(5) was not given. . . ." American Motors and Vickers appealed to the Court of Appeals.

Meanwhile, in a separate proceeding, No. 555A82, American Motors and Vickers on 10 March 1981 petitioned Wake Superior Court for an *ex parte* stay of the Commissioner's order pending "judicial review of said" order. Judge Godwin on 11 March 1981 stayed *ex parte* the Commissioner's order "during the pendency of judicial review." Contending that Judge Godwin's *ex parte* stay expired after ten days pursuant to Civil Procedure Rule 65(b), Pennell moved to intervene in No. 555A82 and prayed that Judge Godwin's *ex parte* stay "be lifted" and for "an immediate hearing." On 2 April 1981 Judge Robert Hobgood, after a hearing, allowed Pennell to intervene, concluded that Judge Godwin's *ex parte* order had expired on 21 March 1981, and denied American Motors and Vickers' motion to continue the stay of the Commissioner's order. On American Motors and Vickers' appeal the Court of Appeals, Judges Webb and Wells, affirmed over Judge Robert Martin's dissent. American Motors and Vickers appealed by right, N.C. Gen. Stat. § 7A-30, to us.

We initially denied American Motors and Vickers' petition in No. 130PA82 to bypass the Court of Appeals; but after the appeal

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in the period from August 1979 to August 1980 when both Pennell and 421 were competing for Jeep customers."

"22. Pennell sold 31 new Jeep vehicles in the period from August 1978 to July 1979. In the period from August, 1979 to July 1980, when Pennell was competing with 421, Pennell sold 16 new Jeep vehicles and 421 sold 16 new Jeep vehicles."

"32. The evidence indicates that the establishment of an additional Jeep dealer in the North Wilkesboro, North Carolina market area has had the effect of splitting the existing sales, which are declining from year to year, between the two dealers, and dividing the sales of the existing dealer in half all to the harm of the existing dealer."

in No. 555A82 was docketed, we allowed the petition in No. 130PA82 on reconsideration. Both cases have been consolidated for the purposes of argument, decision and opinion.

We note first our disagreement with Judge Bailey's conclusion in No. 130PA82 that the Commissioner's order can be affirmed solely on the ground that American Motors failed to advise in writing its existing franchisee of its intention to grant another franchise as the statute requires. If, as appellants contend, the statute violates our constitution's Anti-monopoly Clause, then whether or not American Motors gave the required statutory advice, the Commissioner would be powerless to invalidate the new franchise. We must, therefore, answer the constitutional question—the question which divided the Court of Appeals.

I.

Appellants contend the prohibition of additional line-make motor vehicle dealership franchises in a given trade area by the Commissioner of Motor Vehicles in a proceeding pursuant to N.C. Gen. Stat. § 20-305(5) amounts to the creation of a monopoly by existing franchisees in violation of Art. I, § 34 of the North Carolina Constitution.[3] A majority of the Court of Appeals in No. 555A82 rejected this contention, but Judge Robert Martin, dissenting, and relying largely on *Georgia Franchise Practices v. Massey-Ferguson*, 244 Ga. 800, 262 S.E. 2d 106 (1979), and *In re Hospital*, 282 N.C. 542, 193 S.E. 2d 729 (1979), thought the statute "unconstitutional as it encourages monopolies" in violation of Art. I, § 34. After giving the matter careful consideration, we determine the Court of Appeals' majority correctly decided the constitutional issue presented.

Our analysis of the constitutional question presented begins with an examination of the operation of this statute in light of various economic considerations. A monopoly results from ownership or control of so large a portion of the market for a certain commodity that competition is stifled, freedom of commerce is restricted, and control of prices ensues. It denotes an organization or entity so magnified that it suppresses competition and acquires

3. This section states: "Perpetuities and monopolies are contrary to the genius of a free state and shall not be allowed."

a dominance in the market. The result is public harm through the control of prices of a given commodity. *State v. Atlantic Ice & Coal Co.*, 210 N.C. 742, 747-48, 188 S.E. 412, 415 (1936). Implicit in this definition of a monopoly is the corollary that a restraint of trade must not result in a monopoly. *Durham v. State of North Carolina*, 395 F. 2d 58 (4th Cir. 1968). While all monopolies restrain trade, not every restraint of trade leads to a monopoly in a particular market.

[1] The distinctive characteristics of a monopoly are, then, (1) control of so large a portion of the market of a certain commodity that (2) competition is stifled, (3) freedom of commerce is restricted and (4) the monopolist controls prices. We turn now to an examination of the facts in light of these criteria.

[2] Pennell's franchise does not give it control of so large a portion of the AMC Jeep market as to stifle competition or control prices. His franchise serves, according to its terms, the "North Wilkesboro Market Area," which, according to the Commissioner's findings, comprises Wilkes County in its entirety and portions of Surry and Alleghany Counties. While his franchise agreement gives him control of AMC Jeeps in this trade area, we hardly consider it to constitute the "market" as that term is used in our definition of a monopoly. In order to monopolize, one must control a consumer's access to new goods by being the *only* reasonably available source of those goods. A consumer must be without reasonable recourse to elude the monopolizer's reach. Logically, then, the market encompasses geographically at least all areas within reasonable proximity of potential customers.

The AMC Jeep market for a resident of the North Wilkesboro Market Area extends beyond those arbitrary lines set by AMC. The record shows and the Commissioner found that within the last two years, Jeep dealerships existed in all counties adjacent to Wilkes except Alleghany and Yadkin. Much of Alleghany and Yadkin Counties are closer to Jeep dealerships in another county than they are to Pennell's dealership serving the North Wilkesboro Market Area. Surry County, a portion of which lies in the North Wilkesboro Market Area, is one of those counties adjacent to Wilkes with a Jeep franchise. The factual findings reveal that many consumers in the North Wilkesboro Market Area may,

in fact, be geographically closer to a Jeep dealer other than Pennell. Even if they are not closer, these potential customers are within reasonable range of those dealers. Advertising and other sales devices easily cross county lines via the media, including newspapers, radio, and television. Jeep franchises in a number of proximate counties may compete with one another. Through this competition, prices may fluctuate as various dealers vie for customers. The Commissioner's decision to deny another franchise in the North Wilkesboro Market Area does not on this record operate to stifle competition or allow undue control of prices by either American Motors or its existing franchisee in the selling of AMC Jeeps. No monopoly, therefore, is created by the Commissioner's action in this case pursuant to the statute.

We recognize that prohibiting additional franchises amounts to a restraint of trade. But the restraint of intra-brand trade contemplated by the statute in question is not such as to amount to the creation of a monopoly. *See American Motors Sales Corporation v. Division of Motor Vehicles of the Commonwealth of Virginia*, 592 F. 2d 219, 223-24 (4th Cir. 1979).[4] While competition may not be as full and free as with multiple AMC Jeep franchises existing in the North Wilkesboro Market Area, it is by no means eliminated. More than a mere adverse effect on competition must arise before a restraint of trade becomes monopolistic. *See generally Exxon Corporation v. Governor of Maryland*, 437 U.S. 117 (1978). *Accord, New Motor Vehicles Brand v. Orrin W. Fox Co.*, 439 U.S. 96 (1978). Thus, while the trading of AMC Jeeps is restrained by the statute's operation in this situation, no control of the market or adverse effect on prices and competition, sufficient to constitute a monopoly, results.

II.

[3] Appellants suggest that the statute on its face creates and perpetuates monopolies. We disagree.

4. The Virginia statute is almost identical to the North Carolina statute and provides that an automobile manufacturer may not grant an additional franchise of a particular line-make motor vehicle in a given trade area where a franchise of that line-make already exists if the Commissioner of Motor Vehicles determines that the market will not support all franchises. Virginia Code § 46.1-547(d) (1980).

Courts ordinarily seek the meaning of a legislative provision first from the language of the statute itself. When the language of the statute is sufficiently clear in its context, it controls. *See State ex rel. Utilities Commission v. Edmisten*, 291 N.C. 451, 232 S.E. 2d 184 (1977); *Underwood v. Howland*, 274 N.C. 473, 164 S.E. 2d 2 (1968).

By the limited nature of its language, the statute in question regulates only the granting of additional franchises for a particular line-make of motor vehicle in a given trade area where such a franchise already exists. The clear meaning and import of the statute is to restrict intra-brand competition. Of central importance to the validity of this legislation is the recognition that if it restrains trade, it does so vertically rather than horizontally. A vertical restraint runs from the manufacturer down through the distributer, ending ultimately with the retailer. Horizontal restraints, on the other hand, run between dealers and dealers or retailers and retailers, all operating on the same level. Horizontal restraints run contrary to the public interest because they stifle competition, whereas vertical restraints leave to the public the benefit of competition at a particular level of the marketing process. *Bulova Watch Co., Inc. v. Brand Distributors of North Wilkesboro, Inc.*, 285 N.C. 467, 480, 206 S.E. 2d 141, 150 (1974). To the extent that the statute authorizes the Commissioner to effectuate vertical restraints on the marketing of motor vehicles, it does no offense to the constitutional proscription of monopolies. Horizontal restraints impede competition and lead inexorably to increased prices. That is the evil which the anti-monopoly provision seeks to prevent. *See Tober Foreign Motors, Inc. v. Reiter Oldsmobiles, Inc.*, 376 Mass. 313, 325-30, 381 N.E. 2d 908, 915-17 (1978).

The statute does not restrain trade among automobile retailers. It only authorizes the Commissioner to prevent additional franchises of a particular line-make in a given trade area when the market will not support it. The manufacturers retain a tremendous incentive to police pricing abuses by their retailers. They may guard against such practices by establishing and enforcing sales quotas and price ceilings. Smith, *Franchise Regulation: An Economic Analysis of State Restrictions on Automobile Distribution*, 25 J. Law & Econ. 125, 128-29 (1982). Indeed,

manufacturers have a keen self-interest in the competitive status of their retailers.

The statute essentially incorporates the economic realities of automobile marketing. Automobile manufacturers simply cannot operate their local dealerships from central offices in a cost-effective manner.[5] In response to this situation, the franchise system evolved. It offered a preferred method of distribution reflecting decreased cost and irritations of an integrated system. *H. Brown, Franchising: Realities and Remedies* 2 (2nd ed. 1978).

But it, too, revealed inherent difficulties, the most significant of which was the disparity in bargaining positions between the manufacturers and the retailers or franchisees. *See* Kessler, *Automobile Dealer Franchises: Vertical Integration by Contract* 66 Yale L.J. 1135, 1156 (1957) (referring to automobile franchise agreements as contracts of adhesion and economic deathtraps). To counter this imbalance, states enacted statutes like the one involved in this case. These statutes provide some protection from abuse of franchisees by manufacturers.

The franchise system provides benefits to both the manufacturer and the retailer.[6] The former retains retail incentives and effective control over product distribution to the consumer. The system induces investments in service and sales facilities by the retailer, all to the ultimate benefit of the manufacturer, as they enhance the attractiveness of the product to the consumer. The franchisee or retailer benefits primarily from territorial security. Smith, *supra*, at 126-27. It is to this benefit of the franchisee—territorial security— that the North Carolina statute is directed. If a manufacturer could routinely invade a particular market area with additional franchises of certain line-makes, the original fran-

5. North Carolina law prohibits an automobile manufacturer from owning, operating, or controlling a motor vehicle dealership in a trade area already served by a motor vehicle dealer under a franchise for the same line-make by that manufacturer. N.C. Gen. Stat. § 20-305.2 (1978).

6. An additional benefit of the automobile franchise system, and one which provides a legitimate justification for a state's regulatory protection of automobile franchises, is that it allows minorities and ordinary citizens to gain access to the economic system. By enhancing the availability of franchises through decreased cost and territorial security, people who lack tremendous capital and are less affluent may at least consider undertaking a franchise. *See* Note, *State Motor Vehicle Franchise Legislation: A Survey and Due Process Challenge to Board Composition*, 33 Vand. L. Rev. 385, 386-87 (1980).

chisee suffers from the loss of perhaps its most important benefit of the franchise system. The legislature responded to this unequal bargaining situation with the statute in question. By restricting the influx of additional line-make franchises in a given market area, the statute limits the franchisee's "economic death sentence" threatened by the franchise system. Kessler, *supra*, at 1156. This legislative determination represents a valid exercise of the state's extensive police power designed, in this case, "to promote the economic welfare of the public (or a particular group in need of relief from hardship or duress)." *United States v. Women's Sportswear Manufacturers Association*, 336 U.S. 460, 464 (1949).

Thus, the facial validity of the statute hinges on the acceptability of vertical integration itself. Although vertical restraints affect the number of entities in a market, they do not, in and of themselves, result in monopolies. *See Watch Co.*, 285 N.C. at 480-81, 206 S.E. 2d at 150-151. The franchising system used by automobile manufacturers neither unduly restrains competition nor escalates prices. Manufacturers may sell only to certain dealers without illegally restraining trade. "[I]f nothing more is involved than vertical 'confinement' of the manufacturer's own sales of the merchandise to selected dealers, and if competitive products are readily available to others, . . ." then no monopoly results. *United States v. Arnold, Schwinn and Co.*, 388 U.S. 365, 376 (1967).

Appellants argue that two of our prior cases control our decision regarding the monopoly issue: *In re Certificate of Need for Astin Park Hospital, Inc.*, 282 N.C. 542, 193 S.E. 2d 729 (1973); *State v. Ballance*, 229 N.C. 764, 51 S.E. 2d 731 (1949). We find both cases easily distinguishable. In *In re Hospital*, we held that the statutory requirement of obtaining a certificate of need prior to constructing a private hospital violated the Anti-monopoly Clause of the North Carolina Constitution. Our decision turned on the absence of a rational relationship between the required certificate of need and any public good or welfare consideration. Furthermore, that requirement constituted a horizontal restraint since it regulated available services at the same level across the state. 282 N.C. at 548, 193 S.E. 2d at 734. In *Ballance*, we held unconstitutional a statute which imposed licensing requirements on the photography profession. We found no reasonable relationship

between the restraint on a person's liberty to engage in a legitimate and harmless profession and the public welfare. 229 N.C. at 770-772, 51 S.E. 2d at 735-36. Neither case controls the disposition of the instant appeal. Unlike both of those cases, the statute at bar imposes a vertical rather than horizontal restraint on the automobile industry. Furthermore, as we have already noted, the state possesses an important interest in protecting automobile dealerships from manufacturer's abuse of the franchise system, an interest which is accomplished by the statute in question.

Appellants suggest, as did Judge Martin in his dissent below, that we follow the lead of our sister state, Georgia. *See Georgia Franchise Practice Commission v. Massey-Ferguson, Inc.*, 244 Ga. 800, 262 S.E. 2d 106 (1979). *See generally General GMC Trucks, Inc. v. General Motors Corporation*, 239 Ga. 373, 237 S.E. 2d 194 (1977) (invalidating a similar statute under the Commerce Clause of the United States Constitution). *Georgia Franchise* invalidated, without substantial discussion, a state statute which restricted the granting of new franchises of the same line-make motor vehicle in trade areas where a franchise of that line-make already existed. The Georgia Court relied on Article III, section 8, paragraph 8 of the 1976 Georgia Constitution [now Art. III § 6 par. 5(c) of the 1983 Georgia Constitution] which prohibits the legislature from authorizing "any contract or agreement which may have the effect of or which is intended to have the effect of defeating or lessening competition, or encouraging a monopoly, which are hereby declared null and void." Although the Court cited *GMC Trucks*, that case neither discussed nor referred to the Georgia Constitution. We decline to follow *Georgia Franchise*, noting that the Georgia constitutional provision, unlike its North Carolina counterpart, concerns legislation having "the effect . . . of defeating or lessening competition . . .," as well as "encouraging a monopoly." Thus, its scope seems considerably more far-reaching into the area of commerce than our anti-monopoly provision. Notwithstanding whatever differences might flow from the broader, more inclusive language of the Georgia constitutional provision, we are not persuaded by the reasoning of the Georgia Court.

Since the North Carolina statute essentially protects franchisees from abuses of vertical integration and is not on its face

designed to lessen competition or increase prices, we find N.C. Gen. Stat. § 20-305(5) does not run afoul of the Anti-monopoly Clause of the North Carolina Constitution.

III.

[4] Appellants next contend the Commissioner exceeded his authority by issuing injunctions against them. Specifically, they point to the order's provisions whereby (1) AMC's grant of a franchise to 421 is "enjoined, invalidated and revoked"; (2) 421 is "enjoined" from further advertising, promoting or trading in AMC Jeeps; and (3) AMC is "enjoined" from granting other franchises in the relevant trade area absent compliance with the state guidelines. The Court of Appeals rejected these assertions, holding that the Commissioner had not issued an injunction. Essentially, the Court of Appeals concluded that the order reflected simply an inartful use of language by the Commissioner.

The statute does not authorize or empower the Commissioner to issue injunctions. N.C. Gen. Stat. § 20-301 (authorizing the Commissioner to prevent unfair trade practices and conduct hearings pursuant to the exercise of this authority). When one engages in practices contrary to the letter and spirit of the statute, an injunction may be warranted. The statute provides a mechanism through which such an injunction may issue:

> The Commissioner may, whenever he shall believe from evidence submitted to him that any person has been or is violating any provision of this [statute], in addition to any other remedy bring an action in the name of the state against such person and any other persons concerned or in any way participating in, or about to participate in practices and acts so in violation, to enjoin such persons and such other persons from continuing the same.

Id. § 20-301(d).

The statutory language is abundantly clear. The legislature authorized the Commissioner to seek injunctions through normal judicial channels. It did not authorize him to issue injunctions. The parties do not advance this position, and the Court of Appeals did not so hold.

The statute does, however, empower the Commissioner to deny a motor vehicle manufacturer the privilege of franchising an

additional line-make dealer if he determines the market in the given trade area will not support it. Perforce the Commissioner is authorized to invalidate or revoke such a franchise already in effect at the time of the hearing. Insofar as the Commissioner's order revoked and invalidated the franchise here in question, it was within the Commission's statutorily delegated powers. Insofar as the order enjoined future practices of American Motors or Vickers, the order exceeds the Commissioner's authority.

IV.

[5] Finally, we consider appellants' contention that they complied with the notice requirement of the statute.[7] Before a manufacturer may grant an additional franchise for a particular line-make of automobile, it must "first [advise] *in writing* such other dealers in the line-make [which operate] in the trade area . . . ." N.C. Gen. Stat. § 20-305(5) (emphasis added). After taking evidence on this issue, the Commissioner found as a fact that "Pennell received no written notice from [AMC] informing Pennell of [AMC's] intention to grant a Jeep franchise to 421 prior to the granting of the franchise to 421." Once the Commissioner makes this factual determination, we, like other judicial tribunals, are bound by it so long as it is supported by substantial evidence. N.C. Gen. Stat. § 150A-51(5) (1983). *See id.* § 20-300 (noting that appeals from the Commissioner are governed by the Administrative Procedures Act). This level of review is the "whole record test," that is, whether the administrative decision has a rational basis in the evidence. *In re Rogers*, 297 N.C. 48, 64, 253 S.E. 2d 912, 922 (1979); *North Carolina Department of Correction v. Gibson*, 58 N.C. App. 241, 293 S.E. 2d 664 (1982). In applying this test, this Court does not substitute its judgment for that of the agency, even if it could have legitimately reached a differing result upon a *de novo* review of the record. *Thompson v. Wake County Board of Education*, 292 N.C. 406, 410, 233 S.E. 2d 538, 541 (1977).

There was ample evidence presented at the hearing to support the Commissioner's determination. Pennell testified that he

7. Appellants also argued that Pennell did not have "clean hands" and that the courts below erred in denying their request for a stay. Since we find for appellants on their challenge to the Commissioner's issuance of an injunction, we need not address these issues and express no opinion as to them.

had received no written notice. While he did receive a letter from AMC dated 30 October 1979, that document did not mention the granting of a franchise to 421. Attorneys for AMC admitted that no written notice was provided the Commissioner. Furthermore, agents for AMC testified regarding a letter of 8 June 1979 to Pennell dealing with a "one-on-one" proposal. No evidence suggested, however, that mentioning of a one-on-one proposal amounted to the written notice of an intention to grant a new franchise as required by the statute.

From this evidence, the Commissioner could reasonably have found that Pennell received no written notice from AMC as required by the statute. The Commissioner's finding on this issue is supported by substantial evidence on the whole record. *The North Carolina State Bar v. Dumont*, 304 N.C. 627, 643, 286 S.E. 2d 89, 98-99 (1982).

V.

In conclusion, we affirm the North Carolina Court of Appeals' determination that N.C. Gen. Stat. § 20-305(5) does not create or perpetuate monopolies in violation of Article I, section 34 of the North Carolina Constitution, either on its face or as applied in this case. We affirm both Judge Bailey's and the Court of Appeals' decisions that the Commissioner correctly concluded that Pennell did not receive the written notice required under the statute. Insofar as both Judge Bailey and the Court of Appeals sustained the Commissioner's order revoking and invalidating American Motors' franchise to Vickers, their decisions are affirmed. Insofar as Judge Bailey and the Court of Appeals sustained the Commissioner's order enjoining future actions by American Motors and Vickers, their decisions are reversed.

Affirmed in part; reversed in part.

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

Hofler v. Hill and Hofler v. Hill

IN THE MATTER OF THE FORECLOSURE OF DEED OF TRUST EXECUTED AND GIVEN BY RAYMOND SUTTLES AND WIFE, JOYCE SUTTLES, GRANTORS, DATED THE 30TH DAY OF JANUARY, 1979, AS APPEARS OF RECORD IN BOOK 421 AT PAGE 49, CHATHAM COUNTY REGISTRY, R. HAYES HOFLER, III, TRUSTEE v. PAUL W. HILL AND WIFE, PATRICIA B. HILL; RAYMOND SUTTLES AND WIFE, JOYCE SUTTLES; AND R & H CONCRETE PUMPING, INC.

IN THE MATTER OF THE FORECLOSURE OF DEED OF TRUST EXECUTED AND GIVEN BY PAUL W. HILL AND WIFE, PATRICIA B. HILL, GRANTORS, DATED THE 30TH DAY OF JANUARY, 1979, AS APPEARS OF RECORD IN BOOK 303 AT PAGE 470, ORANGE COUNTY REGISTRY, R. HAYES HOFLER, III, TRUSTEE v. PAUL W. HILL AND WIFE, PATRICIA B. HILL; RAYMOND SUTTLES AND WIFE, JOYCE SUTTLES; AND R & H CONCRETE PUMPING, INC.

Nos. 456PA82 and 457PA82

(Filed 6 July 1984)

1. **Guaranty § 1; Mortgages and Deeds of Trust § 28; Principal and Surety § 1 — foreclosure proceeding — execution of repurchase agreement in favor of bank as security for bank loan to third party — obligation of appellee neither that of guarantor nor surety**

In a foreclosure proceeding where the parties had previously agreed that the bank would make a loan to R & H Company and take as security (1) a security interest in the equipment, (2) an "Unconditional Guaranty" executed by the individual defendants, (3) deeds of trust on the individual defendants' residences, and (4) a repurchase agreement with Allentown, the maker of the equipment for which the loan was being made, Allentown's status vis-a-vis the primary debt, while not being that of co-surety, was also not that of a guarantor as that concept has been traditionally considered. The individual defendants and Allentown were not equally obligated on the debt in that the "Unconditional Guaranty" made appellants primarily unconditional obligors, while the "Repurchase Agreement" made Allentown a secondary, conditional obligor. Therefore, neither G.S. 26-5 nor the equitable principle that co-sureties on a debt may not be subrogated to the rights of the creditor against each other applied to the case, and neither barred Allentown, as a signee of the R & H note and the individual defendants' "guaranty" and deeds of trust, from maintaining an action against the individual defendants for any amount due Allentown as assignee and foreclosing the deeds of trust in order to collect this amount.

2. **Mortgages and Deeds of Trust § 17.1 — foreclosure proceedings — amount due assignee of debt not properly established**

In a foreclosure proceeding where the evidence did not establish the amount, if any, due to Allentown as assignee of the corporate defendant's original obligation, the case must be remanded for further proceedings on the question of the amount before Allentown is entitled to foreclose the deeds of trust. G.S. 45-21.16(b).

Hofler v. Hill and Hofler v. Hill

ON discretionary review of decisions of the Court of Appeals reversing orders by *Judge Coy E. Brewer, Jr.*, presiding at the 2 June 1980 Session of ORANGE County Superior Court.

Newsom, Graham, Hedrick, Murray, Bryson, Kennon & Faison by Robert O. Belo for appellee (Allentown Pneumatic Gun Company).

Dalton H. Loftin for defendant appellants (Paul W. Hill and wife, Patricia B. Hill).

EXUM, Justice.

In reviewing the determination of the Court of Appeals that the substitute trustee, on behalf of appellee, may foreclose two deeds of trust, we must consider two issues: First, whether appellee, which as security for a bank loan to a third party executed a repurchase agreement in favor of the bank, and appellants, who as security for this same bank loan executed what is denominated a "guaranty" in favor of the bank, were co-sureties on the debt owed the bank. Second, whether there is any amount due appellee as a result of the transactions in question. We conclude the appellee and appellants are not co-sureties on the debt. Therefore, the principle that one co-surety cannot be subrogated to the rights of the principal creditor against another co-surety does not bar the foreclosure proceedings. We remand for further proceedings to determine whether any amount remains due to the appellee.

I.

In January 1979 Paul W. Hill and Raymond Suttles were the principal owners of R & H Concrete Pumping, Inc., the debtor-corporation. R & H purchased two pieces of concrete pumping equipment from appellee, Allentown Pneumatic Gun Company. To finance this purchase, R & H borrowed $195,000 from First Union National Bank. This loan was evidenced by a promissory note in favor of the bank. As collateral the bank took a security interest in the equipment, an "Unconditional Guaranty" executed by Hill and his wife and Suttles and his wife, and deeds of trust on the Hills' Orange County residence and the Suttles' Chatham County residence.

Before lending R & H the amount necessary to purchase this equipment, the bank entered into a repurchase agreement with Allentown which included the following provision:

> Allentown Pneumatic Gun Company agrees that in the event that R & H Concrete defaults on their loan, Allentown will purchase the equipment from First Union National Bank for the balance of the unpaid principal on the loan. It is further agreed that Allentown will make the necessary arrangements to take physical possession of the equipment in the event of default. At that time, the Bank will assign all of its security interest and rights of recovery in the equipment to Allentown.

Both the Hills and Suttles were apparently aware of the repurchase agreement before they closed their loan with the bank.

In June 1979 R & H defaulted on the loan and delivered the equipment to the bank. One piece of the equipment was sold while it was in the bank's possession and the proceeds credited to the balance due. Upon notification by the bank of an intention to act upon the repurchase agreement, Allentown accepted delivery of the other piece of the equipment and executed a promissory note to the bank which apparently covered in full the remaining balance due on R & H's note. The bank assigned to Allentown its security interest in the equipment, the R & H note, the deeds of trust on the property of the Hills and Suttles, and the "Unconditional Guaranty" executed by the Hills and Suttles. Allentown sold the other piece of equipment and credited the debt accordingly.

Allentown requested the Hills and Suttles to pay the balance due it on the original note. The Hills and Suttles consistently refused to pay Allentown. Allentown instructed the substitute trustee, R. Hayes Hofler, III, to foreclose on the deeds of trust.

These cases began as two separate proceedings brought, respectively, in Chatham and Orange Counties, pursuant to N.C. Gen. Stat. § 45-21.16, by the substitute trustee in the deeds of trust to sell the two residences under the powers of sale contained in the deeds. The clerks in both counties ordered the sales to proceed and both the Hills and the Suttles appealed to the superior court. Since a common set of facts underlaid the controver-

sy in both proceedings, all parties stipulated that Judge Brewer, presiding in Orange County Superior Court, could hear and determine both appeals. After a hearing, Judge Brewer made findings and conclusions upon which he ordered that the sales not proceed. His order was entered, again by stipulation of the parties, in both Orange and Chatham Counties. The superior court concluded: (1) By virtue of the repurchase agreement Allentown became jointly and severally liable as co-sureties with the Hills and Suttles on R & H corporation's note. (2) Therefore, Allentown, after purchasing the equipment from the bank for the amount due on the note, could not become subrogated to and enforce the bank's rights under the deeds of trust against the Hills and Suttles. (3) The trustee could not, consequently, foreclose the deeds of trust.

Upon Allentown's appeal of both cases, the Court of Appeals reversed and remanded. The Court of Appeals' opinion, which governs its decisions in both cases, is reported at 58 N.C. App. 201, 293 S.E. 2d 238 (1982). Its actual decision in the Chatham County proceeding is unreported. The Court of Appeals first concluded that the repurchase agreement was properly offered in evidence on the questions of whether Allentown was the holder of a valid debt against the Hills and Suttles and whether the trustee had a right to foreclose. *See* N.C. Gen. Stat. § 45-21.16(d). It then held that even if Allentown was a co-surety with the Hills and Suttles and not thereby entitled to be subrogated to the bank's rights against them, the repurchase agreement constituted an agreement to the contrary. It provided, according to the Court of Appeals, that Allentown upon performance of its obligations under this agreement would be entitled to be assigned all the bank's rights against the Hills and Suttles. The Court of Appeals said:

> We do not believe that Allentown and the respondents may have been sureties for the payment of the note is determinative. In the cases cited by the respondents, *Insurance Co. v. Gibbs*, 260 N.C. 681, 133 S.E. 2d 669 (1963); *Bunker v. Llewellyn*, 221 N.C. 1, 18 S.E. 2d 717 (1942); and *Liles v. Rogers*, 113 N.C. 197, 18 S.E. 104 (1893), the court applied the principle that sureties are not entitled to subrogation against co-sureties. In none of these cases was there an agreement at the time the parties entered into the obligations that the party who paid a debt of the principal would have recourse against the other sureties. G.S. 26-5, upon which the respond-

ents also rely, provides a surety who performs under a contract may maintain an action for contribution against other sureties. It does not say that parties may not by contract agree to different rights than are provided by the statute. *See Commissioners v. Nichols*, 131 N.C. 501, 42 S.E. 938 (1902), for a case which holds that a surety may contract for a different indemnity than he would be given by law in the absence of such an agreement. *See also Bank v. Burch*, 145 N.C. 317, 59 S.E. 71 (1907), for language to this effect.

We hold that the parties are bound by the contract they entered and this contract gives Allentown the right to foreclose under the deed of trust. We reverse and remand for further proceedings pursuant to this opinion.

We allowed petitions for further review in both cases and elected to consolidate the two proceedings for purposes of argument, opinion and decision. Only the Hills have appeared, however, before us.

II.

[1] The trial court made the following conclusion of law:

That immediately following the closing of the loan and purchase transaction of January 30, 1979, Hill and wife, Suttles and wife, and Allentown were all jointly and severally liable for the payment of said R & H note to the bank, and were therefore co-sureties as to each other concerning their liability thereon.

This conclusion of law is fully reviewable on appeal and may be reversed if determined by us to be erroneous. *Humphries v. City of Jacksonville*, 300 N.C. 186, 265 S.E. 2d 189 (1980). The Court of Appeals did not consider the validity of this conclusion of law, but concluded that the question of the parties' status as co-sureties was irrelevant. It said:

The respondents argue that the record shows and the court found that Allentown and the respondents were co-sureties and for this reason Allentown has no right of subrogation but is limited to contribution. We do not believe the fact that Allentown and the respondents may have been sureties for the payment of the note is determinative.

Hofler v. Hill, 58 N.C. App. at 204, 293 S.E. 2d at 239-40. The Court of Appeals went on to hold that Allentown, even if a co-surety, had merely contracted with the bank for a different liability and that the provisions of this contract could be enforced. *Id.* at 204, 293 S.E. 2d at 240.

The correctness of this conclusion is not altogether certain. Arguably one surety should not be allowed to contract with the principal for a different liability to the detriment of other sureties at least not without the consent of the other sureties. Further, it is arguable that the repurchase agreement does not give Allentown any right to be subrogated to the bank's recovery rights against the Hills and Suttles on the original note and deeds of trust securing it. The repurchase agreement refers only to the bank's duty to assign to Allentown "its security interest and rights of recovery *in the equipment*." (Emphasis supplied.) This can reasonably be read as referring only to the bank's security interest in the equipment itself—not its interest in the original note and the deeds of trust. On the other hand, the "security interest and rights of recovery in the equipment" might also include all forms of security which the bank held on the debt. We find it unnecessary to reach this issue and express no opinion on the merits of the Court of Appeals' analysis. Unlike the Court of Appeals, we find each party's status vis-a-vis the primary debt to be the paramount consideration and the issue upon which the case should turn.

III.

Appellants argue Allentown is a co-surety and equally obligated with them on the R & H debt. Therefore Allentown as the bank's assignee may not maintain an action against them for the outstanding balance due on the R & H note and may not foreclose the deeds of trust. Appellants argue that Allentown may only seek "a just and ratable" contribution from them. *See* N.C. Gen. Stat. § 26-5 (1965), which provides:

> Where there are two or more sureties for the performance of a contract, and one or more of them may have been compelled to perform and satisfy the same, or any part thereof, such surety may have and maintain an action against every other surety for a just and ratable proportion of the same

> which may have been paid as aforesaid, whether a principal, interest or cost.

Equity requires that parties which are equally obligated on a debt be treated alike. *Smith v. Carr*, 128 N.C. 150, 38 S.E. 732 (1901). Therefore co-sureties, or equal obligors, on a debt may not be subrogated to the rights of the creditor against each other but are limited to a "just and ratable" contribution. *Peebles v. Gay*, 115 N.C. 38, 20 S.E. 173 (1894). We conclude that Allentown and appellants are not equally obligated on the R & H debt; therefore they are not co-sureties.

On 30 January 1979 the Hills and Suttles executed a document entitled "Unconditional Guaranty." This agreement purported to secure the promissory note of R & H in favor of the bank. The label on this agreement is not determinative of the nature of the contract. The substance rather than the form of the agreement controls, and this Court is not "bound by the labels which have been appended to the episode by the parties." *Branch Banking & Trust Co. v. Creasy*, 301 N.C. 44, 53, 269 S.E. 2d 117, 123 (1980). The agreement executed by the Hills and Suttles states, in pertinent part:

> This guaranty is and shall remain an unconditional and continuing guaranty of payment and not of collection, shall remain in full force and effect irrespective of any interruption(s) in the business or other dealings and relations of Customer [R & H] with FUNB [the bank] and shall apply to and guarantee the due and punctual payment of all "Obligations of Customer [R & H]" due by Customer [R & H] to FUNB [the bank]. To that end, Guarantor hereby expressly waives any right to require FUNB [the bank] to bring any action against any Customer [R & H] or any other person(s) or to require that resort be had to any security or to any balance(s) of any deposit or other account(s) or debt(s) or credit(s) on the books of FUNB [the bank] in favor of Customer [R & H] or any other person(s). Guarantor acknowledges that its liabilities and obligations hereunder are primary rather than secondary, recognizing that Customer [R & H] is first above identified as "PRIMARY OBLIGOR" and undersigned are identified first above as "GUARANTOR(S)" solely for convenience in identification of the parties involved in this

> Guaranty Agreement and in the obligation being secured hereby.

This document explicitly imposes primary and unconditional liability upon the Hills and Suttles for payment of R & H's debt to the bank. Appellants concede as much in their brief and argument before us.

To understand the significance of the primary, unconditional obligation incurred by the Hills and Suttles under this agreement, it may be helpful to consider distinctions sometimes drawn between contracts of guaranty and contracts of suretyship.

> A guaranty is a promise to answer for the payment of a debt or the performance of some duty in the event of the failure of another person who is himself primarily liable for such payment or performance. A surety is a person who is primarily liable for the payment of the debt or the performance of the obligation of another. While both kinds of promises are forms of security, they differ in the nature of the promissor's liability. A guarantor's duty of performance is triggered at the time of the default of another. On the other hand, a surety is primarily liable for the discharge of the underlying obligation, and is engaged in a direct and original undertaking which is independent of any default.

Id. at 52-53, 117 S.E. 2d at 122 (citations omitted). *See generally* A Stearns, The Law of Suretyship § 1.5 at 5 (J. Elder, 5th ed. 1951); L. Simpson, Handbook on the Law of Suretyship 6-9 (1950). Essentially, a surety promises to do what the principal has promised to do and incurs an obligation which arises jointly with that of the principal. On the other hand, a guarantor promises to perform if the principal does not perform; a guarantor cannot, ordinarily, be sued jointly with the principal. "The obligation of a surety is primary, while that of a guarantor is collateral." *Wachovia Bank & Trust Co. v. Clifton*, 203 N.C. 483, 485, 166 S.E. 334, 335 (1932).

These distinctions illustrate the importance of ascertaining each party's obligation vis-a-vis the principal debt. A primary unconditional obligor does not stand in the same position as a collateral conditional obligor as far as the creditor is concerned. As the language of their "Unconditional Guaranty" demonstrates, the

Hills and Suttles incurred a primary unconditional obligation to pay the debt of R & H.

Allentown's obligation to the bank depends upon the substance of the repurchase agreement. By that document's terms Allentown agreed only to purchase the equipment from the bank for the balance of the unpaid principal on the loan if R & H defaulted. In return, the bank would assign all its security interest and rights of recovery in the equipment to Allentown. The key aspect of Allentown's obligation is its agreement to purchase the equipment from the bank. Therefore its obligation arose only if and when the bank regained possession of the equipment from R & H. For the bank to regain possession, R & H would have to relinquish possession, either voluntarily or involuntarily. Here R & H voluntarily turned the equipment over to the bank because it could not pay. Thus, under the repurchase agreement Allentown made itself collaterally and conditionally liable on the debt of R & H to the bank. It incurred an obligation which is more akin to that of a guarantor rather than a surety, as these concepts have been sometimes distinguished in our cases. *See Investment Properties of Asheville, Inc. v. Norburn*, 281 N.C. 191, 195, 188 S.E. 2d 342, 345 (1972). *See generally* Stearns, *supra*, § 4.5 at 64. We do not purport to hold, however, that Allentown's obligation was that of a guarantor as that concept has been traditionally considered. As the Court said in *Union Bank v. Winnebago Industries, Inc.*, 528 F. 2d 95, 98 (9th Cir. 1975), with reference to a fixed price repurchase agreement, Allentown's obligations under its repurchase agreement are "enforceable according to its terms without reference to principles of guarantee or suretyship."

The nature of the obligation created by a repurchase agreement, such as the one executed by Allentown in the instant case, is a question of first impression in North Carolina. We have been cited by appellants to only one case from another jurisdiction holding that a repurchase agreement similar to the one at bar constitutes a contract of suretyship between the obligor on the repurchase agreement and the principal creditor. *McMullan v. Community Acceptance Corp.*, 78 Ga. App. 616, 51 S.E. 2d 575 (1949). In none of the other cases relied on by appellants did the court construe a repurchase agreement to constitute a contract of either suretyship or guaranty. *McGraw Edison Credit Corporation v. Motorola Communications and Electronics, Inc.*, 579 F. 2d

885 (5th Cir. 1978), distinguishes *McMullan* on the ground that the repurchaser before the Fifth Circuit promised to pay only 80 percent of the loan balance in one agreement and the other agreement was conditioned on the repossessed collateral being in "good order and repair." The Fifth Circuit, applying Georgia law, concluded that *McMullan* did not make "*all* repurchase agreements guaranties as a matter of law." *Id.* at 887. The Fifth Circuit reversed a summary judgment against the obligor on the repurchase agreements because the summary judgment was based on the district court's conclusion that under *McMullan* all such repurchase agreements were guaranty contracts as a matter of law. The Fifth Circuit said:

> These repurchase agreements, which do not mention the words guaranty or surety and are not closely tied to the outstanding debt of the purchaser, are not on their face guaranty contracts as a matter of law. A fuller development of the facts may show the agreements to be ones of suretyship, but additional evidence is necessary to aid in their interpretation. . . . When the facts are fully developed, these agreements may yet be found to be guaranty contracts.

Id. at 888.

Appellants also rely on *Personal Loan and Finance Co. v. Kinnin*, 56 Tenn. App. 481, 408 S.W. 2d 662; *Ballinger v. Delta Loan and Finance Co.*, 197 Tenn. 661, 277 S.W. 2d 368 (1955); and *Security Mutual Finance Corp. v. Walker*, 43 Ala. App. 130, 181 So. 2d 515 (1965). In *Ballinger* the Tennessee Supreme Court did not construe a repurchase arrangement between an automobile dealer and a retail financer to be a contract of surety or guaranty. The Court held that the dealer under the repurchase agreement was obligated, upon default of the retail purchasers, to buy back the conditional sales contracts and take possession of the repossessed automobiles from the financer even though the financer had not complied with certain provisions of the statutes dealing with conditional sales. In *Kinnin* the Tennessee Appellate Court followed *Ballinger* in holding the obligor under a repurchase agreement to the promises made in the agreement without characterizing the agreement as a contract of suretyship or guaranty. The *Kinnin* Court, however, did refer to an earlier unreported decision of the Tennessee Court of Appeals which referred to *Bal-*

linger as a case involving "a repurchase agreement as distinguished from a contract of guaranty. . . ." 56 Tenn. App. at ---, 408 S.W. 2d at 667. In *Walker* the Alabama Court of Appeals concluded that the automobile retail financer could not recover against the dealer on a repurchase agreement similar to the one at bar because the dealer was an endorser of the original promissory note and conditional sales contract "without recourse." The Alabama Court of Appeals relied also on *Hawkeye Securities Fire Insurance Co. v. Central Trust Co.*, 208 Iowa 573, 221 N.W. 486 (1928), which held that a repurchase agreement is not a contract of guaranty. The Iowa Supreme Court said:

> By the [repurchase] agreement the [obligor on the agreements] is in nowise purported to bind itself that the maker of the note would pay it or perform the covenants of the mortgage, and that the [obligor] would be answerable for such maker's nonfulfillment. The agreement is to repurchase in the event of default, not to pay the debt; to reacquire the paper with the rights of a holder thereof, not to pay another's debt with the merely implied right to reimbursement. The instrument is wholly lacking in evidence of intention to assume the obligation of a guarantor.

Id. at 577, 221 N.W. at 487 (citation omitted).

We do not think it necessary to label or to legally pigeonhole the obligations assumed by appellants on the one hand and Allentown on the other vis-a-vis the R & H debt. The question arising on the principal issue before us is simply whether these respective parties were equally obligated on the debt. In answering the question it is enough to say that the "Unconditional Guaranty" made appellants primary and unconditional obligors; while the "Repurchase Agreement" made Allentown a secondary, conditional obligor. The parties, therefore, were not equally obligated on the debt. Therefore neither N.C. Gen. Stat. § 26-5 nor the equitable principle that co-sureties on a debt may not be subrogated to the rights of the creditor against each other applies to the instant case. Neither bars Allentown, as assignee of the R & H note and the Hills' and Suttles' "guaranty" and deeds of trust, from maintaining an action against the Hills and Suttles for any amount due Allentown as assignee and foreclosing the deeds of trust in order to collect this amount.

IV.

[2] Finally appellants argue that Allentown has not proved that there is any amount due it as a result of the transactions in question. This aspect of the case was not well presented in the trial court and the findings of the trial judge regarding it are confusing. As we understand the evidence presented, the R & H note was originally for $195,000 repayable in monthly installments of $4,337.68 each with interest accruing at the rate of 12 percent per year. R & H made three payments on this note and, being unable to continue the payments, relinquished to the bank the equipment it had purchased with the loan. One piece of the equipment was sold through Allentown's efforts while it was still in the bank's possession for $95,000 and this amount was credited to the R & H note. Allentown took possession of the smaller piece of equipment under the terms of the repurchase agreement and executed a note to the bank for $105,000 which represented the then unpaid balance on the R & H note. The bank accepted Allentown's note in full satisfaction and discharge of Allentown's obligation under the repurchase agreement. Later Allentown sold this second piece of equipment for $20,000 which was credited against Allentown's note in favor of the bank. According to the testimony of an executive vice president of Allentown, there is now due and owing on R & H's original indebtedness the sum of "approximately $92,000."

The trial court made findings on this aspect of the case as follows:

> XIII. That within a few days or weeks subsequent to June 15, 1979, R & H, Allentown, Suttles and wife, and Hill and wife were all notified that said R & H Note was in default. That said note remained in default until on or about August 30, 1979 at which time Allentown executed and delivered to the Bank a new note in the principal sum of approximately One Hundred Five Thousand Dollars ($105,000.00) in which Allentown was the maker and the Bank was the payee, which sum represented the then unpaid balance on said R & H Note. The new note given by Allentown to the Bank (hereinafter referred to as Allentown Note) on or about August 30, 1979 was accepted by the Bank in satisfaction and

discharge of Allentown's obligation under said Repurchase Agreement.

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XIV. That at the time said Allentown Note was delivered to and accepted by the Bank, the Bank assigned to Allentown the R & H Note, the Security Agreement, the Guaranty Agreement, and the Deeds of Trust given by Suttles and wife, and Hill and wife.

XV. That during the month of August or September of 1979, Allentown was instrumental in selling the truck pump unit for approximately Ninety-Five Thousand Dollars ($95,000.00), which sum was credited on the R & H Note.

XVI. Some time after August 30, 1979, Allentown sold the trailer pump unit for approximately Twenty Thousand Dollars ($20,000.00), which sum was credited against the Allentown Note of August 30, 1979.

It is not clear from the findings whether the proceeds received from the sale of the equipment ($115,000) were applied to the $105,000 Allentown note, in which case there would be no balance due to Allentown, or whether these proceeds were applied instead to the original $195,000 R & H note, in which case there would be a balance due Allentown.

Since both the evidence and the findings must establish that there is an amount due Allentown arising out of the transactions in question before Allentown is entitled to foreclose the deeds of trust, *see* N.C. Gen. Stat. § 45-21.16(d), the case must be remanded for further proceedings on the question of the amount, if any, due to Allentown as assignee of R & H's original obligation.

In conclusion, therefore, we have determined to modify and affirm the decisions of the Court of Appeals insofar as they hold that Allentown's status as a party to the original debt arising by virtue of the repurchase agreement is no bar to the foreclosure of the deeds of trust. We remand the case, however, to the Court of Appeals for further remand to the Superior Court for further proceedings on the question of the amount, if any, due to Allentown as assignee of R & H's original obligation.

Modified, affirmed and remanded.

STATE OF NORTH CAROLINA v. GARY ELLIOTT GOLDMAN

No. 354A83

(Filed 6 July 1984)

1. **Constitutional Law § 51— speedy trial—pre-indictment delay—investigative delay justified**

In a prosecution for first-degree murder, where the crime took place on 6 May 1975 but where defendant was not indicted until 14 December 1981, from the record, the Court concluded that the pre-indictment delay was attributable to an ongoing investigation of the case, and therefore, that the delay was reasonable, justified and for legitimate purposes. Defendant's only allegations of prejudice concerned claims of faded memory and evidentiary difficulties inherent in any delay, and the allegations were insufficient to find his constitutional due process right to a speedy trial was violated. G.S. 15A-954(a)(3).

2. **Constitutional Law § 51— denial of motion to dismiss for pre-indictment delay —no error—allegations of prejudice insufficient to justify motion**

There was no error in the trial court's denial of defendant's motion to dismiss for pre-indictment delay pursuant to G.S. 15A-954(a)(3) on grounds that his motion contained only conjectural and conclusory allegations of possible prejudice or deliberate and unnecessary delay on the part of the prosecution where defendant made only general allegations of faded memory and lost witnesses, and where he did not indicate how he had been prejudiced by the additional length of the delay. Further, contrary to defendant's claim, in the absence of a showing of actual prejudice, our courts should consider dismissal in cases of serious crime with extreme caution.

3. **Constitutional Law § 51— pre-indictment delay—no evidentiary hearing on motion to dismiss—no error**

There was no error in failing to provide defendant with an evidentiary hearing on his motion to dismiss on the basis of a pre-indictment delay where defendant's motion contained no factual allegations which merited further inquiry.

4. **Constitutional Law § 31— denial of a motion for funds to hire private investigator—no error**

The trial judge did not abuse his discretion in denying defendant's motion for funds to hire a private investigator where defendant failed to demonstrate that "the State's failure to provide funds with which to hire an investigator substantially prejudiced his ability to obtain a fair trial."

5. **Constitutional Law § 30— in camera inspection of the evidence—procedures complied with**

In a prosecution for first-degree murder, the trial court fully complied with the mandates of *State v. Hardy*, and G.S. 15A-904(a) in ruling on defendant's motion requesting an *in camera* inspection of evidence in the State's possession where the record disclosed that the State voluntarily provided defense counsel with prior statements of the testifying witnesses following

their direct examination, and with respect to the one statement which the State did not voluntarily provide, the trial judge reviewed the evidence *in camera* and sealed the excluded evidence and placed it in the record for appellate review.

6. Criminal Law § 97.1— recalling witness to corroborate the testimony—no abuse of discretion

The trial judge acted well within his discretion in permitting a detective to be recalled and questioned to corroborate testimony of other witnesses since the manner and presentation of evidence is largely within the discretion of the trial judge and his control of the case will not be disturbed absent a manifest abuse of discretion.

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

APPEAL by defendant from *Bowen, J.*, at the 28 February 1983 Criminal Session of Superior Court, WAKE County, following defendant's convictions of first-degree murder, under the felony murder rule, and robbery with a dangerous weapon. Defendant was sentenced to life imprisonment and appeals as of right pursuant to G.S. § 7A-27(a). Heard in the Supreme Court 8 May 1984.

Defendant was convicted of the 1975 robbery and murder of Elizabeth Parks Rosenburg. The issues brought forward on this appeal involve allegations of a violation of defendant's right to a speedy trial; denial of his motion for funds to hire a private investigator; the trial court's ruling on his discovery motion; and the trial court's allowing a State's witness to be recalled. We find no error.

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

H. Spencer Barrow and Allen W. Powell, Attorneys for defendant-appellant.

MEYER, Justice.

Facts pertinent to a resolution of the issues raised in this appeal include the following:

Shortly after 6:30 a.m. on 6 May 1975, the body of the victim, Elizabeth Parks Rosenburg, was discovered lying near her car which was parked in the driveway of an insurance company building across from the campus of North Carolina State University in

Raleigh. Her face had been crushed beyond recognition. She had also been struck in the abdomen with a blow of such force as to crush her liver causing extensive hemorrhaging. It was the opinion of the examining pathologist that the victim had bled to death as a result of the damage to her liver. The physical evidence tended to suggest that the victim had been struck by a metal pipe with a concrete base which was found a short distance from the body. Ms. Rosenburg was last seen shortly after midnight on 6 May leaving the D. H. Hill Library on the North Carolina State University campus where she had been studying for final exams. She was carrying her books and a leather shoulder bag. The shoulder bag containing her wallet and credit cards was not found at the scene and was never recovered.

Defendant was indicted on 14 December 1981 for the 6 May 1975 robbery and murder of Elizabeth Parks Rosenburg. Evidence at trial tended to show that in May 1975 the defendant was living near the campus of North Carolina State University. During the evening of 5 May, defendant had visited Tracy Current, a resident of Haven House, a rehabilitation facility for drug addicts. Sometime after midnight defendant returned to Haven House, which was located a short distance from the scene of the crime, and woke Miss Current. She testified that defendant complained of scratches on his arm and was in possession of paper money and what appeared to be a credit card. Miss Current testified that when she asked him about the scratches on his arm, defendant responded that "he didn't hurt as bad as she did or she got worse." Miss Current first disclosed this information to law enforcement authorities when she was questioned in 1981. Larry Lumsden testified that sometime between May 7-9, 1975, defendant stated in the presence of Lumsden and others that "he [defendant] was sitting on the walk by the Baptist State Center on Hillsborough Street (opposite the parking area where the victim's body was discovered) and he wanted some money for some wine and that he was going to snatch a woman's purse," and that "[w]hen he did she broke or fought back so he had to hurt her." Mr. Lumsden was questioned by police in 1975 and apparently disclosed this information at that time.

In April 1976 defendant was living in Dalton, Georgia. In the presence of Thomas Wiley and Phyllis Hamilton he allegedly made reference to his "trouble in North Carolina"—specifically

purse snatching around a college campus. He stated that he had "killed before" and "it wouldn't bother [him] to do it again." These witnesses were not questioned by police until 1981.

In 1976 defendant was sentenced to life imprisonment in Georgia for murder and robbery. Franklin Adams testified that in 1981, while a resident of the Georgia State Prison system, he had occasion to talk with the defendant. Defendant told Adams that he had beaten a girl to death with some type of fence post or metal with cement and that this occurred in North Carolina close to a college campus. Defendant stated that he and another boy snatched the girl's purse but that a man who was with the girl tried to stop them. The man ran off and defendant dragged the girl out of her car and beat her.

[1] Defendant makes three arguments in support of his contention that he was denied his right to a speedy trial on grounds of pre-indictment delay. Defendant first contends that the trial judge committed prejudicial error in denying his Motion to Dismiss under G.S. § 15A-954(a)(3) for violation of his constitutional right to a speedy trial. The motion, filed 24 March 1982, states the following:

PRE-INDICTMENT DELAY

1. The State alleges that on May 6, 1975, Elizabeth Rosenburg was murdered in the City of Raleigh, North Carolina.

2. On the 15th day of December, 1981, defendant was arrested in Atlanta, Georgia, on warrants charging him with murder and armed robbery. Defendant has since been held without privilege of bond.

3. Motion and Arraignment in this case was originally set for March 15th, but has been continued until April 2, 1982. Therefore, the defendant will be tried, at the earliest, nearly seven years after the date of the victim's death.

4. The defendant, upon information and belief, is of the opinion that the State will primarily base its case upon alleged statements made by the defendant to fellow inmates during the course of defendant's term of imprisonment in the Georgia Prison System. These alleged statements supposedly

were made sometime in late 1975 or early 1976. Therefore, the foundation of the State's case has been available to the State for approximately six years.

5. There is no justifiable excuse for the State's delay in instituting these proceedings against defendant.

The delay has rendered it impossible to properly prepare the defendant's defense for the following reasons:

a. It is now impossible for defendant to recall his exact whereabouts at the time the murders occurred.

b. Potential witnesses for the defendant are unable to recall where they were or whether they were with defendant at the times alleged in the Bills of Indictment; and

c. Any hope of learning the true identity of the individuals who committed this murder has been removed by the lapse of time.

6. Defendant has been available for interviews and to be arrested since he was imprisoned in Georgia on June 23, 1976. Raleigh, Wake County, and North Carolina law enforcement officers have known the defendant's whereabouts since June 23, 1976.

The principles of law respecting the violation of defendant's constitutional right to a speedy trial based on pre-indictment delay are fully set forth in *United States v. Lovasco*, 431 U.S. 783, 52 L.Ed. 2d 752 (1977), and have been applied by this Court in *State v. McCoy*, 303 N.C. 1, 277 S.E. 2d 515 (1981).

In *Lovasco*, the United States Supreme Court first reiterated its holding in *United States v. Marion*, 404 U.S. 307, 30 L.Ed. 2d 468 (1971), a case which considered the significance, for constitutional purposes, of a lengthy pre-indictment delay. The Court wrote:

> We held [in *Marion*] that as far as the Speedy Trial Clause of the Sixth Amendment is concerned, such delay is wholly irrelevant, since our analysis of the language, history, and purposes of the Clause persuaded us that only "a formal indictment or information or else the actual restraints imposed by arrest and holding to answer a criminal charge . . .

> engage the particular protections" of that provision. We went on to note that statutes of limitations, which provide predictable, legislatively enacted limits on prosecutorial delay, provide " 'the primary guarantee against bringing overly stale criminal charges.' " But we did acknowledge that the "statute of limitations does not fully define [defendants'] rights with respect to the events occurring prior to indictment," and that the Due Process Clause has a limited role to play in protecting against oppressive delay.

Id. at 788-89, 52 L.Ed. 2d at 758 (citations omitted).

The Court then stated that "the due process inquiry must consider the reasons for the delay as well as the prejudice to the accused." *Id.* at 790, 52 L.Ed. 2d at 759.

In determining whether the defendant in the present case is entitled to dismissal of the charges against him for violation of his constitutional due process right to a speedy trial, we must first consider the reasons for the pre-indictment delay. The record does not disclose what event initiated the State's further investigation of the case in 1981. It is clear, however, that the State's decision to postpone indictment until 1981 was sound. Apart from a statement made to law enforcement authorities by Larry Lumsden, there was, in 1975, no other evidence to connect this defendant to the crime. Defendant's inculpatory statements to Wiley, Hamilton, and Adams were not disclosed until 1981. Ms. Current was not interviewed until 1981. We can only speculate that defendant was perhaps a suspect in 1975, and due to the persistent efforts of law enforcement authorities, some inculpatory evidence was uncovered which ultimately led police to witnesses Wiley, Hamilton, Adams and Current in 1981.

In *Lovasco*, the United States Supreme Court wrote: "In our view, investigative delay is fundamentally unlike delay undertaken by the Government solely 'to gain tactical advantage over the accused' . . ." *Id.* at 795, 52 L.Ed. 2d at 762. In a pre-*Lovasco* case, this Court recognized the legitimacy of pre-indictment investigative delay, stating that "[t]he legitimate need to protect the existence of an ongoing undercover investigation from exposure has been frequently recognized by the federal courts as a reasonable justification for delay in bringing an indictment." *State v. Dietz*, 289 N.C. 488, 492, 223 S.E. 2d 357, 360 (1976).

On the question of pre-indictment investigative delay, we find that the rationale for the Court's decision in *Lovasco* bears particular relevance to the present case. Noting first that the "Due Process Clause does not permit courts to abort criminal prosecutions simply because they disagree with a prosecutor's judgment as to when to seek an indictment," the Court reasoned:

> It requires no extended argument to establish that prosecutors do not deviate from "fundamental conceptions of justice" when they defer seeking indictments until they have probable cause to believe an accused is guilty; indeed it is unprofessional conduct for a prosecutor to recommend an indictment on less than probable cause. It should be equally obvious that prosecutors are under no duty to file charges as soon as probable cause exists but before they are satisfied they will be able to establish the suspect's guilt beyond a reasonable doubt. To impose such a duty "would have a deleterious effect both upon the rights of the accused and upon the ability of society to protect itself." From the perspective of potential defendants, requiring prosecutions to commence when probable cause is established is undesirable because it would increase the likelihood of unwarranted charges being filed, and would add to the time during which defendants stand accused but untried. . . . From the perspective of law enforcement officials, a requirement of immediate prosecution upon probable cause is equally unacceptable because it could make obtaining proof of guilt beyond a reasonable doubt impossible by causing potentially fruitful sources of information to evaporate before they are fully exploited. And from the standpoint of the courts, such a requirement is unwise because it would cause scarce resources to be consumed on cases that prove to be insubstantial, or that involve only some of the responsible parties or some of the criminal acts. Thus, no one's interests would be well served by compelling prosecutors to initiate prosecutions as soon as they are legally entitled to do so.

United States v. Lovasco, 431 U.S. at 790-92, 52 L.Ed. 2d at 759-60 (citation omitted).

The Court then held that "to prosecute a defendant following investigative delay does not deprive him of due process, even if

his defense might have been somewhat prejudiced by the lapse of time." *Id.* at 796, 52 L.Ed. 2d at 763.

In *State v. McCoy*, 303 N.C. 1, 277 S.E. 2d 515, we first applied the principles enunciated in *Lovasco* and stated that in order to prevail on allegations of a constitutional due process violation of the right to a speedy trial, a defendant must show "that the delay actually prejudiced the conduct of his defense and that it was unreasonable, unjustified, and engaged in by the prosecution deliberately and unnecessarily in order to gain tactical advantage over the defendant." *Id.* at 7-8, 277 S.E. 2d at 522. On the record before us we can conclude only that pre-indictment delay was attributable to an ongoing investigation of the case. We therefore hold that the delay was reasonable, justified, and for legitimate purposes.

Defendant's only allegations of prejudice concern claims of faded memory and evidentiary difficulties inherent in any delay. As we stated in *State v. Dietz*, 289 N.C. at 493, 223 S.E. 2d at 361, "[h]ardly a criminal case exists where the defendant could not make these general averments of impaired memory and lost witnesses." We therefore hold that in balancing what can only be viewed on these facts as the State's legitimate decision to defer prosecution during an ongoing investigation of the case, against defendant's failure to show actual or substantial prejudice resulting from the delay, defendant's constitutional due process right to a speedy trial was not violated.

[2] As his second argument, defendant contends that the trial court erred in denying his Motion to Dismiss pursuant to G.S. § 15A-954(a)(3) on grounds that his motion contained only conjectural and conclusory allegations of possible prejudice or deliberate and unnecessary delay on the part of the prosecution. For the reasons stated in our discussion of defendant's first issue, we find no error. Defendant attempts to distinguish *State v. Dietz*, 289 N.C. 488, 223 S.E. 2d 357, by arguing that his allegations were more specific than those in *Dietz*; that the delay in the present case was considerably longer than that in *Dietz*; and the crimes in the present case are more serious than those in *Dietz*.

While it may be true that defendant's allegations in his motion are more specific than the *affidavit* filed in *Dietz*,[1] they nevertheless fall short of the factual allegations necessary to support his contentions of unnecessary and deliberate delay on the part of the prosecution, or of actual prejudice. The record does not support his conclusion that "the foundation of the State's case has been available to the State for approximately six years." Nor, as we have noted earlier, is there a basis in the record for his conclusion that "[t]here is no justifiable excuse for the State's delay in instituting these proceedings against the defendant." It is clear that delay was occasioned by an ongoing investigative process and defendant's motion fails to allege facts that would refute the evidence now of record or suggest otherwise. We agree, too, that the six and one-half year delay in prosecuting this defendant was considerably longer than the four and one-half month pre-indictment delay in *Dietz*. However, as we stated in *State v. McKoy*, 294 N.C. 134, 140, 240 S.E. 2d 383, 388 (1978), "it cannot be said precisely how long a delay is too long," but rather the courts must engage in a balancing test. Here defendant has made only general allegations of faded memory and lost witnesses. He has not indicated how he has been prejudiced by the additional length of the delay. Finally, we do not agree that defendant's cases, because they involve more serious crimes, are more deserving of dismissal. To the contrary, it would seem more appropriate, in the absence of a showing of actual prejudice, that our courts should consider dismissal in cases of serious crimes with extreme caution. We therefore agree with the trial judge that defendant failed to allege, with sufficient specificity, facts to support his Motion to Dismiss based on pre-indictment delay.

[3] Finally, we reject defendant's third argument that, based on the allegations in his motion, he was entitled to an evidentiary hearing. The trial court based its ruling on *State v. Dietz*, 289 N.C. at 494, 223 S.E. 2d at 361. In *Dietz* we quoted from *United States v. Pritchard*, 458 F. 2d 1036 (7th Cir. 1972), *cert. denied*, 407 U.S. 911 (1972), and stated:

> ". . . In the instant case the defendant's assertion of prejudice is a wholly conclusory allegation. No specific actual

1. We do not have the benefit of the motion filed in *Dietz*. The record does not disclose whether defendant here accompanied his motion with an affidavit.

prejudice is factually alleged. The rationale of *Marion* is equally applicable here. Mere 'delay' does not equate with 'actual prejudice.' And, defendant alleged nothing in his motion which entitled him to an evidentiary hearing on an issue of actual prejudice alleged to have resulted from the delay. His motion speaks only of a potential prejudice predicated on the pre-indictment delay itself. Moreover, no actual prejudice was shown at the ensuing trial."

Here, defendant's motion, as we have stated, contained no factual allegations which would merit further inquiry. Nor does the record before us reveal that an evidentiary hearing would have disclosed information favorable to defendant's position. In fact, based on testimony at trial, it became evident that defendant made no inculpatory statements to Adams until 1981, contrary to his allegation in the motion that "these alleged statements supposedly were made sometime in late 1975 or early 1976." The trial judge did not abuse his discretion in denying defendant an evidentiary hearing.

Having considered defendant's three arguments in support of his contention that his right to a speedy trial has been violated, we hold that the trial court did not err in denying the motion to dismiss based on pre-indictment delay.[2]

[4] Defendant assigns as error the trial court's denial of his motion for funds to hire a private investigator. In his motion defendant alleged that the delay in prosecuting the defendant "has rendered it impossible to properly prepare the defendant's defense," setting out as his reasons:

(a) It is now impossible for defendant to recall his exact whereabouts at the time the murder and robbery occurred;

(b) Since the defendant is being held without privilege of bond, it is impossible for him to locate potential witnesses or interview potential witnesses to determine where they were

2. Defendant's motion to dismiss also included allegations of a violation of his right to a speedy trial based on post-indictment delay. The record discloses no objection or exception taken to the trial court's findings of fact on this assignment. Defendant did not assign error on this question nor is it discussed in his brief. Our review of the record discloses no error.

or whether they were with defendant at the time alleged in the Bills of Indictment; and

(c) Upon information and belief the complexity of this case requires that the defendant have an investigator at his disposal with which to investigate the charges or mitigate guilt.

He also argued that "thousands of man hours" had been spent on his case by law enforcement authorities; and that counsel did not have sufficient time to adequately prepare his case without assistance. Defendant's motion, while arguably alleging that the services of a private investigator would be of some benefit to his defense, fails to demonstrate that "the State's failure to provide funds with which to hire an investigator substantially prejudiced his ability to obtain a fair trial." *State v. Parton*, 303 N.C. 55, 66, 277 S.E. 2d 410, 418 (1981). *See State v. Corbett*, 307 N.C. 169, 297 S.E. 2d 553 (1982). In *State v. Gray*, 292 N.C. 270, 277, 233 S.E. 2d 905, 911 (1977), we recognized that "the assistance of an expert or private investigator or both would be, generally, welcomed by all defendants and their counsel as an added convenience to the preparation of a defense. We must, however, also recognize that it is practically and financially impossible for the state to give indigents charged with crime every jot of advantage enjoyed by the more financially privileged." (Citation omitted.) The decision whether to provide a defendant with an investigator is a matter within the discretion of the trial judge and will not be disturbed on appeal absent a showing of abuse of that discretion. *State v. Parton*, 303 N.C. 55, 277 S.E. 2d 410. We hold that the trial judge did not abuse his discretion in denying defendant's motion for funds to hire a private investigator.

[5] Defendant next contends that the trial judge erred in its ruling on defendant's motion requesting an *in camera* inspection of evidence in the State's possession. Defendant cites as authority *State v. Hardy*, 293 N.C. 105, 235 S.E. 2d 828 (1977). The trial judge granted the motion to the extent that it agreed to "review statements of the witnesses and make appropriate findings as witnesses are presented." Defendant now argues that "[a] reading of the Transcript indicates that this statement by the trial judge was the only ruling on the Motion in question," and that to de-

fendant's knowledge "the trial judge never reviewed any statements of witnesses who testified in the trial." Defendant also argues that he has no knowledge of any statements being placed in sealed envelopes for appellate review.

It is clear from the record that the State voluntarily provided defense counsel with prior statements of the testifying witnesses following their direct examination. With respect to the one statement which the State did not voluntarily provide, the trial judge ruled as follows:

> Let the record show that the court has reviewed in camera two pages bearing Raleigh Police Department supplemental offense report No. 192136, dated May 12, 1975, and one page bearing Raleigh Police Department supplemental offense report, dated May 6, 1975, and based upon its review the court finds that the supplemental reports above identified are not inconsistent with the witness's testimony and concludes that the defense counsel are not entitled to copies of the report. The court directs that copies of the reports be placed in an envelope and sealed for appellate review. Neither do they appear to be exculpatory and the court concludes not entitled to copies of them.

The excluded evidence was sealed and placed in the record for appellate review. Upon our examination of the statement, we hold that the trial judge's ruling was proper.

The record therefore reflects that the trial court fully complied with the mandates of *State v. Hardy* and G.S. § 15A-904(a).[3] *See State v. Waters*, 308 N.C. 348, 302 S.E. 2d 188 (1983).

Defendant also contends that the trial court erred in failing to conduct an *in camera* inspection of all physical evidence in the State's possession. At trial the defendant had a full opportunity to examine the physical evidence, to request reports, and to cross-examine investigating officers. Our review of the record discloses no suggestion that the State withheld information or evidence favorable to the defendant. Certainly the trial judge is not re-

3. *See State v. Jean*, 310 N.C. 157, 311 S.E. 2d 266 (1984), which sets out fully the amendment to G.S. § 15A-903 respecting discovery procedures for statements of State's witnesses.

quired to engage in a speculative *in camera* judicial assessment and analysis of all the evidence gathered in preparation for a criminal prosecution. This assignment of error is overruled.

[6] Finally defendant contends that the trial judge erred in permitting Detective Holder to be recalled as a witness for the State. Detective Holder was first called by the State to testify concerning his observations at the crime scene. Following his testimony, SBI Agent Jones testified that footprints found at the scene were made by canvas-type tennis shoes. The defense attempted, through cross-examination of several witnesses who were at the scene, to suggest that the footprints were made by investigating personnel. Detective Holder was then recalled to testify whether any investigating officer at the crime scene was wearing tennis shoes. At this time he was also permitted to corroborate the testimony of previous witnesses. Later Detective Holder was again recalled to corroborate the testimony of a witness who had just testified. We find no error in allowing Detective Holder to be recalled to testify concerning these matters.

This Court has long recognized that the trial court has the discretion to allow either party to recall witnesses to offer additional evidence, even after jury arguments. *State v. Anderson*, 281 N.C. 261, 188 S.E. 2d 336 (1972). *See* G.S. § 15A-1226(b).

The trial judge has the power and the duty to supervise and control the trial, including examination and cross-examination of witnesses. *State v. McDougall*, 308 N.C. 1, 301 S.E. 2d 308 (1983). The manner and presentation of evidence is largely in the discretion of the trial judge and his control of the case will not be disturbed absent a manifest abuse of discretion. *State v. Harris*, 308 N.C. 159, 301 S.E. 2d 91 (1983). We hold that the trial judge acted well within his discretion in permitting Detective Holder to be recalled and questioned.

Our review of the trial transcript and record on appeal discloses that defendant has been ably represented at trial and on appeal. He received a fair trial free of prejudicial error.

No error.

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

STATE OF NORTH CAROLINA v. THEODORE MORRIS FOUST

No. 624A83

(Filed 6 July 1984)

1. **Criminal Law § 50.1— expert testimony—percentage of synthetic fibers which are rayon—admission of testimony as harmless error**

In a prosecution for a sexual offense in which an expert in fiber analysis and identification testified that fibers from defendant's bedspread and from the victim's clothing contained rayon, the admission of testimony by the expert that, based on 1979 statistics, less than six and one-half percent of all man-made textile fibers produced in the United States have rayon in them, if erroneous, was not prejudicial where the witness had previously testified without objection that "based upon my experience, the use of polyester is quite common, but the use of rayon is becoming more and more less common"; the overall implication of the expert's testimony was that the fibers from the clothing came from a bedspread using the same materials; and there was other overwhelming evidence of defendant's guilt.

2. **Criminal Law § 102.8— jury argument that State's evidence was uncontroverted or uncontradicted—no comment on failure of defendant to testify**

The prosecutor did not improperly comment on defendant's failure to testify when he made repeated references to the fact that the evidence presented by the State was "uncontroverted" or "uncontradicted" where much of the State's evidence was theoretically contradictable by testimony of persons other than defendant, and the prosecutor's argument was directed at defendant's failure to offer evidence to rebut the State's case. Furthermore, any prejudice from the remarks was removed by the trial court's instructions on defendant's right not to testify.

3. **Criminal Law § 126; Rape and Allied Offenses § 6— sexual offense—instruction in disjunctive—no denial of unanimous verdict**

A defendant convicted of a first-degree sexual offense was not denied his right to a unanimous verdict by the trial court's instruction that the jury should return a verdict of guilty if they found beyond a reasonable doubt, *inter alia*, that defendant engaged in "oral sex or anal sex with the victim" where the trial court's other instructions obviously required a verdict of not guilty if all twelve jurors were not satisfied beyond a reasonable doubt that defendant participated in either fellatio or anal intercourse, or both, with the victim, and the evidence amply sustained a conviction for either or both of those offenses. However, it is the better practice that trial judges in cases involving first or second-degree sexual offenses submit separate issues of each unlawful sexual act if more than one act exists.

ON appeal by defendant as a matter of right from the judgment of *Long, Judge*, entered at the 5 August 1983 Criminal Session of GUILFORD County Superior Court, imposing a life sentence

for first-degree sexual offense and twenty-five years for first-degree kidnapping, with the sentences to run consecutively. We allowed defendant's motion to bypass the North Carolina Court of Appeals on the kidnapping conviction.

In relevant part, the evidence for the State tended to show that on 3 July 1982, an eighteen year old named John lived with his mother in Elon College, North Carolina. In the early hours of the morning, John, his mother and his grandparents drove to the Farmer's Curb Market in Greensboro to sell their produce. When they arrived at the Farmer's Market, John helped his mother and grandparents unload their truck.

After unloading the truck, John walked a couple of blocks to buy a soda from a drink machine. As he was returning, a black male, approximately six feet tall, wearing shorts and a tank top, walked passed John, grabbed him around the neck and stuck a gun in his back. John was ordered at gunpoint to a brick two-story house located next to a loan company in the 500 block of Summit Avenue and forced to enter the unlocked back door. Once inside, they climbed the stairs, turned left and walked down a long hall to a padlocked door with the number "7" on it. The man unlocked the door and ordered John inside.

John first observed a small narrow hallway containing a refrigerator, stove, two bicycles and a bathroom. The apartment was a one room apartment. The bed was across the room from the hallway. Next to the bed was a coffee table with a digital clock and a black light lamp on it.

At this point the assailant ordered John onto the bed. John turned around and for the first time observed the man, whom he later identified as the defendant. He ordered John to undress. John replied that he did not want to undress, but the man threatened to kill him unless he obeyed. The man inquired as to John's name and then stated that his name was "Ted."

After John removed his clothes he was forced to lie on his stomach. His hands were tied behind his back and the gun was placed on the coffee table adjacent to the bed. John later described it as a .45 caliber pistol.

Using cream as a lubricant, the defendant performed anal intercourse on John for a period of five to ten minutes. After this

assault, the sodomist ordered John to perform fellatio on him. When John refused, the man, who in the meantime had picked up the pistol, told him that he would kill him if he did not comply. Defendant cocked the pistol and began to count to three. John succumbed and began to perform. Then the assailant performed fellatio on the frightened victim. When this assault was completed John was untied and told to get dressed.

As John dressed, the defendant told him, "You don't know me, you don't know what I look like and you don't know where I live." Under the circumstances, John agreed. John was then led at gunpoint out of the apartment, down the front stairs and out the front door. Once outside, the defendant asked John if he wanted any liquor or drugs. John refused and was allowed to leave. He ran back to the Farmer's Market where his mother and grandparents were waiting.

After informing his mother of the assault, she drove him to the police station. There John related to Officer Simmons what had occurred and directed her to the defendant's apartment. He later described the assault in detail to Officer Ingold, who escorted him to the hospital. At the hospital John was examined and a rape kit was prepared.

The swabs and smears in the rape kit were later examined by F.B.I. Agent McInnis, a serologist. Agent McInnis testified that he examined two anal smears taken from the victim. On one of the slides he found evidence of semen. He found no semen on the other slide and no semen on either of the anal swabs.

The victim was examined by Dr. Nelson and interviewed by Officers Ingold and Lee. John gave the officers a complete statement of the incident which was substantially consistent with his trial testimony. John also gave the officers a description of the inside of the apartment and of the clothes the defendant was wearing. He was then taken to the police station where he was shown a photo-array. John identified the defendant's picture as the perpetrator of the crimes. Shortly thereafter, the defendant was arrested and taken to the police department.

Defendant was questioned, after being advised of his rights and a waiver of rights was obtained. He denied knowing anything about the assault. He stated that no one had been in his apart-

ment that night or morning. The defendant consented to a search of his apartment and accompanied the officers to Apartment #7.

The defendant opened the apartment door for the officers. Photographs of the apartment were taken and other evidence collected. Inside the apartment, Officer Michaels seized a white rag, a pair of black gym shorts inscribed with the name "Greensboro Public Schools" and a blue mesh tank top. A Vaseline jar was found on the floor between the bed and the coffee table. The lamp on the table near the bed contained a black light bulb. The police also seized a brown bedspread from the unmade bed as well as a Marksman Repeater pistol with a slide action top mounted on a .45 caliber frame which was found in a travel bag.

The bedspread seized from the defendant's apartment was sent to the F.B.I. laboratory for fiber analysis. Agent Chester Blythe testified that he examined the victim's belt, blue jeans, shirt and underwear and found brown fibers on them. After comparing these brown fibers and the bedspread fibers, Agent Blythe determined that the dyes in the fibers were identical and that both were composed of polyester and rayon fabrics. Over the defendant's objection, Agent Blythe was permitted to testify that based on some 1979 statistics, less than six and one-half percent of all man-made textile fibers produced in the United States have rayon in them. Based on the microscopic analysis that he conducted on the fibers from the bedspread and fibers found on the victim's clothes, it was Agent Blythe's opinion that the fibers on the victim's clothes could have originated from the defendant's bedspread.

Defendant offered no evidence. Judge Long instructed the jury on first-degree sexual offense and first-degree kidnapping. No lesser included offenses were submitted to the jury. The jury found the defendant guilty of both offenses and the defendant was sentenced to life imprisonment for first-degree sexual offense and a consecutive term of twenty-five years for first-degree kidnapping.

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

Attorney General Rufus L. Edmisten by Special Deputy Attorney General Isham B. Hudson, Jr., for the State.

Assistant Appellate Defender Ann B. Petersen, for the defendant.

COPELAND, Justice.

Defendant brings forward three assignments of error which he contends require a new trial. We disagree and affirm the sentences imposed.

[1] Under the first assignment, the defendant contends that the court erred in permitting the State to introduce evidence concerning the percentage of rayon fibers produced in the United States, on the grounds that such evidence was inadmissible hearsay as well as irrelevant.

As part of its case in chief, the State presented testimony from F.B.I. Special Agent Blythe, who had been qualified as an expert in the field of hair and fiber analysis and identification. As stated earlier the Agent opined that the fibers found on the victim's clothes could have originated from the defendant's bedspread. Defense counsel objected to the following testimony elicited by the prosecutor on direct examination:

> Q. Have you done any comparison, checking in light of your duties and responsibilities as a fiber analyst into the amount of use of rayon in fabrics?
>
> A. Yes, sir, I have.
>
> Q. And do you have an opinion based on your research and investigation into this matter as to how commonplace the use of rayon fabric is in the textile industry?
>
> MR. HARRELSON: Objection.
>
> THE COURT: On grounds of expertise?
>
> MR. HARRELSON: Yes. He said he did some checking, but he hasn't shown what extent it was done.
>
> MR. COMAN: Does he want to ask him about the research?
>
> MR. HARRELSON: I don't want to ask him about anything. I think the burden is on you.

THE COURT: Well, the objection is overruled. The Court holds he is in a better position than the jurors to form such an opinion.

BY MR. COMAN:

Q. Go ahead, Agent Blythe.

A. I did some checking of data that we have in the FBI Laboratory concerning the use of both polyester and rayon fibers as are in relation to the production of these synthetic fibers in the United States.

Q. All right. What would that percentage be?

MR. HARRELSON: Objection.

THE COURT: Overruled.

You may answer, if you know.

THE WITNESS: Based on the latest information which I could find—This is 1979 statistics—Rayon comprised slightly less than six and a half percent of all the man-made textile fibers produced in the United States.

The defendant argues that the challenged testimony misled the jury by giving them the impression that since rayon is seldom used, the fact that the fibers from the bedspread and from the victim's clothes contained rayon was highly significant to the defendant's guilt. Defendant reasons that the State wanted to show that while the tests performed by Agent Blythe were inconclusive, there was a high probability that the fibers found on the victim's clothing did in fact originate from the bedspread. The defendant concludes that the State accomplished its goal when the agent was permitted to testify with regard to the actual percentage of rayon in American made textile fibers.

The record discloses that prior to the objected testimony being offered, Agent Blythe testified, without objection, that "[b]ased upon my experience, the use of polyester is quite common, but the use of rayon is becoming more and more less common." Further, the overall implication gathered from the agent's testimony was that the fibers from the clothes came from a bedspread constructed using the same materials.

Assuming, arguendo, that the challenged testimony was improperly admitted into evidence, we believe the defendant has failed to show actual prejudice. An erroneous admission of evidence is prejudicial, or reversible error if "there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at trial . . ." N.C. Gen. Stat. § 15A-1443(a); *See: State v. Corbett*, 307 N.C. 169, 297 S.E. 2d 553 (1982) and *State v. Wood*, 306 N.C. 510, 294 S.E. 2d 310 (1982), *later app.*, 310 N.C. 460, 312 S.E. 2d 467 (1984).

Given the overwhelming evidence against the defendant, it is clear that the error, if any, was harmless. Accordingly, defendant is not entitled to relief from this assignment of error.

[2] Defendant next contends that his constitutional rights were violated during the State's final argument by the prosecutor improperly commenting on defendant's failure to testify. The prosecutor made repeated references to the fact that the evidence presented by the State was "uncontroverted" or "uncontradicted." Defendant construes the prosecutor's remarks as a comment on the defendant's failure to testify. We do not agree with this contention.

Under the Fifth and Fourteenth Amendments, the defendant has a right to remain silent, thus any comment by the prosecutor on the defendant's failure to take the stand and testify is impermissible. *Griffin v. California*, 380 U.S. 609, 14 L.Ed. 2d 106, *reh. den.*, 381 U.S. 957 (1965); *State v. McCall*, 286 N.C. 472, 212 S.E. 2d 132 (1975), *later app.*, 289 N.C. 512, 223 S.E. 2d 303, *vacated in part*, 429 U.S. 912, 50 L.Ed. 2d 278 (1976). However, the State may, in its closing argument, properly bring to the jury's attention the defendant's failure to produce exculpatory evidence or to contradict the State's evidence. *State v. Jordan*, 305 N.C. 274, 280, 287 S.E. 2d 827, 831 (1982); *State v. Williams*, 305 N.C. 656, 675, 292 S.E. 2d 243, 255, *cert. den.*, 459 U.S. 1056, 74 L.Ed. 2d 622 (1982). We interpret the challenged arguments of the prosecutor to be directed at the defendant's failure to offer evidence rebutting the State's case rather than directed at his failure to take the stand. Defendant asserts that since the defendant was the only available witness who could have contradicted the State's evidence, the prosecutor's comment must be construed as a comment on the defendant's failure to testify. In evaluating a prosecu-

tor's argument that the State's case was "uncontradicted," we do not consider the unavailability of witnesses for the defense to be a determinative factor. This is not a case where evidence, necessary to contradict that of the State, would have to come from the defendant himself. Here, the State's evidence consisted of considerably more than the victim's testimony of what happened. There was testimony involving, for example, the fibers found on the victim's clothing and the results of the physical examination made of the victim. There was evidence relating to the victim's conversation with his mother immediately after the assault, the victim's statement to investigators, and various items allegedly found in defendant's apartment. Much of this evidence was theoretically contradictable by testimony of persons other than defendant. For this reason, the prosecutor's arguments do not constitute a comment on defendant's failure to testify.

The record reveals that defense counsel did not object to any of the prosecutor's argument concerning the State's "uncontroverted" evidence. However, in his closing argument he carefully, and effectively we believe, reminded the jury that the State had the burden of proving each and every element of the crimes charged. The trial court, in its charge to the jury, instructed that a defendant is presumed to be innocent and that the burden of proof was on the State. Any alleged prejudice that may have resulted from the challenged remarks, were removed by the judge's additional instructions:

> In this case, the defendant has not testified. The law of North Carolina gives him this privilege. This same law also assures him that his decision not to testify creates no presumption against him. Therefore, his silence is not to influence your decision in any way.

This assignment of error is overruled.

[3] As his third assignment of error, defendant challenges the trial court's instructions on the offense of first-degree sexual offense. He contends that these instructions deprived him of his right to a unanimous verdict, by permitting the jury to return a verdict of guilty without being unanimous about which particular criminal act defendant committed.

The indictment charged the defendant with unlawfully engaging in a sexual act with the prosecuting witness, without specifying what act was performed. The State's evidence tended to show the commission of two distinct offenses of first-degree sexual offense, to wit, anal intercourse and fellatio.

The trial judge instructed that the State was required to prove four elements beyond a reasonable doubt, the first being that a sexual act occurred. A sexual act was explained as meaning oral sex or anal intercourse. After properly advising the jury as to the remaining three elements, the trial judge then instructed that the jury must return a verdict of guilty if they found that the defendant engaged in "oral sex or anal sex" with the victim and if they found all the other elements of first-degree sexual offense.

It appears, from a disjunctive reading of the trial court's charge, that such instructions would allow the jury to return a guilty verdict if they found that defendant committed either of the distinct offenses, without requiring that all twelve members agree as to the guilt on at least one of the offenses. Defendant argues that possibly six of the jurors could have found him guilty of anal intercourse, while the remaining six jurors could have found him guilty of the act of oral sex. Thus, under these circumstances, there would be no unanimity among the jurors as to the specific crime committed.

However, the trial judge continued his charge to the jury on the sexual offense with the following instruction:

> 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.

The trial court clearly informed the jurors that they must agree on all the elements before a verdict of guilty could be reached. However, immediately thereafter, the jury was given instructions on the requirement of unanimity.

> Your verdicts must be unanimous. You may not take a vote by majority, but all twelve of the retiring jurors must agree as to what your verdict will be in each case. . . . It is your duty to reason together with your fellow jurors, to discuss

the evidence at some length until you feel there is some consensus about the facts . . .

These instructions, when read as a whole, obviously required a verdict of not guilty if all twelve jurors were not satisfied beyond a reasonable doubt that the defendant participated in either fellatio or anal intercourse, or both. We believe the evidence amply sustains a conviction for either or both offenses. Nothing in the record indicates any confusion, misunderstanding or disagreement among the jury members regarding the unanimity of the verdict. The convincing inference is that the jury unanimously agreed that defendant engaged in both oral and anal sex.

This Court has considered a similar argument in *State v. Hall*, 305 N.C. 77, 286 S.E. 2d 552 (1982). There the bill of indictment charged the defendant with one count of armed robbery involving the taking of personal cash from the gas station attendant and from the gas station. The State's evidence that the defendant took both the money belonging to the attendant and the property of the gas station owner, resulted in defendant's conviction. The defendant argued that the failure of the trial court to instruct the jury that it must unanimously find that defendant committed both takings was error. We found defendant's contention that this instruction deprived him of his right to a unanimous verdict unpersuasive.

Although we are satisfied that the defendant, in this case, was not deprived of his right to a unanimous determination of his guilt, it is the better practice that trial judges in cases involving first or second-degree sexual offenses, submit separate issues of each unlawful sexual act if more than one act exists. This procedure would eliminate any possible confusion or claim of error with respect to the jury's verdict as to the particular transaction that constituted the unlawful sexual act. We recommend that in the future trial judges abide by this practice of submitting separate issues.

We have carefully examined all the assignments of error and conclude that no prejudicial errors were committed.

Accordingly, we find no error.

No error.

ERASTUS JONES DURHAM v. QUINCY MUTUAL FIRE INSURANCE COMPANY

No. 519PA83

(Filed 6 July 1984)

1. **Insurance § 122— fire insurance—exclusion of evidence relating to possible motive for plaintiff burning home—no error**

In an action on a fire insurance policy issued by the defendant to plaintiff and his wife, the trial court did not err in excluding conjectural and remote evidence concerning plaintiff's wife's desire to have possession of the home after plaintiff and his wife separated. Defendant did not establish that plaintiff had any knowledge, prior to the fire, of plaintiff's wife's desire to have possession of the house, and any relevance of the evidence was clearly outweighed by the potential of the evidence to confuse and mislead the jury.

2. **Appeal and Error § 31— no objection at trial to jury instructions—error for Court of Appeals to consider issue**

Where defendant did not take any exception to the jury instructions nor make any assignment of error to the jury charge as given, it was error for the Court of Appeals to consider the issue of the jury instructions. App. 10(b)(2).

3. **Evidence § 19— exclusion of evidence concerning similar fire—no error**

The trial judge properly excluded evidence that about ten years prior to the fire relative to this appeal, plaintiff and his wife were separated and another fire loss occurred in property they jointly owned. Any possible relevance of plaintiff's actions ten years ago was far outweighed by the unwarranted prejudice the evidence could produce.

4. **Trial § 33.1— failure to submit as issue to jury plaintiff's failure to submit to "examinations under oath"—no error**

The trial court properly failed to submit an issue to the jury of whether plaintiff failed to submit to an examination under oath by defendant pursuant to G.S. 58-176(c) where the facts disclosed that plaintiff complied with the policy requirements pertinent to that statute.

5. **Trial § 33.1— no abuse of discretion in failure to submit issue to jury**

In an action on a fire insurance policy, the trial court did not abuse its discretion in failing to submit as an issue to the jury whether plaintiff increased the hazard of loss in breach of the policy since there was no evidence that plaintiff intentionally increased the hazard of loss. G.S. 1A-1, Rule 49(b).

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

ON discretionary review upon plaintiff's petition, pursuant to N.C.G.S. 7A-31, of the decision of the Court of Appeals, 63 N.C. App. 700, 306 S.E. 2d 499 (1983), setting aside the judgment in

favor of plaintiff entered by *McConnell, J.*, at the 3 May 1982 session of Superior Court, FORSYTH County. Heard in the Supreme Court 10 May 1984.

This is an action on a fire insurance policy issued by the defendant to plaintiff and his wife insuring their house located at 1750 Reynolda Road, Winston-Salem. On 13 January 1977, the house was destroyed by fire. At that time, Mr. and Mrs. Durham had been living separate and apart for about four months.

On 27 June 1978, plaintiff brought suit seeking recovery of the full policy limits of $80,000 for the dwelling, $40,000 for the contents, and $600 for additional living expenses. The defendant filed answer, admitting the policy but denying liability, alleging (1) plaintiff had failed to submit to an examination under oath, a condition in the policy, and (2) plaintiff himself intentionally set the fire.

The case came on for trial before Judge McConnell during the 3 May 1982 session of superior court, the parties stipulating that the liability issue should be severed and tried first. The only issue submitted to the jury was: "Was the fire intentionally caused by the plaintiff, E. J. Durham?" The jury answered this issue no. Judge McConnell thereupon entered a judgment against defendant on the question of liability, reserving the issue of damages for a later trial. The parties stipulated as to damages, and a judgment in the sum of $53,576.73 was entered upon the stipulation by Judge Albright in June 1982.

The Court of Appeals ordered a new trial. That court held: (1) Judge McConnell erred in excluding certain evidence which it found relevant to plaintiff's possible motive for setting the fire; (2) Judge McConnell misstated the substance of a witness's testimony in his instructions to the jury.

This Court granted plaintiff's petition for discretionary review on 6 March 1984.

Morrow and Reavis, by John F. Morrow, for plaintiff appellant.

Womble, Carlyle, Sandridge & Rice, by Allan R. Gitter and Richard T. Rice, for defendant appellee.

MARTIN, Justice.

We have examined all of the errors assigned by the defendant and, in particular, the two errors upon which the Court of Appeals has based its decision to award the defendant a new trial, and we reverse. For reasons which follow, we conclude that the trial of this case and the judgment entered thereupon must be sustained.

[1] The defendant fire insurance company attempted to show at trial that a possible motive for plaintiff's intentionally setting the fire arose out of an ongoing dispute between plaintiff and his estranged wife, in which Mrs. Durham was insisting that she be awarded possession of the marital residence.

On cross-examination, plaintiff testified as follows:

> Q. Sometime before this loss on January thirteen, 1977, have you ever made a statement to anyone that you would make sure that your wife wouldn't get possession of that house?
>
> A. No sir, not that I recall. She said she didn't want the house; that it was too much upkeep; that she wanted something that was not so much upkeep.
>
> And I had never asked any attorney when I had been informed that when a woman left a man deliberately, that the law had been changed, and that she would not get the house. And she had never asked for the house at that time.
>
> And I did find something later on where she did ask for the house, after the fire. Now, I could have been telling her this and they got the idea, but, as I say, she would never live there any more, definitely out of the blue sky, I don't ever recall having that talk. Mrs. Bennett, myself, we talked about something like that. She's the one that telling me what my ex-wife said; she didn't want the house.
>
> Q. Who is Mrs. Bennett?
>
> A. Annie Bennett is all I know. She's a friend of my—mine and my wife.

To rebut this testimony and to establish that plaintiff's wife had demanded possession of the house *before the fire*, defendant

called Mrs. Durham as a witness. In the presence of the jury, the following transpired:

> Q. (By Mr. Gitter, continuing) Have you, at any time prior to the fire that occurred on January 13, 1977, made a demand upon Mr. Durham for possession of the house on Reynolda Road so that you could live in—separate and apart from him?
>
> THE COURT: You can answer that.
>
> THE WITNESS: I had not made a demand in Court yet; but—
>
> MR. MORROW: Objection.
>
> THE COURT: Objection sustained. I don't know what she meant.
>
> . . . .
>
> Q. Did you ever have any conversation with Mr. Durham about possession of the house prior to the fire?
>
> A. No.

In the absence of the jury, defense counsel sought to introduce a document in connection with a 1976 divorce action instituted by Mrs. Durham against plaintiff: "All I'm trying to show is, Your Honor, in connection with this action that was instituted for divorce by Mrs. Durham against Mr. Durham that in connection with that, she had made demand for possession of the home of the parties."

There followed this exchange between Mrs. Durham and defendant's attorney:

> And upon looking at the order, does the order not further state that it is upon motion of the plaintiff for alimony pendente lite possession of the home of the parties, custody of the minor child born to the marriage, child support and attorneys fees?
>
> A. That's what it says, but, I—I couldn't remember all the details.
>
> . . . .

Q. (By Mr. Gitter, continuing) And, after seeing it here, does that refresh your recollection?

A. Yes.

Q. And did you, in connection with this proceeding, make a demand for possession of the home?

A. I don't know. I've been through too many hearings to really know.

Defense counsel then sought to introduce, still out of the presence of the jury, a copy of the verified complaint from a divorce proceeding initiated by Mrs. Durham ten years earlier in 1966, in which she did make a specific demand for possession of the Reynolda Road dwelling house. The Durhams were reconciled before any order was entered in that action. Defendant's attorney then returned to the 1976 divorce action upon which the defendant's motive theory in this case rests:

Q. And in connection with the action that your attorneys then filed in 1976 after your second separation, did you inform your attorneys that you wanted possession of the house?

A. Yes. I wanted possession of the house because I had a minor child.

Q. And that's the reason that you wanted to have possession of the house here on Reynolda Road?

A. (The witness nods her head up and down.)

When Judge McConnell repeated his decision to sustain plaintiff's objection to the introduction of this testimony, counsel for the plaintiff noted the following:

I appreciate your sustaining my objection. They have read from the order that you know, your official paragraph—this cause coming on to be heard—refers to, of course, possession of the house, and they are using that to refresh this lady's recollection which would be improper; but I would like to point two things out for the Court.

The complaint in this file which, of course, was sworn to by her and verified, does not request possession of the house

> in any manner, nor does the notice of hearing that's contained in this file and, you know, maybe one of those could be used to refresh her recollection if they laid a proper groundwork for that, but obviously it's to the contrary and I would like to point that out just for the record.
>
> THE COURT: Well, I'm not going to let that in. I think it's going too far afield.

Judge McConnell's exclusion of this testimony was lawful and proper. The record above reveals that even a number of promptings by defense counsel did not help Mrs. Durham to remember whether she had sought possession of the home in the 1976 divorce action, prior to the fire. In the presence of the jury, she denied having any conversation with Mr. Durham about possession prior to the fire. Furthermore, our review of the exhibits in this matter confirms that specific mention of the Reynolda Road house appears nowhere in any of the documents related to the 1976 divorce proceedings. Mrs. Durham did not ask for possession of the home in her verified complaint. Reference to "the home of the parties" in the introductory form-paragraph of the order in no way merits the significance argued by defendant.

Because the defendant did not establish that plaintiff had any knowledge, prior to the fire, of Mrs. Durham's desire to have possession of the house, the proffered testimony was far too conjectural and remote to give rise to motive. Any relevance is clearly outweighed by the potential of this evidence to confuse and mislead the jury. *See* 1 Brandis on North Carolina Evidence §§ 77, 78, and 83 (1982).

> No fact or circumstances in any way connected with the matter in issue or from which any inference of the disputed fact can reasonably be drawn ought to be excluded from the consideration of the jury. On the other hand, such facts and circumstances as raise only a conjecture or suspicion ought not to be allowed to distract the attention of juries from material matters.

Pettiford v. Mayo, 117 N.C. 27, 28, 23 S.E. 252, 253 (1895).

Although evidence of motive is relevant on the issue of the origin of the fire, *State v. Edmonds*, 185 N.C. 721, 117 S.E. 23 (1923), the evidence excluded does not tend to show a motive on the part of plaintiff. The private desires of Mrs. Durham, uncom-

municated to plaintiff, fail to establish such motive. The Court of Appeals erred in holding this evidence was improperly excluded.

[2] The Court of Appeals also based its decision to award a new trial on findings regarding a second issue, as follows:

> The court erred in its charge to the jury both by misstating the substance of Mrs. Durham's testimony and by relaying its assumption as to what was meant by the testimony. It is the function of the jury, not the judge, to interpret testimony and it is error for the court to state its assumptions as to the meaning of testimony.

63 N.C. App. at 704, 306 S.E. 2d at 502.

We agree with the plaintiff that it was error for the Court of Appeals to consider the issue of the jury instructions in this case. No objection was made at trial to any portion of the jury instructions. Defendant did not take any exception to the jury instructions. Defendant did not make any assignment of error to the jury charge as given. In order to preserve an issue for appellate review, there must be an exception in the record and the exception must be brought forward in an appropriate assignment of error. N.C.R. App. P. 10. Otherwise, no question is presented to the appellate court. *State v. McMorris*, 290 N.C. 286, 225 S.E. 2d 553 (1976). Where a portion of the charge is challenged, it must be identified in the record on appeal by clear means of reference. N.C.R. App. P. 10(b)(2). Defendant has failed to so do. Nor has defendant complied with the other requirements of App. R. 10(b)(2).

Although the issue of "plain error" arose in the oral argument of this appeal, defendant did not argue in its brief that the Court should apply the doctrine in considering the instructions to the jury. Heretofore, this Court has limited the application of the plain error doctrine to appeals in criminal cases, and we decline to apply it in appeals in civil cases. *See State v. Odom*, 307 N.C. 655, 300 S.E. 2d 375 (1983).

Defendant failed to properly present this issue to the Court of Appeals and to this Court. The rules of appellate procedure are mandatory and we decline to consider the argument. *Craver v. Craver*, 298 N.C. 231, 258 S.E. 2d 357 (1979).

Defendant argues other assignments of error which were presented to but not discussed by the Court of Appeals. We find no prejudicial error in these assignments.

[3] Defendant first argues that the trial court erred in excluding evidence defendant contends shows that about ten years prior to this fire, plaintiff and his wife were separated and another fire loss occurred in property they jointly owned. Defendant offers this evidence to show plan or design on the part of plaintiff. We are not required to resolve the issue of whether prior acts of a party can be admitted in a *civil* case to show plan or design. 1 Brandis, *supra*, § 92. *See* N.C.R. Evid. 404(b) (effective 1 July 1984). We hold that any possible relevance of plaintiff's actions ten years ago is far outweighed by the unwarranted prejudice the evidence would produce. *Electric Company v. Dennis*, 259 N.C. 354, 130 S.E. 2d 547 (1963); 1 Brandis, *supra*, § 80. The trial judge properly excluded this evidence.

We find no evidence in the record to justify defendant's argument that the trial court committed prejudicial error by communicating to the jury an attitude antagonistic to defendant's case. Defendant relies on the following actions by the trial judge in support of this argument. The trial court did not formally declare witnesses Holcomb, Spillman, or Zwick to be experts. It is not necessary for a trial judge to declare a witness to be an expert. 1 Brandis, *supra*, § 133. This is especially true where, as here, the opposing party concedes that the witness is an expert. *See State v. Perry*, 275 N.C. 565, 169 S.E. 2d 839 (1969). The court's questions to the witness Zwick were for clarification purposes and displayed no antagonistic attitude. The trial judge's response, "You are right. Let's move on," to counsel's statement that he believed that a witness had answered a question did not manifest an antagonistic attitude by the judge. Rather, it showed his commendable efforts to keep the trial moving forward. Alone or together, we find no error in these arguments by defendant.

[4] Defendant contends the trial court erred in failing to submit an issue to the jury of whether plaintiff failed to submit to an examination under oath by defendant. The statute, N.C.G.S. 58-176(c), and the policy in question required plaintiff to submit to "examinations under oath." The evidence discloses that plaintiff went to the office of defendant's attorney and found that an ex-

amination under oath, a deposition, had been scheduled for that time. Plaintiff told defendant's counsel that plaintiff should have his lawyer present. Defendant's counsel readily agreed, and the deposition did not proceed. Following negotiations by counsel, defendant did proceed with the deposition and plaintiff submitted to the examination under oath. Defendant argues strenuously, but the facts disclose that plaintiff complied with the policy requirements in submitting to the examination under oath. The fact that the examination was delayed was not attributable entirely to plaintiff; both plaintiff and defendant were responsible for the delay. The examination under oath had been held, and the trial court properly refused to submit this issue.

[5] The defendant originally requested an issue substantially as that submitted by the trial judge: "Was the fire intentionally caused by the plaintiff, E. J. Durham?" Thereafter, defendant requested an issue of whether plaintiff increased the hazard of loss in breach of the policy.

There is no evidence that plaintiff intentionally increased the hazard of loss. Plaintiff's evidence indicated that the fire resulted from an electric toaster oven that was not unplugged from the electrical source. Negligence by an owner is not an increase of the hazard within the meaning of the policy. *Whitehurst v. Fay. M. Insurance Co.*, 51 N.C. 352 (1859); 18 Couch on Insurance 2d § 74:658 (rev. ed. 1983). Defendant's contention at trial was that plaintiff set the fire. This issue was submitted to and answered by the jury. The form of the issues is in the discretion of the trial judge. *Griffin v. Insurance Co.*, 225 N.C. 684, 36 S.E. 2d 225 (1945). We find no abuse of discretion. *See* N.C.R. Civ. P. 49(b).

Defendant insists that the trial judge erred in failing to give the instruction on impeachment of witnesses that he requested. The trial judge gave an adequate and proper instruction on impeachment of witnesses by prior inconsistent testimony. Instructions do not have to be in the precise language submitted by the party. *State v. Beach*, 283 N.C. 261, 196 S.E. 2d 214 (1973). Three times during the instructions to the jury the trial judge gave the substance of defendant's request. We find no error.

Last, defendant contends, without citing any authority, that it should have had the final argument to the jury. Where defendant introduces evidence, as here, the decision of the trial judge

with respect to the order of arguments is final and not reviewable. *Heilig v. Insurance Co.*, 222 N.C. 231, 22 S.E. 2d 429 (1942); *Lumber Co. v. Elizabeth City*, 181 N.C. 442, 107 S.E. 449 (1921). *See* N.C. Gen. R. Prac. 10.

The decision of the Court of Appeals is reversed, and this case is remanded to that court for further remand to Superior Court, Forsyth County, for reinstatement of the judgment of the trial court in favor of plaintiff.

Reversed and remanded.

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

STATE OF NORTH CAROLINA v. RANDY SILLS

No. 589A83

(Filed 6 July 1984)

1. Indictment and Warrant § 13.1— rape of child—date of offense—denial of motion for more definite bill of particulars

In a prosecution for first-degree rape of a child in which the indictment charged that the crime occurred "on or about March 15, 1983" and the State responded to a motion for a bill of particulars that the specific date was unknown because of the age of the victim and the ongoing nature of the offense, the trial court did not abuse its discretion in the denial of defendant's pretrial oral motion for a more definite bill of particulars providing the specific time and date of the alleged rape where the victim testified that the offense occurred two days before her March 16 birthday, defendant presented evidence of his lack of access to the child from March 11 to March 16, and defendant thus showed no prejudice attributable to the lack of information about the exact date of the alleged rape. G.S. 15A-925(c).

2. Indictment and Warrant § 17.2; Rape and Allied Offenses § 5— rape of child—date of offense—no fatal variance between indictment and proof

There was no fatal variance between an indictment charging the rape of a child "on or about March 15, 1983" and evidence that the rape occurred on March 14 where defendant was not ensnared or deprived of the opportunity to present an alibi defense in that defendant testified that he was elsewhere and had no access to the victim on March 14 or for a considerable number of days before and after that date, and alibi witnesses testified to defendant's lack of access to the child for the period between March 11 and March 16.

3. Indictment and Warrant § 9.11; Rape and Allied Offenses § 3— indictment for rape—statement of date of offense—effect of statutes

The provisions of G.S. 15-144.1(a) requiring the inclusion of the date of the offense in an indictment for rape do not prevail over the provisions of G.S. 15-155 which expressly excuse the failure to state an exact date.

4. Witnesses § 1.2— competency of child rape victim to testify

The trial court did not abuse its discretion in declaring an eight-year-old rape victim competent to testify where the child indicated that she knew the difference between telling the truth and lying, that she knew that punishment would result from telling a lie, and that she knew she was supposed to tell the truth when she put her hand on the Bible, and where she answered questions about her schooling, family, church attendance, and previous court testimony.

5. Criminal Law § 34.8— evidence of other crimes—competency to show common plan or scheme

In a prosecution for first-degree rape of a child, testimony by the child that defendant had engaged in sexual intercourse with her on a date prior to the incident for which defendant was on trial was competent to show a common plan or scheme embracing the commission of a series of crimes so related to each other that proof of one or more tended to prove the crime charged and to connect the accused with its commission.

6. Criminal Law § 73.1— double hearsay—harmless error

Assuming that a physician's testimony that a child rape victim's natural father told him that "the girl had told him that this (rape) is what happened, that it had happened frequently" was inadmissible hearsay within hearsay, the admission of such testimony was harmless error in light of the other similar evidence admitted properly against defendant and his reliance on the defense of alibi rather than a defense that the rape of the child never occurred.

7. Criminal Law § 33.3; Rape and Allied Offenses § 4— child abuse petition by social worker—irrelevancy—admission of testimony as harmless error

In a prosecution for the rape of a child, assuming that testimony by a social worker that she had filed a child abuse petition after investigating and learning about the facts of the case at bar was irrelevant, its admission was harmless error where defendant failed to show that there was a reasonable possibility that a different result would have been reached at trial had the testimony not been allowed.

8. Rape and Allied Offenses § 7— first-degree rape—life sentence as minimum and maximum terms

The trial court did not err in imposing a sentence of not less than and not more than life imprisonment for first-degree rape. G.S. 15A-1340.1(a); G.S. 15A-1351(b).

BEFORE *Lane, Judge*, at the July 18, 1983 Criminal Session of Superior Court, HERTFORD County, the defendant was convicted of first-degree rape and sentenced to not less than and not more

than life imprisonment. The defendant appeals to the Supreme Court as a matter of right pursuant to G.S. 7A-27(a). Heard in the Supreme Court on March 14, 1984.

Rufus L. Edmisten, Attorney General, by Tiare B. Smiley, Assistant Attorney General, for the State.

W. Hugh Jones, Jr., for the defendant appellant.

MITCHELL, Justice.

Through several assignments of error, the defendant contends that the trial court erred in denying a motion for a bill of particulars and a motion for a dismissal of the charge because of the State's failure to set forth in the indictment the specific date of the offense charged. The defendant also contends the trial court erred in allowing certain testimony to be admitted into evidence and in declaring the eight-year-old victim competent to testify. Having reviewed the assignments of error raised by the defendant, we find no error.

A detailed recitation of the facts surrounding this case is unnecessary for discussion of the issues raised upon appeal. The State's evidence tended to show that on March 14, 1983, or two days prior to the victim's birthday, the defendant engaged in sexual intercourse with the victim, his then seven-year-old stepdaughter. The child testified that the defendant also had had intercourse with her on an earlier occasion prior to the Christmas holidays in the previous year. The State presented corroborating evidence through testimony by the child's natural father, her aunt, her stepmother, her doctor and nurse, and two social workers.

The defendant put on alibi evidence and evidence of his lack of access to the child from March 11, 1983 to March 16, 1983. The defendant took the stand and testified, and seven other witnesses testified in his behalf. The trial court denied the defendant's motions to dismiss the charge at the end of the State's evidence and again at the close of all of the evidence. The jury returned a verdict of guilty of first-degree rape. The trial court sentenced the defendant to not less than nor more than life imprisonment.

[1] The defendant first contends that the trial court abused its discretion in denying the defendant's pretrial motion for a more definite bill of particulars. We do not agree.

The defendant was charged in three indictments for the acts forming the course of conduct which gave rise to his conviction of first-degree rape. The first indictment, charging the defendant with a first-degree sexual offense against the child, gave the date of the offense as March 15, 1983. Upon a motion for a bill of particulars, the State responded that the specific time of the offense charged in the first indictment was unknown. An amended response by the State stated that the offense occurred on or about March 11, 1983 and that due to the nature of the offense charged and the age of the victim, a more definite date was impractical.

A second indictment for a first-degree sexual offense with the child gave the date of the offense charged therein as "on or about the 11th day of March, 1983." Upon a motion by the defendant for a bill of particulars as to the second indictment, the State responded that the offense occurred on or about March 14, 1983, but that a specific date was unknown because of the age of the victim. The defendant was not tried for the offenses charged in the first and second bills of indictment.

The only indictment upon which the defendant was tried or convicted charged him with first-degree rape of the child on or about March 15, 1983. Once again the defendant made a motion requesting a bill of particulars. The State responded that the alleged rape occurred on or about March 15, 1983 and stated that the specific date was unknown because of the age of the victim and the ongoing nature of the offense.

At the start of the defendant's trial on July 19, 1983, the defendant made an oral motion requesting that the State provide the specific time and date of the alleged rape since the defendant had several times informed the court that he intended to put on evidence of an alibi. The trial court denied the motion. The defendant contends that the denial of this motion was error.

The defendant points to G.S. 15A-925(c) in support of his argument that the trial court erred in denying his oral motion for a more definite bill of particulars. G.S. 15A-925(c) establishes that upon a motion for a bill of particulars,

> [i]f any or all of the items of information requested are necessary to enable the defendant adequately to prepare or conduct his defense, the court must order the State to file and serve a bill of particulars. Nothing contained in this section authorizes an order for a bill of particulars which requires the State to recite matters of evidence.

The defendant contends that since a specific date of the alleged rape was "necessary to enable the defendant adequately to prepare or conduct his defense" of alibi, the trial court was required to order the State to file and serve a bill of particulars. He submits that the actual date of the alleged rape was known to the State since the prosecuting witness testified unequivocally that the offense occurred on March 14, 1983, two days before her birthday. The defendant complains that he was presented with a situation of having to account for his actions over a period of almost a week's time. Furthermore, the defendant argues that the denial of his motion circumvented the purpose of a bill of particulars—to inform the defendant of the specific occurrences intended to be investigated in the trial and to limit the evidence to the particular scope of inquiry. *State v. Overman*, 269 N.C. 453, 153 S.E. 2d 44 (1967). We find no error in the trial court's action.

The granting or denying of a bill of particulars lies within the trial court's discretion and is generally not subject to review except in cases of palpable and gross abuse. *State v. Easterling*, 300 N.C. 594, 268 S.E. 2d 800 (1980). Like the defendant in the present case, the defendant in *Easterling* contended that the trial court erred in denying his motion for a bill of particulars giving the exact date of the offenses which were alleged to have occurred. The *Easterling* Court stated a general rule:

> [A] denial of a defendant's motion for a bill of particulars will be held error only when it clearly appears to the appellate court that the lack of timely access to the requested information significantly impaired defendant's preparation and conduct of his case.

Id. at 601, 268 S.E. 2d at 805.

Noting that the defendant had provided an alibi for the entire period stated in the warrant and indictment, the Court in *Easterling* held that no such prejudice was evident. The Court

found no error in the trial court's denial of the defendant's motion.

The defendant in the present case has shown no prejudice attributable to the lack of information about the exact date of the rape charged. The indictment upon which the defendant was convicted charged that the crime was committed on or about March 15, 1983. In response to the defendant's motion for a bill of particulars as to this indictment, the State replied that the offense occurred on or about March 15, 1983, after 12:00 noon, and that a more precise date was unknown because of the age of the victim and the ongoing nature of the offense. The victim testified that the rape occurred two days before her March 16th birthday, making the date of the offense March 14, 1983.

The defendant testified that he had not been alone with the victim for several months including the period from March 11 until March 16. He accounted for his actions from March 11 until March 16, 1983 and six witnesses corroborated various portions of his alibi. The defendant has not shown how his defense tactics would have varied if the motion had been allowed or how the court's denial of his final motion for a more definite bill of particulars prejudiced his efforts to conduct his case. We find no abuse of discretion in the trial court's denial of the defendant's motion in this regard.

[2] In a related assignment of error, the defendant contends that the trial court erred in failing to dismiss the rape charge at the conclusion of the State's evidence and again at the close of all of the evidence. The defendant maintains that the variance between the date established as the actual date of the offense and the alleged date in the indictment is fatal. He notes that G.S. 15-144.1(a) requires indictments for rape to set forth, *inter alia*, "the date of the offense." The indictment for rape upon which the defendant was convicted gives the date of offense as "on or about March 15, 1983."

We find no merit in the defendant's argument. We have long held that one purpose of an indictment is to give the defendant notice of the charge against him to the end that he may prepare a defense and be in a position to plead double jeopardy if he is again brought to trial for the same offense. Another purpose is to enable the court to know what judgment to pronounce in case of

conviction. *State v. Dorsett*, 272 N.C. 227, 158 S.E. 2d 15 (1967). This Court has stated on a number of occasions that the date given in a bill of indictment usually is not an essential element of the crime charged. The State may prove that the crime was in fact committed on some other date. *State v. Whittemore*, 255 N.C. 583, 122 S.E. 2d 396 (1961). *See also State v. Effler*, 309 N.C. 742, 309 S.E. 2d 203 (1983). We have held that this rule may not be used to deprive a defendant of his defense, however. *State v. Whittemore*, 255 N.C. 583, 122 S.E. 2d 396.

The General Assembly in G.S. 15-155 explicitly provided that no judgment on an indictment shall be stayed or reversed 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.

[3] The provisions of 15-144.1(a), relied upon by the defendant, do not prevail over G.S. 15-155. *See State v. Corbett*, 307 N.C. 169, 297 S.E. 2d 553 (1982). Although G.S. 15-144.1(a) requires the inclusion in an indictment of the date of the offense charged in an indictment for rape, G.S. 15-155 expressly excuses the failure to state an exact date.

We are aware that this Court in *State v. Wilson*, 264 N.C. 373, 378, 141 S.E. 2d 801, 804 (1965) stated that "it may be difficult to conceive of a case where the time of the commission of a crime is not material to the defense of alibi." In *Wilson*, however, we held that since the defendant was not ensnared or deprived of an opportunity to present adequately his defense of alibi, a variance between the date of the offense given in the indictment and the date of the offense shown by the evidence at trial did not entitle him to a nonsuit.

The defendant in this case was not ensnared or deprived of the opportunity to present his alibi defense. The State's evidence tended to show that the victim was raped on March 14. The defendant testified that he was elsewhere and had no access to the victim on that day or for a considerable number of days before and after that day. Alibi witnesses testified to his lack of access

to the child for the period between March 11 and March 16. The responses to the defendant's motions for bills of particulars concerning this indictment and other indictments gave the defendant ample notice of the fact that an exact date could not be pinpointed due to the victim's youth and the ongoing nature of the offense. *See State v. Effler*, 309 N.C. at 750, 309 S.E. 2d at 207-08. The defendant has shown neither ensnarement nor prejudice resulting from the variance, and we overrule this assignment of error.

[4] The defendant next contends that the trial court abused its discretion in declaring the eight-year-old prosecuting witness competent to testify. A child is competent to testify in this jurisdiction when he or she, under the obligation of an oath, has sufficient capacity to understand and relate facts which will assist the jury in reaching its decision. *State v. Oliver*, 302 N.C. 28, 274 S.E. 2d 183 (1981). There is no fixed age limit below which a witness is incompetent to testify. *State v. Jones*, 310 N.C. 716, 314 S.E. 2d 529 (1984); *State v. Oliver*, 302 N.C. 28, 274 S.E. 2d 183 (1981); 1 Brandis on North Carolina Evidence, § 55 (1982). The ruling on competency of a witness is within the trial court's discretion and its decision is not reversible except for clear abuse of discretion. *State v. Oliver*, 302 N.C. 28, 274 S.E. 2d 183 (1981).

The trial court did not err by ruling that the child in this case was competent to testify. She indicated that she knew the difference between telling the truth and lying, and she testified that she knew that punishment would result from telling a lie. On *voir dire* she answered questions about her schooling, her family, her church attendance, and previous court testimony. The child further indicated that she knew she was supposed to tell the truth when she put her hand on the Bible. The trial court's conclusion that the witness was competent was well within the boundaries of sound discretion. The defendant's assignment of error is without merit.

[5] In the defendant's next assignment of error he contends that the trial court erred in permitting the child victim to testify that the defendant had engaged in sexual intercourse with her in December 1982 before the incident for which the defendant was on trial. The child's stepmother also testified that when the child

returned from visiting the defendant in December 1982, the child complained of itching and burning between her legs.

In *State v. McClain*, 240 N.C. 171, 81 S.E. 2d 364 (1954), Justice Ervin enunciated for the Court the general rules for admitting evidence of the commission of independent and unrelated crimes or offenses. These include the rule that "evidence of other crimes is admissible when it tends to establish a common plan or scheme embracing the commission of a series of crimes so related to each other that proof of one or more tends to prove the crime charged and to connect the accused with its commission." *Id.* at 176, 81 S.E. 2d at 367. Our Court has been "very liberal in admitting evidence of similar sex crimes." *State v. Effler*, 309 N.C. 742, 309 S.E. 2d 203 (1983); *State v. Greene*, 294 N.C. 418, 423, 241 S.E. 2d 662, 665 (1978). We have held admissible in particular evidence showing prior similar sex crimes committed by the defendant against the same victim. *State v. Hobson*, 310 N.C. 555, 313 S.E. 2d 546 (1984); *State v. Browder*, 252 N.C. 35, 112 S.E. 2d 728 (1960). We hold in the case at hand that the trial court did not err in admitting evidence which tended to show previous sex crimes by this defendant against the same victim.

[6] The defendant next contends that the trial court erred in overruling an objection to testimony by Dr. Roy Flood, a family physician. Flood testified that the natural father of the prosecuting witness, Bobby Collins, told him that "the girl had told him (Collins) that this (rape) is what happened, that it had happened frequently." The defendant asserts that the testimony was prejudicial double hearsay and prevented the defendant from receiving a fair trial.

Erroneous admission of hearsay, like erroneous admission of other evidence, is not always so prejudicial as to require a new trial. *State v. Powell*, 306 N.C. 718, 295 S.E. 2d 413 (1982); *State v. White*, 298 N.C. 430, 259 S.E. 2d 281 (1979). Unless such error infringes upon a criminal defendant's constitutional rights, the defendant has the burden of showing that he was prejudiced by the error and that there was a reasonable possibility that a different result would have been reached at trial if the error had not been committed. *See* G.S. 15A-1443(a); *State v. Powell*, 306 N.C. 718, 295 S.E. 2d 413 (1982); *State v. Murvin*, 304 N.C. 523, 284 S.E. 2d 289 (1981).

Assuming *arguendo*, that the testimony was inadmissible hearsay within hearsay, the defendant has not shown how he was prejudiced by its admission. The defendant did not maintain as his defense that the rape of the child never occurred. Instead, he produced evidence of an alibi and of his lack of access to the child at the time of the rape. The testimony of which he now complains related to only the occurrence of rape. In light of the other similar evidence admitted properly against the defendant and his reliance on a defense of alibi, we are not persuaded that the evidence complained of here requires a new trial. We find no merit in this assignment of error.

[7] The defendant assigns as error the admission of testimony by a social worker. The social worker stated over objection that she had filed a child abuse petition after investigating and learning about the facts of the case at bar. The defendant contends that the witness's testimony was irrelevant and prejudicial. Assuming *arguendo* that the testimony was irrelevant, the defendant has not met his burden of demonstrating that there is a reasonable possibility that a different result would have been reached at trial had the testimony not been allowed. This assignment of error is without merit.

[8] In his final assignment of error the defendant contends that since first degree rape is a Class B felony punishable by life imprisonment, the trial court committed error by setting a minimum and maximum term. The Fair Sentencing Act does not apply to Class B felonies. G.S. 15A-1340.1(a). We note that G.S. 15A-1351(b) states that with regard to convicted persons not subject to Chapter 15A, Article 81A of the General Statutes, the Fair Sentencing Act, a term of imprisonment must impose a maximum and may impose a minimum term. "The judgment may state the minimum term or may state that a term constitutes both the minimum and the maximum terms." G.S. 15A-1351(b). The judgment in this case stated that the life sentence constituted both the minimum and the maximum terms. We find no error in the judgment.

For reasons stated herein, we find that the defendant received a fair trial free from prejudicial error.

No error.

STATE OF NORTH CAROLINA v. MICHAEL LINDSAY TAYLOR

No. 500PA83

(Filed 6 July 1984)

1. **Receiving Stolen Goods § 7— possession of stolen pistol—felony—sentence proper**

The Court of Appeals erred in holding that defendant was entitled to a new sentencing hearing because the offense for which he was convicted, possession of a stolen firearm, was not a felony since a fair and reasonable reading of G.S. 14-71.1 together with G.S. 14-72(a), (b), and (c) leads inescapably to the conclusion that the General Assembly intended to make the possession of any stolen firearm, by anyone knowing or having reasonable grounds to believe the firearm to be stolen, a felony, regardless of the value of the firearm. Therefore, defendant, who was found guilty by a jury of possessing a stolen firearm, was properly convicted of a felony, and pursuant to G.S. 14-1.1 and G.S. 15A-1340.4(f)(6) and G.S. 15A-1340.4(b), where the trial judge found one aggravating factor and no mitigating factors, it was within his discretion to impose a sentence of five years which exceeded the presumptive term of three years. G.S. 15A-1340.4(a) and (b).

2. **Receiving Stolen Goods § 6— instructions concerning possession of a stolen firearm—proper**

In a prosecution for possession of a stolen firearm, the trial court's instructions contained all the elements of the crime, a felony, and the Court of Appeals erred in stating that the trial judge instructed the jury on misdemeanor possession of stolen goods.

ON discretionary review of the decision of the Court of Appeals, 64 N.C. App. 165, 307 S.E. 2d 173 (1983), finding no error in defendant's trial, but vacating the judgment entered and remanding the case for resentencing. Judgment was entered at the 7 June 1982 Criminal Session of Superior Court, NEW HANOVER County, by the *Honorable Napoleon B. Barefoot, Judge Presiding.* Heard in the Supreme Court 7 May 1984.

Rufus L. Edmisten, Attorney General, by William F. Briley, Assistant Attorney General, for the State-appellant.

William Norton Mason, for defendant-appellee.

FRYE, Justice.

Defendant was charged in indictments, proper in form, with breaking or entering a motor vehicle with the intent to commit a felony, larceny of a firearm and felonious possession of a stolen

firearm. Defendant entered a plea of not guilty to all charges. A jury found defendant not guilty of the charges of breaking or entering a motor vehicle and larceny of a firearm. However, defendant was found guilty of felonious possession of a stolen firearm.

After a sentencing hearing, Judge Barefoot found as an aggravating factor that "[d]efendant has a prior conviction or convictions for criminal offenses punishable by more than 60 days confinement." Finding no mitigating factors, Judge Barefoot sentenced defendant to an active prison term of five years, which exceeds the presumptive sentence of three years. *See* G.S. 14-72; G.S. 15A-1340.4(f)(6).

On appeal, the Court of Appeals found no error in defendant's trial. However, the Court of Appeals held, *ex mero motu*, that defendant had only been convicted of a misdemeanor, instead of a felony, for which the maximum sentence allowable was imprisonment for two years. Therefore, the Court of Appeals remanded defendant's case for resentencing. This Court allowed the State's petition for discretionary review on 6 March 1984.

I.

The State's evidence tended to show that on 27 February 1982, Roy K. Trimer was visiting his parents' house in Wilmington, North Carolina. Between the hours of 5:00 p.m. and 12:00 midnight, Mr. Trimer's pickup truck, which he had parked in an alley beside his parents' home, was broken into by an unidentified person. Among other things, a German .32 caliber semi-automatic pistol was stolen from Mr. Trimer's truck. The pistol was worth between fifty and seventy-five dollars. Immediately after discovering the theft at approximately 12:00 midnight, Mr. Trimer reported it to the police.

On that same day, during the late evening hours, James D. Blake observed the defendant acting very suspiciously near a local ABC store in Wilmington. When the defendant noticed that Mr. Blake was watching him, he reached into his coat pocket as if he were trying to hide something. Mr. Blake, thinking that defendant had a gun, went to a local hotel and had a guard call the police.

Upon his return to the general area where he first observed the defendant, Mr. Blake noticed that defendant kept riding around the ABC store on a bicycle. When the defendant left the scene, Mr. Blake followed him into an alley. Mr. Blake cornered defendant in the alley with his car and yelled at him. At that time, defendant stooped down beside a car, pulled a gun from his coat pocket and threw it under the car. The car under which defendant threw the gun was apparently parked beside some bushes.

Subsequently, two police officers arrived on the scene. Defendant was questioned by one police officer while the other police officer searched the area where defendant had thrown the gun. A gun was found in the bushes beside the car where defendant had stooped down. The gun was subsequently identified as the gun which had been previously stolen from Mr. Trimer's truck. Defendant was then placed under arrest.

Defendant did not present any evidence at trial.

II.

[1] The main question presented for review by this Court is whether the Court of Appeals erred in holding that the defendant was entitled to a new sentencing hearing because the offense for which he was convicted, possession of a stolen firearm, is not a felony, but a misdemeanor punishable by a term of imprisonment not to exceed two years. Based upon the explicit language of G.S. 14-71.1 and G.S. 14-72, we reverse the decision of the Court of Appeals and hold that defendant was properly convicted of a felony and properly sentenced accordingly.

G.S. 14-71.1 provides that anyone convicted of possession of stolen goods "shall be punished as one convicted of larceny." G.S. 14-72(a) describes the crimes of larceny of property and receiving or possessing stolen goods, and designates whether the crime is a felony or a misdemeanor based upon whether the property is valued at more than four hundred dollars. The statute also provides, in pertinent part, that the

> [r]eceiving or possession of stolen goods as provided in subsection (c) of this section is a Class H felony. Except as provided in subsections (b) and (c) of this section, larceny of property, or the receiving or possession of stolen goods

knowing or having reasonable grounds to believe them to be stolen, where the value of the property or goods is not more than four hundred dollars ($400.00), is a misdemeanor punishable under G.S. 14-3(a).

G.S. 14-72(b) and (c) provide, in pertinent part, as follows:

(b) The crime of larceny is a felony, without regard to the value of the property in question, if the larceny is:

(1) From the person; or

(2) Committed pursuant to a violation of G.S. 14-51, 14-53, 14-54 or 14-57; or

(3) Of any explosive or incendiary device or substance . . . .

(4) Of any firearm. As used in this section, the term "firearm" shall include any instrument used in the propulsion of a shot, shell or bullet by the action of gunpowder or any other explosive substance within it. A "firearm," which at the time of theft is not capable of being fired, shall be included within this definition if it can be made to work. This definition shall not include air rifles or air pistols.

(5) Of any record or paper in the custody of the North Carolina State Archives as defined by G.S. 121-2(7) and 121-2(8).

(c) The crime of possessing stolen goods knowing or having reasonable grounds to believe them to be stolen in the circumstances described in subsection (b) is a felony or the crime of receiving stolen goods knowing or having reasonable grounds to believe them to be stolen in the circumstances described in subsection (b) is a felony, without regard to the value of the property in question.

The Court of Appeals interpreted G.S. 14-72 as follows:

The "circumstances" described in subsection (b) which raise the possession or receiving of stolen goods [a stolen firearm] to the level of a felony are confined to those circumstances described in subsections (b)(1) and (2), to wit: the possession or receiving of goods stolen from the person, or stolen pur-

> suant to a violation of G.S. 14-51, 14-53, 14-54 or 14-57. Subsections (b)(3) and (4) do not describe "circumstances" making the *possession* or *receiving* of stolen goods a felony. Subsections (b)(3) and (4) provide, in pertinent part, that the crime of *larceny* is a felony, without regard to the value of the property in question, if the larceny is of any explosive or incendiary device or substance or of any firearm. (Emphases in original.)

State v. Taylor, 64 N.C. App. 165, 167, 307 S.E. 2d 173, 175 (1983).

After enunciating the above interpretation of G.S. 14-72, the Court of Appeals noted that the value of the stolen firearm was not more than four hundred dollars and that there was no evidence that the firearm was stolen from the person or pursuant to G.S. 14-51, 14-53, 14-54 or 14-55. It also stated that the trial judge instructed the jury on the elements of misdemeanor possession of stolen goods and subsequently sentenced defendant to a term of five years. Based on the above reasoning, the Court of Appeals held that "defendant was convicted of misdemeanor possession of stolen goods and that the sentence imposed exceeds the statutory maximum." *Taylor*, 64 N.C. App. at 168, 307 S.E. 2d at 175. We disagree with the reasoning of the Court of Appeals and its attempt to distinguish the circumstances listed in G.S. 14-72(b)(1) and (2) from the circumstances listed in G.S. 14-72(b)(3) and (4).

G.S. 14-72(a) provides that the possession of stolen goods as provided in subsection (c) is a Class H felony. Subsection (c) provides that possessing stolen goods having reasonable grounds to believe that they are stolen "in the circumstances described in subsection (b) is a felony, without regard to the value of the property in question." G.S. 14-72(c). Subsection (b) provides that larceny is a felony if it is larceny "[o]f any firearm." G.S. 14-72(b)(4).

A fair and reasonable reading of G.S. 14-71.1 together with G.S. 14-72(a), (b) and (c) leads inescapably to the conclusion that the General Assembly intended to make the possession of any stolen firearm, by anyone knowing or having reasonable grounds to believe the firearm to be stolen, a felony, regardless of the value of the firearm. Therefore, we hold that defendant, who was found guilty by a jury of possessing a stolen firearm, was properly convicted of a felony.

Additionally, we note that Class H felonies are punishable by imprisonment up to ten years, G.S. 14-1.1, and the presumptive sentence is imprisonment for three years. G.S. 15A-1340.4(f)(6). In the instant case, the trial judge found one aggravating factor and no mitigating factors. *See* G.S. 15A-1340.4(b). After the trial judge had made the above findings, it was within his discretion to impose a sentence which exceeds the presumptive term. *See* G.S. 15A-1340.4(a) and (b). Therefore, we hold that defendant's sentence is within the statutory limit and otherwise proper.

III.

[2] We note that the Court of Appeals also stated that the trial judge instructed the jury on the elements of misdemeanor possession of stolen goods, apparently because of its erroneous reasoning that larceny of a firearm is not a "circumstance" within the meaning of G.S. 14-72(c). We disagree.

The trial judge instructed the jury as follows:

> Now the defendant has been accused of possession of a stolen firearm, which is possessing a firearm which the defendant had reasonable grounds to believe had been stolen.
>
> Now I charge that for you to find the defendant guilty of possession of a stolen firearm the State must prove five things beyond a reasonable doubt.
>
> First, that a pistol was stolen. Property is stolen when it is taken and carried away without the owner's consent by someone who intends at the time to deprive the owner of its use permanently and knows that he is not entitled to take it.
>
> Second, a pistol is a firearm.
>
> Third, that the defendant possessed this pistol.
>
> Fourth, that the State must prove beyond a reasonable doubt that the defendant knew or had reasonable grounds to believe that the pistol was stolen.
>
> Fifth, that the defendant possessed the pistol with a dishonest purpose. That is, that he converted it to his own use and that would be a dishonest purpose.

The above instruction contains all of the elements of the crime of possession of a stolen firearm, which is a felony. *See* G.S. 14-71.1; G.S. 14-72; *see also* N.C.P.I.—Crim. § 216.49 (Replacement May 1979). *Cf. State v. Perry*, 305 N.C. 225, 287 S.E. 2d 810 (1982). Therefore, the trial judge properly instructed the jury concerning the elements which had to be proven beyond a reasonable doubt by the State before the defendant could be convicted as charged.

In conclusion, we hold that the Court of Appeals erred in holding that defendant had been convicted of a misdemeanor and that his sentence exceeded the statutory maximum. The Court of Appeals also erred in stating that the trial judge instructed the jury on misdemeanor possession of stolen goods. The Court of Appeals correctly concluded that there was no error in defendant's trial. Accordingly, insofar as the Court of Appeals vacated the judgment of the trial court and remanded the case for resentencing, its decision is reversed. Insofar as it found no error in defendant's trial, the decision of the Court of Appeals is affirmed.

Reversed in part; affirmed in part.

STATE OF NORTH CAROLINA v. JAMES HAROLD CAMPBELL

No. 40A84

(Filed 6 July 1984)

1. **Criminal Law § 42.2— admission of real evidence—necessary showing**

Before real evidence is properly received into evidence, the item offered must be identified as being the same object involved in the incident and it must be shown that the object has undergone no material change. The trial court possesses and must exercise sound discretion in determining the standard of certainty that is required to show that an object offered is the same as the object involved in the incident and is in an unchanged condition.

2. **Criminal Law § 42.6— necessity for showing chain of custody**

A detailed chain of custody of real evidence need be established only when the evidence offered is not readily identifiable or is susceptible to alteration and there is reason to believe that it may have been altered.

3. **Criminal Law § 42.6; Rape and Allied Offenses § 4— chain of custody of rape kit**

The State established a sufficient chain of custody of a "rape kit" to prove that samples in the kit examined by an SBI serologist were those placed in the

kit by the examining physician so that the kit and an analysis of its samples were properly admitted into evidence where the kit was sealed in the presence of the physician who examined the victim, the physician testified that the kit introduced into evidence was "without question" the one he had prepared for the victim, and the physician's seal and another one placed upon the kit by a police officer were still unbroken when the kit was placed in the possession of the serologist, and where defendant can only speculate about the possibility that the rape kit in this case was tampered with or interchanged with another kit.

BEFORE *Lee, Judge*, presiding at the September 19, 1983 session of Superior Court, CHATHAM County, the defendant was convicted of first degree rape and sentenced to life imprisonment. The defendant appealed directly to the Supreme Court as a matter of right pursuant to G.S. 7A-27(a). Heard in the Supreme Court May 11, 1984.

Rufus L. Edmisten, Attorney General, by James Peeler Smith, Assistant Attorney General, for the State.

Robert L. Gunn, for defendant appellant.

MITCHELL, Justice.

The sole issue raised on this appeal is whether the trial court erred in admitting into evidence a "rape kit" prepared by a physician who examined the victim shortly after the rape occurred. The defendant contends that the State failed to establish a chain of custody for the kit between the time of its preparation and the time its contents were analyzed by a forensic serologist employed by the State Bureau of Investigation. We find no error in the admission of the kit into evidence.

A detailed recitation of the facts of this case is unnecessary for a discussion of the issue raised on appeal. The evidence tended to show that on June 11, 1983 the defendant, aged twenty-three, engaged in vaginal and anal intercourse with the nine-year-old victim, his stepdaughter. He threatened that he would "kill and drown" her if she told anyone what had happened. The child reported what had happened to relatives on the following day. The child was taken to North Carolina Memorial Hospital in Chapel Hill later that day where she was examined by Dr. Larry Cobb Mickens, a senior resident pediatrician. Mickens observed lacerations in the child's genital and rectal areas which were con-

sistent with the child's having engaged in intercourse with an adult male. Mickens took hair and blood samples from the child and vaginal and rectal smears and swabs. After completing necessary paperwork, he placed the evidence obtained in a cylindrical container called a "rape kit" which was marked and sealed in his presence and placed in a refrigerator nearby.

A forensic serologist testified that bloodstains found on the bedspread upon which the rape allegedly occurred were consistent with the blood taken from the victim. Traces of semen found on the bedspread were consistent with that of a male having the defendant's blood groupings.

The defendant argues that the State failed to establish a chain of custody sufficient to allow the admission of either the rape kit or results obtained by analysis of its contents into evidence. He points to evidence showing that when Mickens prepared the kit, it was placed in a refrigerator around the corner from the emergency room where the examination took place. The defendant complains that there was no evidence about the location of the refrigerator and that there was no indication of whether the refrigerator was locked or unlocked. Mickens testified that on the morning following the preparation of the kit, he saw the kit in the hands of physicians and nurses interviewing the victim. The defendant notes that the hospital's chief security officer in charge of evidence was on vacation when the kit was prepared. That officer had no knowledge of the kit until his return from vacation eight days after its preparation when the kit finally came into his possession. The defendant argues that the failure of the State to demonstrate a chain of custody renders the evidence inadmissible. We find no merit in this assignment of error.

[1, 2] This Court has stated that a two-pronged test must be satisfied before real evidence is properly received into evidence. The item offered must be identified as being the same object involved in the incident and it must be shown that the object has undergone no material change. *State v. Barfield*, 298 N.C. 306, 259 S.E. 2d 510 (1979), *cert. denied*, 448 U.S. 907, *reh'g denied*, 448 U.S. 918 (1980). The trial court possesses and must exercise sound discretion in determining the standard of certainty that is required to show that an object offered is the same as the object in-

volved in the incident and is in an unchanged condition. *Id.* A detailed chain of custody need be established only when the evidence offered is not readily identifiable or is susceptible to alteration and there is reason to believe that it may have been altered. *See State v. Kistle*, 59 N.C. App. 724, 297 S.E. 2d 626 (1982), *review denied*, 307 N.C. 471, 298 S.E. 2d 694 (1983). Further, any weak links in a chain of custody relate only to the weight to be given evidence and not to its admissibility. *State v. Montgomery*, 291 N.C. 91, 229 S.E. 2d 572 (1976). *See also State v. Grier*, 307 N.C. 628, 300 S.E. 2d 351 (1983).

[3] We hold that an adequate chain of custody was established in this case to prove that the samples in the rape kit examined by the SBI serologist were those placed in the kit by Mickens. The evidence showed that the samples were taken in Mickens' presence and that he signed various forms for inclusion in the rape kit as he examined the victim and performed procedures required for the kit's completion. Mickens testified that the kit he identified on the witness stand was, without question, the same kit he had completed as he examined the victim; he testified that he recognized his handwriting on the kit and the victim's panties that he had included in the kit. He testified that the kit was new when he prepared it, and that it was sealed in his presence by the attending nurse. Mickens testified that the nurse then placed the kit in a refrigerator at his request and reported that she had placed it there.

The chief of security and evidence custodian at the hospital, David Donaldson, testified about the procedures used in securing evidence at the hospital. He stated that when a rape kit is completed, it is given to a security officer and placed in an evidence refrigerator that remains locked. The key to the refrigerator is kept by a security officer until the evidence is turned over to Donaldson or the acting chief who puts the evidence in the main refrigerator. The chief of security has the sole key to the main refrigerator. Donaldson testified that a record is kept of the custody of the evidence until the evidence is released to a police officer. The record for the rape kit in question showed that the kit passed from a nurse to two successive security guards and finally to the evidence custodian who was acting in Donaldson's stead while he was on vacation. The acting custodian placed the kit in the main refrigerator to which she had the sole key at 7:32

a.m. on June 13, 1983 following the examination on the night of June 12, 1983. When Donaldson returned from vacation she returned the key to him. Donaldson testified that when the container came into his possession it was sealed and did not appear to have been tampered with. Donaldson gave the sealed container bearing the victim's name to Officer Henry Shamburger who transported the container to the SBI laboratory. A written record of the chain of possession of the kit while at the hospital was entered into evidence without objection.

Officer Shamburger testified that when he received the rape kit from Donaldson, the plastic seal around the kit was intact. Shamburger placed his own seal around the kit and delivered it to the SBI laboratory. There the kit was placed in a lockbox which was padlocked until the examining serologist unlocked the box and removed the kit. The serologist, William Weis, testified that he had the only key to the lockbox. The serologist testified that when he received the kit, it did not appear to have been tampered with and that the seals were intact. Weis testified that he recognized the markings on the kit admitted into evidence and confirmed that the kit was the one identified as containing samples taken from the victim.

The defendant can only speculate about the possibility that the rape kit in this case was tampered with or interchanged with another kit. The kit was sealed in the presence of the physician who examined the victim. The physician testified that the kit introduced into evidence was "without question" the one he had prepared for the victim. His seal and another one placed upon the kit by Officer Shamburger were still unbroken when the kit was placed in the possession of the serologist.

We take guidance from our decision in *State v. Detter*, 298 N.C. 604, 260 S.E. 2d 567 (1979). In *Detter* the evidence showed that tests from an autopsy were mailed to a laboratory. The tests were labeled with the name of the deceased. The procedure at the laboratory was to receive mailed samples and to place the samples upon a bench to await assignment to individual technicians. Although the defendant in *Detter* argued that several people had access to the samples while they remained on the bench and that the identity of the employee who picked up the sample from the post office was unknown, we held it "clear that the possibility

that the specimens were interchanged with those of another body is too remote to have required ruling this evidence inadmissible." *State v. Detter*, 298 N.C. at 634, 260 S.E. 2d at 588. This assignment of error is without merit.

The defendant's remaining assignment of error having been abandoned at oral argument, we find the defendant received a full and fair trial free of prejudicial error.

No error.

STATE OF NORTH CAROLINA v. LANCE ALBERT SNYDER

No. 76PA84

(Filed 6 July 1984)

Homicide § 21.7— second-degree murder—malice—recklessness of consequences—disregard for human life

The State's evidence was sufficient to support a finding that defendant's acts evidenced recklessness of consequences and a total disregard for human life so as to establish the malice necessary to support conviction of defendant of three counts of second-degree murder where it tended to show that defendant was drunk and engaged in a fight with a tavern owner; defendant staggered to his car in the tavern parking lot and drove off; defendant passed a car in a "no passing zone," struck a motorcycle from behind and forced it from the road, and continued toward an intersection; as defendant approached the intersection, the traffic light facing him was red, as it had been for some time, and defendant entered the intersection at a speed of 60 to 70 miles per hour; as defendant entered the intersection, he crashed into another car occupied by three persons who were killed by the impact; and after the accident defendant had a blood alcohol level of .24 percent and perhaps as high as .32 percent.

ON discretionary review of a decision by the Court of Appeals, 66 N.C. App. 358, 311 S.E. 2d 379 (1984), reversing three convictions of the defendant for second-degree murder entered by *Judge Julius Rousseau, Jr.*, presiding at the November 29, 1982 session of Superior Court, FORSYTH County. Heard in the Supreme Court May 11, 1984.

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

James J. Booker and W. Eugene Metcalf, for the defendant appellee.

MITCHELL, Justice.

The State seeks review of a Court of Appeals decision which reversed three convictions for murder in the second degree upon a finding that there was no evidence of malice on the part of the defendant. We reverse the decision of the Court of Appeals and remand the case to that court for further consideration.

The evidence at trial tended to show that on September 4, 1982 the defendant spent the afternoon with his brother in Winston-Salem. The two drank until about 4:00 p.m. when they went to a local tavern called Smokey's Lounge. The defendant was described as being loud, vulgar, rowdy and drunk. Worth Shelton, the proprietor of the bar, refused to serve the two men drinks and ordered them to leave. A fight ensued in which Shelton struck the defendant twice. The defendant fell and hit his head on the base of a door. Rising, the defendant staggered to his car in the parking lot and struck it with his fist. He got inside the car and drove off onto Highway 311.

Walden Ball was traveling on Highway 311 at that time. He testified that he heard squealing tires behind his car. In his rear-view mirror, Ball saw the defendant approaching from behind in a beige Cutlass. The defendant passed Ball's car in a "no passing" zone. Ball further testified that after passing him, the defendant struck a motorcycle from behind forcing it from the road. The defendant continued driving toward the intersection of Highway 311 and Highway 66. As he approached the intersection, the traffic light facing him was red, as it had been for some time. The defendant entered the intersection at a speed of 60 to 70 miles per hour.

As the defendant entered the intersection, he swerved to avoid one car in his lane and crashed into another car occupied by three persons who were killed by the impact. After the accident, the defendant was taken to Forsyth Memorial Hospital. Records

at the hospital indicated that the defendant had a blood alcohol level of .24 percent and perhaps as high as .32 percent.

The defendant's evidence at trial tended to show that he could not remember anything that occurred after being struck by the tavern owner. He attempted to offer testimony showing that he may have been unconscious at the time of the accident, but the trial court refused to permit him to produce evidence along those lines and refused to instruct the jury on a defense of unconsciousness. The jury found the defendant guilty of three counts of second-degree murder. In sentencing the defendant, the trial court found as an aggravating factor that the defendant was engaged in a pattern of violent conduct. The trial court found no mitigating factors and sentenced the defendant to twenty years imprisonment for each conviction to be served concurrently.

The defendant appealed to the Court of Appeals. The Court of Appeals reversed the convictions. Although the issue was not raised by the parties, the Court of Appeals held that the convictions constituted "plain error" as there was no evidence at trial of malice on the part of the defendant. We disagree.

Murder in the second degree is the unlawful killing of a human being with malice but without premeditation and deliberation. *State v. Robbins*, 309 N.C. 771, 309 S.E. 2d 188 (1983); *State v. Wilkerson*, 295 N.C. 559, 247 S.E. 2d 905 (1978). While an intent to kill is not a necessary element of murder in the second degree, that crime does not exist in the absence of some intentional act sufficient to show malice and which proximately causes death. *State v. Lang*, 309 N.C. 512, 308 S.E. 2d 317 (1983). *State v. Wilkerson*, 295 N.C. 559, 247 S.E. 2d 905.

In *State v. Reynolds*, 307 N.C. 184, 297 S.E. 2d 532 (1982) this Court stated that there are three kinds of malice in our law of homicide.

> One connotes a possible concept of express hatred, ill-will or spite, sometimes called actual, express or particular malice. . . . Another kind of malice arises when an act which is inherently dangerous to human life is done so recklessly and wantonly as to manifest a mind utterly without regard for human life and social duty and deliberately bent on mischief. . . . Both these kinds of malice would support a conviction of

> murder in the second degree. There is, however, a third kind of malice which is defined as nothing more than "that condition of mind which prompts a person to take the life of another intentionally without just cause, excuse, or justification."

307 N.C. at 191, 297 S.E. 2d at 536 (citations omitted). It is the second kind of malice which is applicable to the case at bar. As we stated in *State v. Wilkerson*, 295 N.C. 559, 581, 247 S.E. 2d 905, 917,

> any act evidencing "wickedness of disposition, hardness of heart, cruelty, recklessness of consequences, and a mind regardless of social duty and deliberately bent on mischief, though there may be no intention to injure a particular person" is sufficient to supply the malice necessary for second degree murder. Such an act will always be accompanied by a general intent to do the act itself but it need not be accompanied by a specific intent to accomplish any particular purpose or do any particular thing.

The evidence presented at trial and previously reviewed herein was sufficient to support a finding that the defendant's acts evidenced recklessness of consequences and "total disregard for human life." *State v. Lang*, 309 N.C. at 528, 308 S.E. 2d at 325. Such a finding supplies the malice necessary to support a conviction for second degree murder. *Id.; State v. Wilkerson*, 295 N.C. 559, 247 S.E. 2d 905. Therefore, the trial court correctly submitted and instructed the jury on a possible verdict of second-degree murder. For the foregoing reasons, the decision of the Court of Appeals is reversed and the case is remanded to that court with instructions that it reinstate the defendant's appeal and proceed to a determination on the merits of the issues raised there by the defendant. *See e.g. State v. Nickerson*, 308 N.C. 376, 302 S.E. 2d 221 (1983).

Reversed and remanded.

STATE OF NORTH CAROLINA v. SAMUEL LAWRENCE WILLIAMS

No. 78A84

(Filed 6 July 1984)

Criminal Law § 62— misapplication of Supreme Court decision concerning polygraph tests

Where the trial of defendant was concluded prior to the certification of the Supreme Court's decision in *State v. Grier*, 307 N.C. 628 (1983), the Court of Appeals erroneously applied the new rules set forth in *Grier* to the case *sub judice*, and the case must be remanded to that court with instructions to hear the case on its merits.

APPEAL by the State pursuant to N.C. Gen. Stat. § 7A-30(2) from the decision of the Court of Appeals, 66 N.C. App. 374, 311 S.E. 2d 375 (1984) (*Chief Judge Vaughn*, with *Judge Webb* concurring and *Judge Johnson* dissenting), vacating judgment against defendant entered by *Bowen, J.*, at the 17 January 1983 Criminal Session of Superior Court, WAKE County.

Defendant was found guilty of armed robbery and received a fourteen year sentence. A more detailed recitation of the facts of the alleged crime is not necessary to this opinion, since the sole assignment of error before us involves a legal interpretation by the Court of Appeals. Although the defendant-appellee brings forward two assignments of error, our review is limited to a consideration of that issue which forms the basis for the dissenting opinion from the Court of Appeals. *See*: Rule 16 of the North Carolina Rules of Appellate Procedure.

Rufus L. Edmisten, Attorney General, by Dennis P. Myers, Assistant Attorney General, for the State.

Duncan A. McMillan, for the defendant-appellee.

COPELAND, Justice.

Several months prior to trial, the defendant, his attorney and the prosecutor signed a stipulation agreeing to the admissibility of polygraph evidence at trial. At a hearing immediately prior to trial, defendant moved to suppress evidence of both the testimony of the S.B.I. agent who administered the polygraph examination to defendant and the results of that polygraph examination. After

voir dire, the trial court denied the defendant's motion and ordered that the results were properly admissible.

On appeal, the Court of Appeals agreed with the defendant that the admission of these polygraph results and the accompanying testimony of the S.B.I. polygraphist constituted prejudicial error. That court relied on our recent case of *State v. Grier*, 307 N.C. 628, 300 S.E. 2d 351 (1983), where we held that polygraph evidence, even that to which the parties have stipulated to its admissibility, is inadmissible.

The Court of Appeals concluded as follows:

> The Court in *Grier* held that polygraph evidence would not be admissible in the retrial of that case or in the trial of any case commencing after the certification of the opinion.
>
> The *Grier* opinion was filed 8 March 1983. The trial of the case before us was concluded on 19 January 1983. In *Grier*, the Court held that polygraph evidence was inherently unreliable. In the light of that decision, it is obvious that defendant in the present case was convicted, in part, on evidence the Supreme Court has held to be inherently unreliable.
>
> The defendant here has properly raised the question and presented it on direct appeal. We, therefore, see no reason why we should not correct the error and allow a new trial in which the inherently unreliable evidence must be excluded.

Williams at 375, 311 S.E. 2d at 376.

Although we concluded in *Grier* that polygraph evidence is inherently unreliable, we limited the rule of inadmissibility by applying that rule prospectively. We said in pertinent part that:

> The rule herein announced shall be effective in all trials, civil and criminal, commencing on or after the certification of this opinion, including the retrial of this case.

Id. at 645, 300 S.E. 2d at 361.

The trial of this defendant was concluded prior to the certification of this Court's decision in *Grier*. Thus, the rule announced in *Grier* has no application to the case *sub judice*. We stated unequivocally that the *Grier* decision was to be applied

prospectively and the Court of Appeals should have followed the mandate of this Court in that regard.

Since the Court of Appeals erroneously applied the new rules set forth in *Grier* to the case *sub judice*, the decision of the Court of Appeals is therefore reversed and the case is remanded to that court with instructions to hear the case on its merits.

Reversed and remanded.

STATE OF NORTH CAROLINA v. WILLIAM FRANK McCLEARY

No. 13A84

(Filed 6 July 1984)

APPEAL by defendant from a decision of the Court of Appeals, opinion by *Johnson, J.*, with *Hill, J.*, concurring and *Phillips, J.*, dissenting, reversing an order of dismissal entered by *Smith, S. J.*, at the 26 July 1982 Session of GASTON Superior Court. The decision is reported at 65 N.C. App. 174, 308 S.E. 2d 883 (1983).

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

Gingles and Hamrick by Ralph C. Gingles, Jr., for defendant appellant.

PER CURIAM.

We have considered the briefs of the parties, they having by stipulation waived oral argument, on the question of the constitutionality of our statutes controlling lotteries, N.C. Gen. Stat. §§ 14-289, 14-290, and 14-292.1. We have also considered the dissenting opinion in the Court of Appeals and the thoughtful, well-reasoned, and thoroughly documented majority opinion of that court justifying its decision sustaining the constitutionality of the questioned statutes. We conclude that the decision should be and it is

Affirmed.

STATE OF NORTH CAROLINA)
)
v.) ORDER
)
WILLIAM HENRY JOINES)

No. 108P84

(Filed 9 July 1984)

THIS matter is before the Court for consideration of the State's Petition for Discretionary Review to review the decision of the Court of Appeals, reported at 66 N.C. App. 459, awarding defendant a new trial. The Petition is allowed for the sole purpose of entering the following Order:

> In its decision to award defendant a new trial, the Court of Appeals applied the rule enunciated in *State v. Grier*, 307 N.C. 628, 300 S.E. 2d 351 (1983), to cases *decided* after the certification date of *Grier*, 28 March 1983. In *State v. Williams*, 311 N.C. 395, 317 S.E. 2d 396 (1984), this Court held that the rule enunciated in *Grier* applies to only those cases whose *trial commenced* after the certification date of *Grier*. Since Defendant's trial commenced 1 November 1982, approximately five months prior to the certification date in *Grier*, the rule of inadmissibility of polygraph enunciated in *Grier* does not apply to defendant's case. Therefore, the decision of the Court of Appeals is in error.
>
> The decision of the Court of Appeals awarding defendant a new trial is REVERSED, and the case is remanded to that court for further remand to the trial court for reinstatement of the conviction and judgment against defendant.

By order of the Court in Conference, this 9th day of July, 1984.

FRYE, J.
For the Court

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

BOLES v. B-BOM, INC.

No. 211P84.

Case below: 67 N.C. App. 197.

Petition by defendants B-BOM, Inc. and Urban Housing, Inc. for discretionary review under G.S. 7A-31 denied 6 July 1984.

BRYANT v. NATIONWIDE MUT. FIRE INS. CO.

No. 274P84.

Case below: 67 N.C. App. 616.

Petition by defendant for discretionary review under G.S. 7A-31 allowed 6 July 1984.

CHAPPELL v. REDDING

No. 229P84.

Case below: 67 N.C. App. 397.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 6 July 1984.

CLARK v. AMERICAN & EFIRD MILLS

No. 167A84.

Case below: 66 N.C. App. 624.

Petition by defendant for discretionary review under G.S. 7A-31 denied as to additional issues 6 July 1984.

CYCLONE ROOFING CO. v. LAFAVE CO.

No. 181A84.

Case below: 67 N.C. App. 278.

Petition by defendant for discretionary review under G.S. 7A-31 allowed as to additional issues 6 July 1984.

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

DEAN v. CONE MILLS CORP.

No. 203A84.

Case below: 67 N.C. App. 237.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied as to additional issues 6 July 1984.

DEARMON v. B. MEARS CORP.

No. 253PA84.

Case below: 67 N.C. App. 640.

Petition by defendant for discretionary review under G.S. 7A-31 allowed 6 July 1984.

FLEMING v. K-MART CORP.

No. 241PA84.

Case below: 67 N.C. App. 669.

Petition by defendant for discretionary review under G.S. 7A-31 allowed 6 July 1984.

GARRIS v. CROMPTON PILOT MILLS

No. 71P84.

Case below: 65 N.C. App. 825.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 6 July 1984.

HOUSING AUTHORITY v. CLINARD

No. 178P84.

Case below: 67 N.C. App. 192.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 6 July 1984.

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

IN RE BUFFALOE

No. 213P84.

Case below: 67 N.C. App. 562.

Petition by Paula Buffaloe and Luther Buffaloe for discretionary review under G.S. 7A-31 denied 6 July 1984.

IN RE MITCHELL-CAROLINA CORP.

No. 216P84.

Case below: 67 N.C. App. 450.

Petition by Mitchell-Carolina for discretionary review under G.S. 7A-31 denied 6 July 1984.

IN RE WILL OF BAITY

No. 119P84.

Case below: 65 N.C. App. 364.

Petition by propounders for writ of certiorari to North Carolina Court of Appeals denied 6 July 1984.

LATTA v. FARMERS COUNTY MUTUAL FIRE INS. CO.

No. 227P84.

Case below: 67 N.C. App. 494.

Petition by defendant for discretionary review under G.S. 7A-31 denied 6 July 1984.

LEE v. KECK

No. 275P84.

Case below: 68 N.C. App. 320.

Petition by defendant for discretionary review under G.S. 7A-31 denied 6 July 1984.

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

LIVINGSTON v. CITY OF CHARLOTTE

No. 342P84.

Case below: 68 N.C. App. 265.

Motion by defendants to dismiss plaintiffs' petition for discretionary review under G.S. 7A-31 as untimely allowed 6 July 1984. Petition by plaintiffs for writ of certiorari to North Carolina Court of Appeals denied 6 July 1984.

MANUEL v. GATTIS

No. 20P84.

Case below: 65 N.C. App. 622.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 6 July 1984.

METRO. SEWERAGE DIST. OF BUNCOMBE CO.
v. TRUEBLOOD

No. 154P84.

Case below: 64 N.C. App. 690.

Petition by defendants Trueblood for writ of certiorari to North Carolina Court of Appeals denied 6 July 1984.

MILLIKEN & CO. v. GRIFFIN

No. 34P84.

Case below: 65 N.C. App. 492.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 6 July 1984.

MILLS v. BARBER-SCOTIA COLLEGE

No. 223P84.

Case below: 67 N.C. App. 562.

Petition by plaintiffs for discretionary review under G.S. 7A-31 denied 6 July 1984.

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

NORLIN INDUSTRIES, INC. v. MUSIC ARTS, INC.

No. 323P84.

Case below: 67 N.C. App. 300.

Petition by defendants for writ of certiorari to North Carolina Court of Appeals denied 6 July 1984.

POYTHRESS v. LIBBEY-OWENS FORD CO.

No. 259P84.

Case below: 67 N.C. App. 720.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 6 July 1984.

PRESBYTERIAN HOSPITAL v. MCCARTHA

No. 83PA84.

Case below: 66 N.C. App. 177.

Petition by plaintiff for discretionary review under G.S. 7A-31 allowed as to a limited question 6 July 1984. Motion by defendant to dismiss appeal for lack of substantial constitutional question allowed 6 July 1984.

REDEVELOPMENT COMMISSION OF GREENSBORO v. FORD

No. 221P84.

Case below: 67 N.C. App. 470.

Petition by defendant National Advertising Company for discretionary review under G.S. 7A-31 denied 6 July 1984.

SATTERFIELD v. PAPPAS

No. 212P84.

Case below: 67 N.C. App. 28.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 6 July 1984.

STATE v. BENFIELD

No. 288P84.

Case below: 67 N.C. App. 490.

Petition by defendant for writ of certiorari to North Carolina Court of Appeals denied 6 July 1984.

STATE v. BYNUM

No. 69P84.

Case below: 65 N.C. App. 813.

Petition by defendant for discretionary review under G.S. 7A-31 denied 6 July 1984.

STATE v. COLEMAN

No. 331P84.

Case below: 65 N.C. App. 23.

Petition by defendant for writ of certiorari to North Carolina Court of Appeals denied 6 July 1984.

STATE v. CREASON

No. 254P84.

Case below: 67 N.C. App. 763.

Petition by defendant for discretionary review under G.S. 7A-31 denied 6 July 1984. Motion by Attorney General to dismiss appeal for lack of substantial constitutional question allowed 6 July 1984.

STATE v. GREENE

No. 649P82.

Case below: 59 N.C. App. 360.

Petition by defendant for discretionary review under G.S. 7A-31 denied 6 July 1984.

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

STATE v. GREENE

No. 264P84.

Case below: 67 N.C. App. 703.

Petition by defendant for discretionary review under G.S. 7A-31 denied 6 July 1984. Motion by Attorney General to dismiss appeal for lack of substantial constitutional question allowed 6 July 1984.

STATE v. JOINES

No. 108P84.

Case below: 66 N.C. App. 459.

Petition by defendant for discretionary review under G.S. 7A-31 denied 9 July 1984.

STATE v. HICKS

No. 289P84.

Case below: 63 N.C. App. 566.

Petition by defendant for writ of certiorari to North Carolina Court of Appeals denied 6 July 1984.

STATE v. MALONE

No. 62P84.

Case below: 65 N.C. App. 782.

Petition by defendant for discretionary review under G.S. 7A-31 denied 6 July 1984. Motion by Attorney General to dismiss appeal for lack of substantial constitutional question allowed 6 July 1984.

STATE v. MARTIN

No. 200P84.

Case below: 67 N.C. App. 265.

Petition by defendant for discretionary review under G.S. 7A-31 denied 6 July 1984. Motion by Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 6 July 1984.

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

STATE v. NICHOLS

No. 92P84.

Case below: 66 N.C. App. 318.

Petition by defendant for discretionary review under G.S. 7A-31 denied 6 July 1984.

STATE v. POTTS

No. 639P83.

Case below: 65 N.C. App. 101.

Petition by defendant for discretionary review under G.S. 7A-31 denied 6 July 1984.

STATE v. SINCLAIR

No. 285P84.

Case below: 68 N.C. App. 357.

Petition by defendant for discretionary review under G.S. 7A-31 denied 6 July 1984.

STATE v. SMITH

No. 105P84.

Case below: 66 N.C. App. 326.

Petition by defendant for discretionary review under G.S. 7A-31 denied 6 July 1984.

STATE v. STAFFORD

No. 134P84.

Case below: 66 N.C. App. 440.

Petition by defendant for discretionary review under G.S. 7A-31 denied 6 July 1984.

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

STATE v. TENNANT

No. 140P84.

Case below: 65 N.C. App. 222.

Petition by defendant for writ of certiorari to North Carolina Court of Appeals denied 6 July 1984.

STATE v. WILLIS

No. 246P84.

Case below: 67 N.C. App. 320.

Petition by defendant for writ of certiorari to North Carolina Court of Appeals denied 6 July 1984.

WACHOVIA BANK v. GUTHRIE

No. 230P84.

Case below: 67 N.C. App. 622.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 6 July 1984.

WALSTON v. WAKE ELECTRIC

No. 184P84.

Case below: 67 N.C. App. 197.

Petition by defendant for discretionary review under G.S. 7A-31 denied 6 July 1984.

WESTON v. SEARS ROEBUCK & CO.

No. 7P84.

Case below: 65 N.C. App. 309.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 6 July 1984.

STATE OF NORTH CAROLINA v. ARTHUR MARTIN BOYD, JR.

No. 177A83

(Filed 28 August 1984)

1. **Criminal Law § 102.6— accountability of jury to witnesses and society—improper jury argument—no prejudicial error**

Although the prosecutor's jury argument concerning the jury's accountability to the witnesses, the victim, the community and society and how it would respond to such persons if the verdict was for less than first-degree murder is disapproved, it did not amount to such gross impropriety as to require the trial judge to act *ex mero motu*. Furthermore, any impropriety in the prosecutor's remarks was not prejudicial in light of the ample support in the record for defendant's conviction of first-degree murder.

2. **Criminal Law § 135.6— sentencing hearing for first-degree murder—exclusion of testimony concerning effect of stressful life events**

In a sentencing hearing in a first-degree murder case, the trial court did not err in excluding testimony by a college teacher of criminology concerning stressful life events and criminal homicide which tended to show that stressful events in defendant's life history typified that of a man likely to murder a family member or close friend where defendant's entire life history was before the jury, and each of the stressful events in defendant's life was submitted to the jury as a mitigating circumstance, since the witness's testimony would not have added credibility to any of the individual mitigating factors considered by the jury.

3. **Criminal Law § 102.9— jury argument—comment on credibility of defendant and witnesses**

In a sentencing hearing for first-degree murder, comments made by the prosecutor impugning the character of defendant and the credibility of defendant and his witnesses were based upon the evidence or upon inferences properly drawn therefrom.

4. **Criminal Law § 135.9— first-degree murder—sentencing hearing—argument concerning weight of mitigating factors**

In a sentencing hearing for first-degree murder, the prosecutor's argument to the jury that "even though you find [the mitigating factors] to exist, you may not accord them any weight in mitigation" was not improper when taken in the context of the prosecutor's careful discussion of each of the mitigating factors and the instructions by the trial judge.

5. **Criminal Law § 102.6— jury argument—personal opinion—no gross impropriety**

Although the prosecutor may have injected his personal opinion in stating that the Bible may be "the very best law book we have got," such statement was not grossly improper.

6. Criminal Law §§ 102.12, 135.4— jury argument—statement from overruled case

In a sentencing hearing for first-degree murder, the prosecutor did not violate G.S. 84-14 or commit a gross impropriety in quoting a statement from *State v. Jarrette*, 284 N.C. 625, concerning the deterrent effect of a sentence of death although that case was overruled by a U. S. Supreme Court decision which invalidated the capital sentencing scheme as it existed at that time.

7. Criminal Law § 135.9— first-degree murder—sentencing hearing—mitigating factors—findings by jury

In a sentencing hearing for first-degree murder, the trial court did not err in instructing the jury that it could but was not compelled to answer "yes" or "no" to each of the mitigating factors that were submitted but was required only to indicate, as the third issue, whether it found one or more mitigating factors to exist.

8. Criminal Law § 135.9— first-degree murder—sentencing hearing—instructions on mitigating factor—use of "could"

The trial court's instruction in its final mandate in a sentencing hearing for first-degree murder that the jury "could" answer an issue as to a mitigating factor in defendant's favor was not plain error where the court used the mandatory "would" or "should" in other portions of the instructions on such mitigating factor.

9. Criminal Law § 135.9— first-degree murder—sentencing hearing—mental or emotional disturbance—instruction referring to "faculties"

In a sentencing hearing for first-degree murder, the trial court did not err in using the term "loss of faculties" in its instructions to the jury on the mitigating circumstance as to whether defendant was under the influence of mental or emotional disturbance.

10. Criminal Law § 114.3— first-degree murder—sentencing hearing—instructions on mitigating factors—no expression of opinion

The trial judge did not express his opinion on the credibility of defendant's witnesses and the evidence while instructing the jury on the mitigating factors in a sentencing hearing for first-degree murder.

11. Criminal Law § 135.7— first-degree murder—sentencing hearing—instructions—burden of proof—duty to return death penalty

The trial court did not err 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 sufficiently to call for the death penalty or in instructing the jury that it must return a verdict of death if it found that the aggravating circumstances outweighed the mitigating circumstances.

12. Constitutional Law § 63; Criminal Law § 135.3— death qualification of jury—propriety

Death qualifying a jury prior to the guilt phase does not result in a jury which is guilt and death prone.

13. Constitutional Law § 63; Criminal Law § 135.3— exclusion of veniremen opposed to death penalty

Two jurors were not improperly excluded from the jury panel in a first-degree murder case in violation of the *Witherspoon* rule where they both stated that they could not impose a sentence of death.

14. Criminal Law § 135.7— first-degree murder—sentencing hearing—effect of jury's inability to agree—instruction not required

The trial court did not err in failing to instruct the jury during the penalty phase of a first-degree murder case that a sentence of life imprisonment would be imposed if the jury was deadlocked upon the proper sentence.

15. Criminal Law § 135.8— constitutionality of heinous, atrocious or cruel aggravating circumstance

The "especially heinous, atrocious, or cruel" aggravating circumstance of G.S. 15A-2000(e)(9) is not unconstitutionally vague on its face as construed and applied in North Carolina.

16. Criminal Law § 135.9— mitigating circumstances—burden of proof

A defendant in a sentencing hearing for first-degree murder was not denied due process because the trial court placed the burden on him to prove the mitigating circumstances by a preponderance of the evidence.

17. Criminal Law § 135.4— constitutionality of capital murder scheme

The North Carolina capital murder scheme does not unconstitutionally permit subjective discretion and discrimination in imposing the death penalty.

18. Criminal Law § 135.4— constitutionality of death penalty statute

The North Carolina death penalty statute, G.S. 15A-2000, is not unconstitutional.

19. Criminal Law § 135.10— proportionality of death sentence

A sentence of death imposed upon defendant for the first-degree murder of his former girl friend was not excessive or disproportionate where the victim was stabbed 37 times and suffered considerably prior to her death.

Justice EXUM dissenting as to sentence.

Justice MARTIN joins in this dissenting opinion.

BEFORE *Washington, J.*, at the 14 March 1983 Criminal Session of Superior Court, SURRY County, defendant was convicted of first degree murder and sentenced to death, from which sentence he appeals as a matter of right. N.C. Gen. Stat. § 7A-27(a). This case was heard in the Supreme Court on 10 May 1984.

Defendant was tried for and convicted of the first degree murder of Wanda Phillips Hartman. The victim died as a result of thirty-seven stab wounds inflicted by the defendant. Numerous in-

dividuals, including the victim's mother and young daughter, witnessed the murder which occurred outside a shopping mall on the afternoon of Saturday, 7 August 1982. Because the evidence at trial pointed unerringly to the defendant as the perpetrator of the crime, the focus at the guilt phase of the trial was whether the evidence was sufficient to support a conviction of first degree murder on the theory of premeditation and deliberation. Defense counsel argued forcefully that if guilty, defendant could at most be convicted of second degree murder. Also because of the overwhelming evidence of defendant's guilt, defense counsel has prudently raised and argued only one assignment of error respecting the guilt phase of the trial: whether the defendant was deprived of his right to a fair trial by jury as a result of the prosecutor's argument "which sought a conviction of first degree murder on the basis of passion and prejudice rather than the evidence offered at trial." As our discussion of the facts will reveal, although we do not approve of the prosecutor's remarks, the evidence at trial was more than sufficient to support a conviction for first degree murder. Therefore, defendant has failed to show prejudice by any impropriety, particularly as he failed to object during the argument.

Defendant's remaining assignments of error relate to the sentencing phase of his trial. These include numerous assignments of error on issues previously resolved by this Court against the defendant and which have been raised to preserve these issues for further appellate review. In addition, defendant challenges the trial court's exclusion of certain testimony relating to his mental condition, the prosecutor's remarks during argument to the jury, and the instructions on mitigating factors.

Upon our careful reading of the trial transcript and upon full consideration of the arguments set forth in the briefs, we find that no prejudicial error occurred at either the guilt phase or the sentencing phase of defendant's trial. We therefore affirm the conviction of first degree murder and the sentence imposed thereon.

In order to address the assignments of error raised on this appeal, it is necessary to set out a full and detailed statement of the facts.

The defendant had known the victim for approximately three years during which time they had lived together. They had sep-

arated several months prior to the murder when the victim and her daughter moved into the home of the victim's parents. The defendant returned to his wife and children while at the same time attempting a reconciliation with the victim. On the morning of Saturday, 7 August 1982, defendant was seen drinking at a local tavern. He then took a taxi to the Mayberry Shopping Mall in Mount Airy where he bought a lock-blade knife, the murder weapon. He met the victim coming out of a store accompanied by her mother and daughter. He followed the victim to a nearby bank where a local church group was conducting a carwash. The victim's father was the pastor of the church. Witnesses, including the man who sold defendant the knife, described the defendant as calm, polite and not intoxicated. He told one witness that he had "never felt better in his life" and shook hands with the victim's father, stating that he had no hard feelings. This latter remark was apparently in reference to the fact that the victim's father had earlier in the week ordered defendant from his property after which a trespassing warrant had been issued. Defendant and the victim then sat on the curb in front of the bank and talked quietly for some period of time until the victim's mother stated that they had to leave. As the victim stood up, the defendant stood in front of her and asked that she talk to him a little longer. The victim stated that they had nothing further to discuss and that if the defendant was going to kill her, "he should hurry up and get it over with." Of significance was the fact that approximately one week prior to the murder, during a confrontation with the victim's father, defendant turned to the victim and stated "I'll see you like a German submarine, when you are not expecting it." Defendant reached into his pocket, pulled out the knife and assured the victim that he wasn't going to hurt her. He immediately drew back the knife and stabbed her. The victim fell to the ground and the defendant continued to stab her as rapidly as he could. At one point the victim's mother managed to pull the defendant away from her daughter. Defendant, however, pushed the 76 year old woman aside, held the victim by her hair, and continued to stab.

One of the eyewitnesses, a member of a Virginia County Sheriff's Department who was visiting Mount Airy with his son, followed the defendant on foot after the murder. He watched as the defendant walked slowly and inconspicuously from the crime

scene toward the back of the shopping mall. Defendant removed his bloodstained shirt, wiped the blood from his hands, and put the shirt into his back pocket. Defendant eventually reached an embankment, turned, and headed for the mall parking lot as a Mount Airy police car reached the scene. Defendant tossed the knife under a parked car and attempted to conceal himself between other cars. He was apprehended and arrested.

The testimony indicated that the victim suffered considerably prior to her death. When the emergency medical unit arrived at the scene at 2:25 p.m., she was "raking [her hands] back and forth in the dirt," and repeatedly complained of an inability to breathe. She was taken to a local hospital for emergency treatment and then sent by ambulance to Baptist Hospital in Winston-Salem. She died en route at 3:45 p.m. The examining pathologist testified that he identified thirty-seven stab wounds to the neck, chest, left arm, left thigh, back, and each hand, that included two penetrating wounds to the right lung, three to the left lung, one to the stomach and one to the sternum. The wounds to the hands and arm were classified as defensive wounds—"incision wounds which are produced when the victim extends its arms in an effort to defend himself." The victim died of exsanguination caused by multiple stab wounds, leading to hypovolemic shock.

Defendant did not testify at the guilt phase of his trial. He presented three witnesses in an effort to prove he was intoxicated at the time of the murder. Two friends testified that defendant spent the morning at Martin's Place, during which time he allegedly consumed much beer, some whiskey and took some undisclosed type of pill, variously described as "heartshaped" or a large "black capsule" which the defendant removed from his hat. The bartender, however, did not recall seeing the defendant wearing any hat, and testified that defendant left the tavern at 9:30 a.m., soon after he had arrived. The bartender did testify that when defendant returned shortly after noon, she refused to serve him because he appeared to be intoxicated.

At the sentencing phase of the trial, the defendant testified on his own behalf and offered the testimony of a number of preachers who had witnessed defendant's religious rebirth, and his mother who testified concerning defendant's distressing childhood. The thrust of this testimony was that defendant's

father abandoned the family when defendant was a child. Then, defendant's grandfather, to whom he looked as a father figure, died. This event was likened to a dog losing its master. Defendant had a history of alcohol abuse. From the age of fourteen the defendant had either been in prison, on parole, or on probation for crimes including injury to property, nonsupport, seven convictions for larceny, assault with intent to commit rape on a fourteen year old girl, driving under the influence, assault on an officer, and resisting arrest. Prior to the murder he was on an antiabuse program which required him to take a pill before a magistrate each day. He voluntarily stopped the program the day before the murder.

The defendant loved the victim and attempted in every way he could to effect a reconciliation. He had read her diary and knew she was seeing another man. He talked to her for two hours on the telephone on the morning of the murder and knew she would be at the Mayberry Mall for the carwash. In violation of his probation, he had been arrested for driving under the influence earlier in the week and had consulted his attorney the day before the murder. He recalled the details of his activities prior to and following the murder, but did not recall the actual murder.

On Tuesday, 21 December 1982, at 8:30 p.m. defendant experienced a religious awakening. He was permitted to leave prison for his baptism which took place on 15 January 1983 at Holder's Bottom. He has since become an ardent student of biblical literature and was described by one of the preachers who testified on his behalf as "smart. A lot of people don't know how to be saved, and he does." Defendant testified that Jesus Christ "picked me up out of the hog pen," and that "[w]hat you see sitting right here in front of you is sin." "I am guilty, all right, but I have been forgiven for that sin, and that's satisfied me." Twice, each time prior to when the case was scheduled for trial, defendant wrote the victim's father asking for forgiveness and in one letter stated "The D.A. has asked for my life to be taken away. I'm worried about that.—I do not think that would make anyone feel better."

Against this background, defendant attempted to introduce at the sentencing phase the testimony of Jack Humphrey, coauthor of a report entitled "Stressful Life Events and Criminal Homicide." Following the State's objection, the trial judge con-

ducted a voir dire hearing which disclosed the following: The witness teaches criminology at U.N.C.-Greensboro. The witness had reviewed the prison records, social histories and psychiatric histories collected by the Department of Corrections for inmates over a two-year period. The study involved approximately 272 violent offenders and 193 felonious property offenders (non-violent offenders). The report concluded that homicide offenders tend to experience more stressful events than do non-homicide offenders over the course of their lifetime prior to the commission of the crime. In addition, people who tend to kill those close to them tend to experience more loss in their lives than those who kill strangers. "The more loss in someone's life, the more likely they are to become self-destructive. And it seems that killing a family member or killing a close friend is an act of self-destruction." The witness then described the types of "losses" which can be experienced:

1) Loss of a parent or sibling

2) Loss of a student role—being expelled from school

3) Loss of friends

4) Loss of job

5) Loss of liberty—being incarcerated.

The witness had interviewed the defendant and concluded that "what was true of the group of people who had killed someone close to them was especially true of Mr. Boyd." The defendant's father had abandoned the family; he had lost his grandfather; he was unable to keep a job; he had been incarcerated; he had few friends and those he had he kept losing.

Defense counsel argued that the testimony would give "some credence to the submission to the jury of any mitigating circumstance involving Mr. Boyd where he lost his father at an early age and he lost his grandfather at an early age." However, following the voir dire hearing, the trial judge excluded this evidence.

Following the presentation of evidence at the sentencing phase, the court submitted as factors in aggravation N.C. Gen. Stat. § 15A-2000(e)(2), that the defendant had been previously convicted of a felony involving the use or threat of violence to the

person; and N.C. Gen. Stat. § 15A-2000(e)(9), that the murder was especially heinous, atrocious, or cruel. The jury answered these issues in the affirmative, and found that the aggravating factors were sufficiently substantial to call for the imposition of the death penalty. The jury was asked to consider the following mitigating factors:

(1) That the murder was committed while Arthur Martin Boyd, Jr. was under the influence of mental or emotional disturbance.

(2) The capacity of Arthur Martin Boyd, Jr. to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired.

(3) The age of the defendant at the time of the crime.

(4) The defendant had lived with the deceased and at the time of the death of the deceased desired a reconciliation.

(5) The defendant has since the commission of the crime expressed remorse over the death of the deceased.

(6) The defendant knew and cared for the deceased.

(7) The defendant has since the commission of the offense asked the father of the deceased to forgive him.

(8) The defendant has since the commission of the offense expressed a devotion to God.

(9) The defendant has since the commission of the offense been baptized.

(10) The defendant suffered the loss of his grandfather at an early age in life.

(11) The father of the defendant abandoned the family at an early age in the life of the defendant.

(12) The defendant sought help from others before the commission of the crime.

(13) The defendant was addicted during most of his adult life to drugs and alcohol.

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

The jury did not indicate which mitigating circumstances it did or did not find, but affirmatively indicated that it found one or more. Finally, the jury found that the aggravating circumstances outweighed the mitigating circumstances and recommended a sentence of death.

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

Ann B. Petersen and James R. Glover, Assistant Appellate Defenders, and Michael F. Royster, for the defendant appellant.

COPELAND, Justice.

GUILT PHASE

I.

[1] Defendant first contends that he was denied a fair trial as a result of the prosecutor's remarks during closing argument at the guilt phase of the trial. He points specifically to the following statements:

> . . . the reality of this case hit me.
>
> We are talking about real people. By your verdict in this matter you are going to be saying to these real people what you think of what you have heard here this week. Your decision is going to tell those people what you think of what you heard here.
>
> There are several people you will be answering to. What will you say to the people in this Country about what you have heard? What will you say about all those citizens out there in Surry County about what you have heard here this week? Will you say, "Okay, if it happened down there at Mayberry Mall on a Saturday"? Will you say "Okay"?

The prosecutor then went on to ask how the jury would respond to the witnesses, the paramedics, the victim, her parents, and her daughter if its verdict was for less than first degree murder.

As we most recently stated in *State v. Maynard*, 311 N.C. 1, 316 S.E. 2d 197 (1984), a prosecuting attorney may argue vigorously all facts in evidence, the law raised by the issues, and any inferences arising therefrom. However, the prosecutor "may not place before the jury incompetent and prejudicial matters by injecting his own knowledge, beliefs, and personal opinions not supported by the evidence." *Id.* at 15, 316 S.E. 2d at 197. From this it follows that the jury's decision must be based solely on the evidence presented at trial and the law with respect thereto, and not upon the jury's perceived accountability to the witnesses, to the victim, to the community, or to society in general.

The defendant, however, failed to voice any objection at trial to the prosecutor's closing remarks. Therefore, this Court must determine whether the remarks amounted to such gross impropriety as to require the trial judge to act *ex mero motu*. *See State v. Maynard*, 311 N.C. 1, 316 S.E. 2d 197. Following a thorough review of the contested argument, we find that while we do not approve of the prosecutor's remarks, they do not rise to the level of such gross impropriety as to have required *ex mero motu* action by the trial judge. Furthermore, the record provides ample support for the defendant's first degree murder conviction despite the improper remarks. Therefore, any impropriety in the remarks was not prejudicial. In the absence of a showing of prejudice, prosecutorial misconduct in the form of improper jury argument does not require reversal. *See United States v. Hasting*, 461 U.S. 499, 76 L.Ed. 2d 96 (1983) (lower court erred in reversing conviction apparently on the basis that it had the supervisory power to discipline prosecutors for continuing violations of rule banning comment on accused's failure to testify, regardless of whether prosecutor's arguments constituted harmless error). *See also State v. Taylor*, 289 N.C. 223, 221 S.E. 2d 359 (1976); *State v. Westbrook*, 279 N.C. 18, 181 S.E. 2d 572 (1971).

PENALTY PHASE

II.

[2] Defendant contends that the trial court's exclusion of Dr. Humphrey's testimony concerning stressful life events and criminal homicide constituted prejudicial error. Defendant argues, *inter alia* that "[t]he purpose of Doctor Humphrey's testimony was

to link together all of the defendant's mitigating evidence into a unified whole which explained the apparent contradiction of killing the person the defendant loved the most." The defendant intended to show, through Dr. Humphrey's testimony, that the killing was "primarily a depression caused self-destructive act, closely related to the impulse that leads to suicide, resulting from a life history of an inordinate number of losses beginning with the abandonment by the defendant's father and the death of his grandfather and culminating with the threatened loss of Wanda Hartman." Defendant concludes that:

> Without the glue, the entire structure of the defendant's theory of mitigation was shattered into little pieces. Presented only as broken bits, there was virtually no hope that the defendant could convince the sentencing jury that his was a case arising out of the "frailties of human kind" which called for compassion and mitigation of the ultimate penalty of death.

The State argues that evidence of stress, as defined by an accumulation of "losses," most of which are merely manifestations of antisocial behavior, while perhaps resulting in crimes of violence, is of no mitigating value.

In its brief, the State comments that:

> The most Dr. Humphrey's study showed was that stress often times produces violent behavior in susceptible individuals and that persons incarcerated in the North Carolina Prison System for violent crimes have histories of more stress than those incarcerated for non-violent crimes. . . . It is common knowledge that millions of individuals have been subjected to some or all of the stresses inflicted upon defendant without becoming murderers. Many people lose their fathers and grandfathers at an early age and later in life experience marital problems or are rejected by a spouse or other loved one without becoming murderers. The stresses to which defendant was subjected were no more or less than those inflicted upon the population in general by life; the fact that he was weak and succumbed to these stresses hardly reduces his moral culpability or demonstrates that he is a less worthy candidate for capital punishment than another. Rather clearly the evidence shows a weak individual; the

product of an alcoholic father who deserted his family and a less than stable mother; who had gone to prison by the time he was seventeen years of age; who, in the ensuing twenty years, never kept a job for a year while being convicted of twelve crimes; who was taken to church regularly as a child but when not in prison, was high most of the time on drugs and alcohol and who spent all of his time in a pool hall as a hustler and crappie.

In determining whether Dr. Humphrey's testimony was erroneously excluded at the sentencing phase of defendant's trial as bearing on factors in mitigation, our inquiry is twofold: (1) whether the tendered evidence was relevant, and (2) whether defendant has demonstrated the existence of "patent, prejudicial error" by its exclusion. *State v. Pinch*, 306 N.C. 1, 292 S.E. 2d 203 (1982). In this regard, we stated in *Pinch* that:

> Defendant's contentions must be examined against the backdrop of our capital punishment statute which provides, in conformity with the constitutional mandates of the Eighth and Fourteenth Amendments, that any evidence may be presented at the separate sentencing hearing *which the court deems* "relevant to sentence" or "to have probative value," including matters related to aggravating or mitigating circumstances. G.S. 15A-2000(a)(3); *see Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed. 2d 973 (1978). The circumstances of the offense and the defendant's age, character, education, environment, habits, mentality, propensities and criminal record are generally relevant to mitigation; however, the ultimate issue concerning the admissibility of such evidence must still be decided by the presiding trial judge, and his decision is guided by the usual rules which exclude repetitive or unreliable evidence or that lacking an adequate foundation. *See State v. Johnson*, 298 N.C. 355, 367, 259 S.E. 2d 752, 760 (1979); *State v. Cherry*, 298 N.C. 86, 98-99, 257 S.E. 2d 551, 559 (1979), *cert. denied*, 446 U.S. 941, 100 S.Ct. 2165, 64 L.Ed. 2d 796 (1980). *See also State v. Goodman*, 298 N.C. 1, 30-31, 257 S.E. 2d 569, 588 (1979). Consequently, we believe that a new sentencing hearing should not be ordered by this Court for the trial judge's exclusion of evidence at the penalty phase unless the defendant demonstrates the existence of patent, prejudicial error.

Id. at 19, 292 S.E. 2d at 219.

A mitigating circumstance has been defined as:

> "a fact or group of facts which do not constitute any justification or excuse for killing or reduce it to a lesser degree of the crime of first-degree murder, which may be considered as extenuating, or reducing the moral culpability of killing or making it less deserving of the extreme punishment than other first-degree murders."

State v. Brown, 306 N.C. 151, 178, 293 S.E. 2d 569, 586 (1982).

We note first that Dr. Humphrey's report consists of only nine pages of narrative, three statistical charts, and three pages of references. The report, in the final paragraph of the summary, states:

> Support and qualification has been found for the link between stressful life events and criminal homicide. The findings also show that the type of stress typically experienced by the offender tends to influence his choice of victim.

In short, the report lacks comprehensiveness and is characterized by general conclusions of questionable scientific import or value in mitigation. In fact, the pertinent information we have concerning the details of the scientific and statistical methods which Dr. Humphrey and his co-author employed were gleaned from a thorough cross-examination of the witness during voir dire. Furthermore, the "stressful events" described by the witness as pertaining to the defendant—his loss of freedom due to incarceration, his inability to hold a job, and his problem maintaining friendships—offer little as factors which would extenuate or reduce the moral culpability of the killing. Nevertheless, each of these stressful events was presented to the jury in considerable detail through the testimony of the defendant, his mother, and other witnesses. Basically, defendant's entire life history was before the jury, including information about his alcoholic father, the death of his grandfather, his work history, his criminal history, his marital history, and his history of drug and alcohol abuse, together with his eventual religious conversion. Dr. Humphrey's testimony would have placed these various "stressful events" in a context suggesting that defendant's act in murdering Wanda Hartman was predictable. The report merely constructs a profile of a mur-

derer into which the defendant fits. The fact that the defendant's life history typifies that of a man likely to murder a family member or close friend would not, we believe, have added credibility to any of the individual mitigating factors which were supported by the evidence and considered by the jury. The trial judge did not err in excluding the testimony of Dr. Humphrey.

III.

Defendant next contends that he is entitled to a new sentencing hearing because of several allegedly improper statements made by the prosecutor at the completion of the sentencing phase of the trial. The defendant's exceptions pertain to remarks regarding (1) the defendant's character and credibility; (2) the credibility of defendant's witnesses; (3) the weight to be given to the mitigating factors; (4) certain biblical quotations; and (5) the reading of a portion of an opinion written by this Court. Defendant again failed to object to any of the above remarks. We find nothing in the prosecutor's argument so grossly improper as to require the trial judge to act *ex mero motu*. *See State v. Oliver*, 309 N.C. 326, 307 S.E. 2d 304 (1983).

[3] With respect to the remarks impugning the character of the defendant and the credibility of both the defendant and his witnesses, the record discloses that each comment was based upon the evidence or on inferences properly drawn therefrom. *See State v. Pinch*, 306 N.C. 1, 292 S.E. 2d 203.

[4] Concerning the weight to be given to the mitigating factors, the prosecutor told the jury that "even though you find (the mitigating factors) to exist, you may not accord them any weight in mitigation." The prosecutor then went on to discuss each of the fourteen mitigating factors which would be submitted. For example, with respect to the age of the defendant (thirty-seven) as being a factor in mitigation, the prosecutor noted that there was a coincidence between his age and the fact that defendant inflicted thirty-seven stab wounds; that obviously this factor had been proved and must be considered; but that it should be given no weight. When taken in the context of the prosecutor's careful discussion of each of the mitigating factors, together with the instructions by the trial judge, the comment was within allowable limits of argument. *See State v. Kirkley*, 308 N.C. 196, 302 S.E. 2d 144 (1983).

[5] The biblical quotations which form the basis of defendant's next exception are not improper in context, when defendant's propensity to quote the Bible in his defense is considered. The prosecutor may have injected his personal opinion as to the value of the Bible as being "maybe . . . the very best law book we have got," but we do not consider this statement grossly improper. *See State v. Oliver*, 309 N.C. 326, 307 S.E. 2d 304.

[6] Defendant strenuously objects to the prosecutor's quoting a portion of *State v. Jarrette*, 284 N.C. 625, 202 S.E. 2d 721 (1974), a case that was overruled by *Woodson v. North Carolina*, 428 U.S. 280, 49 L.Ed. 2d 944 (1976). Defendant argues that by so quoting, the prosecutor violated N.C. Gen. Stat. § 84-14 which permits counsel to include in argument quotations from opinions or statutes that are relevant and refer to authoritative rules of law. *See State v. Irick*, 291 N.C. 480, 231 S.E. 2d 833 (1977). Counsel may not read an unconstitutional statute and therefore, argues defendant, by analogy counsel may not quote from a case which has been overruled.

We note initially that this Court on occasion cites as authority cases which have been reversed or overruled where the issue in question, particularly an evidentiary issue, is unaffected by the rationale giving rise to the ultimate disposition of the case. Defendant here argues, however, that the portion of the *Jarrette* opinion quoted by the prosecutor "was part of the rationale holding that a mandatory death sentence could constitutionally be imposed for a conviction of first degree murder and rape" which conclusion was later overruled. The prosecutor's remark, including the quoted portion of *Jarrette*, is as follows:

> And ladies and gentlemen of the jury, the Supreme Court of North Carolina, and they have seen hundreds and hundreds of thousands of these cases come through their court system, and their opinion should be given weight. And what do they say? "The steady rising tide of crimes of the most serious nature throughout the nation has occurred in an era of unprecedented permissiveness in our society, in an emphasis on sympathy for the accused rather than for his victim and those endangered by him." And they said this, ladies and

gentlemen of the jury, in a first degree murder case. They said this, this unprecedented permissiveness in our society of sympathy for the accused. "This is ample basis for reasonable man, not just people running out here mad, under the passions of the moment, for reasonable people, to conclude that some punishment of exceptionally vicious crimes, other than imprisonment, coupled with carefully organized programs for rehabilitation, to assure that the prisoner, that he had the sympathy of society, is necessary to bring about the turning of the tide.

We do not agree with defendant's characterization of the quoted portion of *Jarrette* that it formed the rationale of the decision in that case to the extent that the prosecutor was prohibited from referring to it in his argument. The issue in *Jarrette* was whether the capital sentencing scheme as it then existed was constitutional. The Supreme Court of the United States later invalidated that scheme. That Court has since clearly authorized the imposition of the death penalty under carefully limited circumstances. Much of the discussion in *Jarrette*, including the above-quoted portion of the opinion, dealt in general terms with the various arguments which this Court felt justified a death penalty. The above-quoted portion was written in the context of the deterrent effect of a sentence of death and we read the prosecutor's comments here to be likewise an argument relating to the need for the death penalty for its value as a deterrent.

In this regard, we note with interest that the defense attorney responded to the prosecutor's remarks as follows:

> I have heard the argument so many times, I have heard so many people say that the death penalty is a deterrent, it has a deterrent effect. And the District Attorney, of course, never argued that to you directly, but he asked you to send a message. He asked you to send a message to put a stop to this, put a stop to this permissive society that we live in, I believe is what he said. And what he is really talking about, of course, is the deterrent effect argument of the death penalty.

Defense counsel then argued strenuously and at length that "the logic of the death penalty as a deterrent is imperfect. . . . We cannot, we cannot kill people who kill people to show that kill-

ing is wrong. It just doesn't work. It never has." Defense counsel stated that the death penalty was not deterrence, but prevention, and erroneously informed the jury that defendant would spend the rest of his life in prison[1] thereby providing the necessary prevention. In light of our assessment, as well as defense counsel's assessment of the prosecutor's motive for quoting from *Jarrette*, we do not agree that this portion of the argument was so grossly improper or prejudicial as to require action on the part of the trial judge or to require a new sentencing hearing.

IV.

[7] Defendant next argues that the trial court erred in instructing the jury that it could but was not compelled to answer "yes" or "no" to each of the mitigating factors that were submitted but was required only to indicate, as the third issue, whether it found one or more mitigating factors to exist. Defendant objected to the

1. N.C. Gen. Stat. § 15A-1370.1 states that Article 85 of the North Carolina General Statutes "is applicable to all sentenced prisoners, including Class A and Class B felons, and Class C felons who receive a sentence of life imprisonment. . . ." N.C. Gen. Stat. § 15A-1371 states in pertinent part that:

> "(a1) A prisoner serving a term of life imprisonment with no minimum term is eligible for parole after serving 20 years. This subsection applies to offenses committed on and after July 1, 1981."

We disapprove of defense counsel's attempt to mislead the jury as to the effect of a life sentence and caution defense attorneys to avoid such remarks at *any* stage of the trial proceedings. We furthermore note with some concern that defense counsel provided the jury with the following assessment of its responsibility in determining a sentence:

> "The D.A. mentioned at the outset of this trial that, I believe the question he put to you was could you folk be part of the legal machinery that put this man to death. Ladies and gentlemen of the jury, that needs a little clarification. You are not part of the legal machinery, you are the legal machinery that puts the man to death. You are the ones, and you alone, who sign the paper that says death. That merely, ladies and gentlemen of the jury, puts some things into action. They take him down to Raleigh, put him in Central Prison, and set him on death row, and on a day certain and in a year certain and an hour certain, they lead him into the gas chamber, carrying out your orders. They strap him in the gas chamber, ladies and gentlemen of the jury, because you told them to. And then the man drops the pellet in the little pool of acid. He carries out your orders. And then they crank open the louvers and gas fills the gas chamber, and he inhales gas. Poisonous gas fills his lungs, bubbles, and blood oozes from his mouth. . . ."

We consider this portion of defense counsel's argument irrelevant, and highly improper. *See State v. Johnson*, 298 N.C. 355, 259 S.E. 2d 752 (1979).

instructions as given which appear in the transcript in three separate locations.

This argument has been advanced to our Court on numerous occasions and has been rejected. *See State v. Taylor*, 304 N.C. 249, 283 S.E. 2d 761 (1981), *cert. denied*, --- U.S. ---, 77 L.Ed. 2d 1398 (1983); *State v. Rook*, 304 N.C. 201, 283 S.E. 2d 732 (1981), *cert. denied*, 455 U.S. 1038 (1982); *State v. Pinch*, 306 N.C. 1, 292 S.E. 2d 203, *cert. denied*, --- U.S. ---, 74 L.Ed. 2d 622 (1982). We do not agree with defendant's assertion that the trial judge, by these instructions, failed to inform the jury that it *must* consider each listed mitigating circumstance before answering "yes" or "no" to the third issue. While the trial judge's first instruction might be somewhat ambiguous, he later stated "In considering that issue (issue 3), *you must consider the sub-issues or sub-sections submitted there, 1 through 14.*" (Emphasis added.) We hold that the trial judge properly instructed the jury on its duty on how it was to consider the mitigating factors.

V.

Defendant contends that the trial judge erred in failing to correctly instruct the jury on the mitigating circumstance that the defendant was under the influence of mental or emotional disturbance. The trial judge instructed that:

> A defendant is under such influence if he is in any way affected or influenced by a mental or emotional disturbance at the time he kills. Being under the influence of mental or emotional disturbance is similar to, but not the same as being in the heat of passion upon sudden or adequate provocation. A person may be under the influence of mental or emotional disturbance even if he had no adequate provocation and even if his disturbance was not so strong as to constitute heat of passion or to preclude deliberation. For this mitigating circumstance to exist, it is enough that the defendant's mind or emotions were disturbed from any cause, and that he was under the influence of the disturbance when he killed Wanda Phillips Hartman. You *would* find this mitigating circumstance if you find that on the 7th of August, 1982, the defendant, Arthur Martin Boyd, Jr., was suffering from the effects of excessive use of alcohol and excessive use or abuse of drugs; that he was still suffering from the loss of his

> father at an early age, his early age, and of his grandfather at an earlier age; that he was suffering from the loss of the woman that he testified he loved, Wanda Phillips Hartman; that at this time on August 7th, 1982, then that he was so suffering from the mental or emotional disturbance that he was affected and suffered impairment or *loss of his faculties* to the extent that you *should* find or be satisfied from this evidence that he was under the influence of some mental or emotional disturbance. . . .
>
> The first one, as I mentioned, was that the murder was committed while Arthur Martin Boyd, Jr. was under the influence of mental or emotional disturbance. The burden is upon the defendant to satisfy you from the evidence and by its greater weight that he was so under the influence. If he has so satisfied you, you *could* answer that issue yes in his favor; if not so satisfied, you *would* answer the issue no. (Emphasis supplied.)

The defendant argues that "[n]owhere in the entire charge on this mitigating circumstance was the jury told that if it found that the defendant was under the influence of a mental or emotional disturbance, it must, or had a duty to find this mitigating circumstance and consider it in the defendant's favor in its sentence determination." Defendant also objects to the instruction as given inasmuch as "it added to the defendant's burden an additional element to be proven" in that "[i]t required the defendant to prove not only that he was under the influence of a mental or emotional disturbance at the time, but that this disturbance was so great that it *impaired or caused a loss of his faculties*." (Emphasis in the original.)

Defendant objected to this instruction during jury deliberations, but not on the grounds argued on appeal. Rather, the objection was stated as follows:

> Your Honor, we would like to OBJECT to the Court instructing the jury on the mitigating factor of the defendant was laboring under a mental or emotional disturbance at the time of the crime wherein the Court stated that the defendant should be, would have to be suffering from the loss of a grandfather or father or abuse of drugs, or one of these, before this mitigating circumstance could be found.

Thus, with respect to the arguments presented on appeal, we will apply the plain error rule as enunciated in *State v. Odom*, 307 N.C. 655, 300 S.E. 2d 375 (1983). *See State v. Oliver*, 309 N.C. 326, 307 S.E. 2d 304 (1983).

[8] Defendant's first attack on this instruction is launched at the trial court's use of the word "could" ("you *could* answer that issue yes in his favor") in its final mandate. As the trial judge, apart from this one *lapsus linguae*, instructed with the mandatory "would" or "should," we do not consider this grammatical *lapsus* so serious as to amount to plain error.

Defendant's objection to the trial court's use of the word "faculties" is equally without merit. The trial judge had, earlier in the instruction, clearly defined mental or emotional disturbance, concluding that "it is enough that defendant's mind or emotions were disturbed from any cause, and that he was under the influence of the disturbance when he killed Wanda Phillips Hartman."

[9] A mental or emotional disturbance must obviously affect some functioning of the afflicted mind, i.e. cause an impairment or loss of an individual's "faculties." Contrary to defendant's characterization of this word as connoting "some sort of insanity, incompetency or senility," we find the definition of "faculties" quite innocuous:

> "4a: ability to act or do whether inborn or cultivated . . . b: an inherent capability, power, or function . . . c: one of the powers or agencies into which psychologists formerly divided the mind (as will, reason, instinct), and through the interaction of which they endeavored to explain all mental phenomena, d: *obs*: personal characteristics . . ." Webster's Third New International Dictionary of the English Language (1968).

In the context of the overall instructions, we find nothing sinister or additionally burdensome associated with the word "faculties." This assignment of error is overruled.

VI.

[10] Defendant next contends that he was deprived of a fair sentencing determination because the trial judge allegedly ex-

pressed his opinion on the credibility of defendant's witnesses and the evidence while instructing the jury on the mitigating factors. Defendant points to the following statements:

1) In instructing on the non-statutory mitigating factor that defendant had lived with the deceased and desired a reconciliation, the trial judge, after summarizing defendant's evidence, stated:

> You will recall the testimony presented by Mr. and Mrs. Phillips as to the events occurring in that connection with regard to whether or not there was a genuine desire for reconciliation at that time.

Defendant argues that this statement expressed the opinion that "the State had introduced evidence, through Mr. and Mrs. Phillips, that the defendant did *not* have a genuine desire for reconciliation"; and that the trial judge "disbelieved all of the defendant's evidence that there was a 'genuine' desire to reconcile with Wanda." Thus, argues defendant, by this one statement "all the defendant's efforts to convince the jury of his genuine feelings of love, frustration, deep sense of loss and inability to cope with the reality of losing Wanda were negated." Our reading of this statement discloses no such expression of opinion. The objection borders on the frivolous.

The second objection argued under this issue involved the trial judge's instruction on defendant's mitigating factors that he had expressed a devotion to God and had been baptized. The trial judge stated:

> You will recall the testimony of the defendant and of one of the preachers that on the 15th day of January, 1983, the defendant was allowed to leave the jail in Surry County and go out to a place called Holder's Bottom, as I understood the testimony, you will recall that for yourself, where a baptism service was then held and he was baptized. The defendant saying and contending that you should be satisfied that this is a mitigating circumstance, the State saying and contending that you should be very skeptical of this and scrutinize this testimony very carefully, not that you would doubt the word of the minister but you would doubt the sincerity of the de-

fendant because he himself testified that he made a false confession at an earlier time in an effort to get Wanda back.

This appears to be an accurate statement of the evidence and the contentions of the parties. We find no basis for objection.

Nor does our reading of the trial court's instruction on the mitigating factor that defendant sought help from others disclose error, favoritism toward one party or the other, or any form of judicial opinion.

In contending that the trial judge expressed his opinion on the credibility of defendant's evidence during the instruction on defendant's addiction to drugs and alcohol as a mitigating factor, the defendant points to the following:

> You will recall the further testimony that he was taking anti-abuse for a period of two and a half years and took it according to the probation officer up until Thursday before this murder took place. Now whether he was taking anti-abuse and at the same time abusing alcohol and drugs to the extent you have heard is a matter for you to say and determine.

Once again we find nothing objectionable in this statement. Defendant's own evidence was to the effect that he was addicted to drugs and alcohol and was also involved in an anti-abuse program.

Finally defendant advances a somewhat circuitous argument that because the trial judge excluded Dr. Humphrey's testimony concerning stressful life events and criminal homicide, his instruction on the nonstatutory mitigating factors concerning defendant's loss of his father and grandfather was erroneous. The trial judge stated:

> The defendant saying and contending that the loss of his grandfather when he was five years old and the loss of his father when he was either six or eight months old, or three years old, creates certain conditions of stress in the mind of the defendant and that you should consider these as mitigating circumstances.

Essentially defendant contends that when Dr. Humphrey's testimony was excluded, he was forced to list these losses as separate mitigating factors, at which point it was error for the

trial judge to attempt "to tie the defendant's contentions to the effect the losses had on defendant's mental state."

Defendant overlooks the fact that defense counsel, during final argument, quite successfully "tied in" these "stressful life events" to defendant's mental state. Counsel argued:

> Ladies and gentlemen of the jury, I say and contend to you that that has some mitigating value in this case. This man desperately wanted this woman back. I say and contend to you that he truly loved her. I say and contend to you that he loved her more than anything in the world, more than anything that he had ever loved before. A man who has lost his father at an early age, lost his grandfather, lived the way he has with drugs and alcohol, and finally found something that had a little meaning in his life, and he let it get away from him. And he is desperately seeking to get it back.
>
> Now, ladies and gentlemen of the jury, I don't know that any of you all have ever gone through that. I know I haven't. I don't know if any of you all have or not. I didn't ask you those questions when we selected this jury. But I know one thing, the more we read and the more we hear about losing people, losing mamas and losing daddies, I don't care what it is, ladies and gentlemen of the jury, whether you lose your mama or your daddy, it's going to have an effect on people. Yes, ladies and gentlemen of the jury, it will have an effect on this little girl over here. It will. It is going to have an effect on her, ladies and gentlemen of the jury.
>
> Why does the District Attorney argue that to you, that he won't forget about that little girl as long as he lives? I probably won't either. But yet he wants to say, so what. He lost his daddy. So what? Are we supposed to come into court and say she will suffer but he didn't? It means something to her but it won't to him, it hasn't to him? That, ladies and gentlemen of the jury, is one of the mitigating circumstances that we are submitting to you, that he lost his father at an early age in life. You heard him testify and you heard his mama testify. His father left when he was a young child. He never had any father. Never had any father. He was reared, ladies and gentlemen of the jury, by the lady that you folks

saw testify yesterday. I put her up there so you could see who she was and see the lady that reared this defendant.

The fact that he lost his grandfather at an early age in life. You heard what his mother said about that. It caused some type of problem with this young man, five years old when he lost his grandfather. Ladies and gentlemen of the jury, you will have to decide if that mitigates or not. But it's hard for me to see how one side can say it will be tough for this person but it ain't tough for him. So what? So what?

The trial judge's instruction on these factors was proper.

Our reading of the trial transcript discloses that the trial judge's instructions to the jury in this case were thorough; amazingly accurate considering the volume of testimony; detailed; balanced; and fair. In every instance he carefully stated the contentions of both parties. This assignment of error is overruled.

VII.

[11] Defendant also argues that the trial 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 sufficiently to call for the death penalty. Defendant further argues alternatively that the trial court erred in instructing the jury that it *must* return a verdict of death if it found that the aggravating factors outweighed the mitigating factors, thereby lowering the State's burden of proof. As was the case in *State v. Maynard*, 311 N.C. 1, 316 S.E. 2d 197, we again find the challenged jury instructions free from constitutional and prejudicial error.

Defendant's remaining assignments of error 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 re-examine its previous holdings, and, if this Court declines to do so, for purposes of preserving the issues for later review by a Federal court. *See Engle v. Issac*, 456 U.S. 107 (1982)." While we decline to alter our position on these issues, each will be addressed *seriatim*.

VIII.

[12] Defendant contends that he was denied a fair trial because several jurors were improperly excluded from the jury panel due to their beliefs concerning the death penalty. Specifically, defendant claims: (a) that death qualifying a jury prior to the guilt phase results in its being guilt and death prone; and (b) that two jurors were excused in violation of the standard set out in *Witherspoon v. Illinois*, 391 U.S. 510, 20 L.Ed. 2d 776 (1968).

With respect to defendant's contention that a guilt and death prone jury results from death qualification, this Court has consistently held the current jury selection process in this State in first degree murder cases constitutional. *See State v. Maynard*, 311 N.C. 1, 316 S.E. 2d 197 and *cases cited therein.* We again decline to reconsider this issue.

[13] Defendant further contends that two jurors, Arrington and Garland Smith, were excluded from the jury panel in violation of the rule in *Witherspoon.* Upon examination of the jury proceedings it appears that juror Arrington did indeed state unequivocally that he could not impose a sentence of death.

> COURT: And regardless of the evidence, however strong it might be, you say you could not and would not vote for the death penalty?
>
> MR. ARRINGTON: No, sir.

Juror Smith, while initially appearing indecisive, did finally state his opposing opinion.

> COURT: At this time, can you say that your mind is closed to the question of the death penalty?
>
> MR. SMITH: Yes, sir.

This Court finds no error in the exclusion of jurors based on their express opposition to and refusal to apply the death penalty. Defendant's assignment of error is therefore overruled.

IX.

[14] Defendant's next contention is that the trial court erred by not informing the jury during the penalty phase that if it was deadlocked a life sentence would be imposed. The jury here delib-

erated for only one hour and forty-seven minutes. This Court stated in *State v. Williams*, 308 N.C. 47, 73, 301 S.E. 2d 335, 351-52, *cert. denied*, --- U.S. ---, 78 L.Ed. 2d 177, *reh. denied*, 104 S.Ct. 518 (1983), that "such an instruction is improper because it would be of no assistance to the jury and would invite the jury to escape its responsibility to recommend the sentence to be imposed by the expedient of failing to reach a unanimous verdict." We therefore hold that the trial court did not err in failing to give this instruction and, thus, overrule defendant's assignment of error.

X.

[15] Defendant argues that the aggravating factor of "especially heinous, atrocious or cruel," N.C. Gen. Stat. § 15A-2000(e)(9), is unconstitutionally vague on its face as construed and applied in North Carolina and under the Due Process Clause of the Fourteenth Amendment of the United States Constitution. Defendant recognizes that this aggravating circumstance has been consistently upheld when attacked on constitutional grounds of vagueness, yet he urges us to reconsider our position on this issue. We recently did so in *Maynard*, 311 N.C. 1, 316 S.E. 2d 197, and found our interpretation to be entirely consistent with the mandate of *Furman v. Georgia*, 408 U.S. 238, and *Godfrey v. Georgia*, 446 U.S. 420, 64 L.Ed. 2d 398 (1980). *See State v. Oliver*, 309 N.C. 326, 307 S.E. 2d 304. We decline to alter our position on this issue and overrule the assignment of error.

XI.

[16] Defendant asserts that he was denied due process by the trial court's failure to instruct the jury that the State had the burden of proving the nonexistence of each mitigating circumstance beyond a reasonable doubt. Defendant further asserts that the trial court erred in placing the burden on him to prove each mitigating circumstance by a preponderance of the evidence. We have consistently rejected this argument and do so again here. *See State v. Maynard*, 311 N.C. 1, 316 S.E. 2d 197 (1984); *State v. Kirkley*, 308 N.C. 196, 302 S.E. 2d 144. This assignment of error is overruled.

XII.

[17] Defendant argues that the North Carolina capital murder scheme permits subjective discretion and discrimination in imposing the death penalty and is, therefore, unconstitutional under *Furman v. Georgia*, 408 U.S. 238, 33 L.Ed. 2d 346. This Court has repeatedly ruled that N.C. Gen. Stat. § 15A-2000 is constitutional and here do so again. *See State v. Maynard*, 311 N.C. 1, 316 S.E. 2d 197. We overrule this assignment of error.

XIII.

[18] Defendant contends that the North Carolina death penalty statute, N.C. Gen. Stat. § 15A-2000, and consequently the verdict of death in this case is unconstitutional. The constitutionality of N.C. Gen. Stat. § 15A-2000 has been upheld repeatedly. *See State v. Maynard*, 311 N.C. 1, 316 S.E. 2d 197. Defendant's assignment of error is therefore overruled.

PROPORTIONALITY

[19] After a thorough review of the transcript, record on appeal and the briefs of the parties, we find that the record fully supports the jury's written findings in aggravation. We further find that defendant's death sentence was not imposed under the influence of passion, prejudice or any other arbitrary factor and that the transcript and record are devoid of any indication that such impermissible influences were a factor in sentencing.

Finally we have determined that the death sentence imposed is neither excessive nor disproportionate to the penalty imposed in similar cases considering both the crime and the defendant. *See State v. Williams*, 308 N.C. 47, 301 S.E. 2d 335. We find this case comparable to *State v. Martin*, 303 N.C. 246, 278 S.E. 2d 214, *cert. denied*, 454 U.S. 933, *reh. denied*, 454 U.S. 1117 (1981).

We upheld defendant's sentence of death in *Martin* for the shooting death of his wife. As in the present case, the murder was preceded by threats against the victim; the defendant did not murder the victim "in a quick and efficient manner"; *Id.* at 253, 278 S.E. 2d at 219; the victim was murdered in the presence of the victim's child; and defendant presented evidence of social and emotional problems.

The cases cited by defendant involving killings of lovers or spouses in which defendants received life sentences are not comparable. In two cases it was not clear that the defendant personally killed the victim, *see State v. Jackson*, 309 N.C. 26, 305 S.E. 2d 703 (1983); *State v. Woods*, 307 N.C. 213, 297 S.E. 2d 574 (1982); *State v. Parton*, 303 N.C. 55, 277 S.E. 2d 410 (1981). In *State v. Bondurant*, 309 N.C. 674, 309 S.E. 2d 170 (1983), and *State v. Colvin*, 297 N.C. 691, 256 S.E. 2d 689 (1979), there was some evidence to suggest that the killing was not deliberate; and in *State v. Myers*, 299 N.C. 671, 263 S.E. 2d 768 (1980), defendant, who had no significant history of criminal convictions, testified that the killing was accidental. In two cases no aggravating factors were submitted, *see State v. Calloway*, 305 N.C. 747, 291 S.E. 2d 622 (1982); *State v. Misenheimer*, 304 N.C. 108, 282 S.E. 2d 791 (1981), and therefore, they are not included in the pool used for proportionality review. *State v. Williams*, 308 N.C. 47, 301 S.E. 2d 335 (1983). In *State v. Anderson*, 303 N.C. 185, 278 S.E. 2d 238 (1981); *State v. Clark*, 300 N.C. 116, 265 S.E. 2d 204 (1980) and *State v. Franks*, 300 N.C. 1, 265 S.E. 2d 177 (1980), there was evidence that the defendants were suffering from legitimate mental or emotional disorder. In the present case, by contrast, there was overwhelming evidence of defendant's guilt, scanty evidence of emotional or mental disorder, which, together with defendant's significant history of criminal convictions and the heinous nature of the crime, including suffering of the victim, provide the basis for a penalty of death.

No error.

Justice EXUM dissenting as to sentence.

The evidence shows defendant, in a public place and in full view of several witnesses, including the victim's mother, stabbed to death the person whom he professed to love the most. The central question at the sentencing hearing was: "Why?" The state argued the crime was motivated by defendant's mean selfishness. Defendant, argued the state, killed the victim because he did not want anyone else to have her if he could not. This is a motive theory that is easy to sell in this kind of case. It may be the truth. Defendant's motive theory was different, less apparent to the average observer, and probably more difficult to sell. It was a theory which does not excuse the crime but which might have mitigated it in the eyes of the jury. Defendant's motive theory

was, in a nutshell, this: Defendant had suffered a number of severe personal losses during his life. He lost his father, his grandfather, his friends, and his liberty. The thought of losing Wanda was so unbearable that defendant considered killing himself. The act of killing Wanda, the one closest to him, was, in effect, an act of self-destruction. Perhaps this is not the truth.

The question before us is not which motive theory, the state's or the defendant's, is more worthy of belief. That question is for the jury. The question is whether defendant should be permitted to offer evidence in support of his theory. The majority says not and affirms a death sentence imposed after a hearing at which defendant was precluded from proffering his theory in mitigation because Professor Jack Humphrey's testimony upon which the theory wholly rested was excluded from the jury's consideration. I cannot join in this decision. Neither reason nor precedent provide any support for it.

The majority concludes Professor Humphrey's testimony is inadmissible because it finds his opinions to be "of questionable scientific import or value in mitigation" and to suggest merely "that defendant's act in murdering Wanda Hartman was predictable."

Many expert opinions in controversial areas are not only "questionable"; they are often vigorously questioned by opposing experts in courts of law. That an expert's opinions may be "questionable" has never been a ground for excluding them from evidence. It goes to the weight not the admissibility of expert testimony.

Generally experts are permitted to give their opinions if through study or experience they are better qualified than the jury to have an opinion on the particular subject under inquiry. N.C. Gen. Stat. § 8-58.13 provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion.

An expert's opinion is admissible if it is "based on the special expertise of the expert, that is, . . . the witness because of his ex-

pertise is in a better position to have an opinion on the subject than is the trier of fact." *State v. Sparks*, 297 N.C. 314, 325, 255 S.E. 2d 373, 380-81 (1979); *accord, State v. Wilkerson*, 295 N.C. 559, 568-69, 247 S.E. 2d 905, 911 (1978).

The record demonstrates that Professor Humphrey was a duly qualified expert criminologist. He received his doctorate in sociology "with a concentration in criminology" in 1973 from the University of New Hampshire. He is a full professor at the University of North Carolina at Greensboro where he teaches courses in criminology, criminal justice, juvenile delinquency, and deviant behavior. He has published books entitled: *Panorama of Suicide*, based on a federally funded project on suicide in New Hampshire; *Administration of Justice*; and is presently working on a book, *Deviant Behavior*, which is due to be published "in the next year or so." He has worked with Dr. Page Hudson, North Carolina's Chief Medical Examiner, "on various projects . . . having to do with violent and unexplained death. Many of those papers . . . are co-authored with Dr. Hudson." Professor Humphrey has participated in various professional meetings "delivering papers on matters of suicide and homicide and other forms of violence." Since 1968 his professional studies "have concentrated almost solely on violent death."

Clearly criminology is an area of "scientific, technical, [and] specialized knowledge." It is defined by *Webster's Third New International Dictionary* as "the scientific study of crime as a social phenomenon, of criminal investigation, of criminals, and of penal treatment." According to *The Columbia Encyclopedia* (3d ed. 1963), criminology has "[s]ince 1910 . . . become a science with the introduction of intensive research and statistical analysis. . . . Criminology as a study also embraces environmental, hereditary, or psychological causes [of crime]. . . ."

Most recently Professor Humphrey conducted a study and co-authored a report based thereon with Professor Stewart Palmer, "one of the leading figures in homicide research in the United States and author of *Psychology of Murder, the Violent Society.*" This study, done in cooperation with the North Carolina Department of Corrections, was directed essentially to two questions. One was, "Do homicide offenders over the course of their lifetime suffer more [stressful life events] than do non-violent felons?" The second was, "Is there a difference between offenders who kill

family members or someone close to them as opposed to people who kill strangers or mere acquaintances?" After conducting studies of some 272 homicide offenders and 192 non-violent offenders incarcerated in the North Carolina Department of Corrections, Professors Humphrey and Palmer concluded that "homicide offenders tend to experience more stressful events than do non-homicide offenders over the course of their lifetime prior to the commission of the crime." More importantly, for purposes of this case, the professors also considered a "major finding" to be that "people who tend to kill those close to them tend to experience more *loss in their lives* than those who kill strangers." (Emphasis supplied.)

The import of Professor Humphrey's testimony was not that defendant's act was predictable. Indeed, he never so testified. His testimony was directed toward explaining defendant's conduct and establishing defendant's motive for the murder. Professor Humphrey was prepared to testify:

> The more loss in someone's life, the more likely they are to become self-destructive. And it seems that killing a family member or killing a close friend is an act of self-destruction. They are, after all, killing something that is part of them, very close to them, very important to their self. They are destroying them. So in the act of killing another person they are in fact destroying part of their self, a self-destructive act.

Professor Humphrey interviewed defendant. He was prepared to testify that during this interview defendant related a life "which seemed to involve an inordinate amount of losing things, losing his father, losing his grandfather. He didn't have very many friends, and those he had he kept losing them. As his life progressed he lost his liberty. He was incarcerated, repeatedly. . . . [T]he one predominate factor seemed to be repeated losses." When asked about the offense in question, defendant said, "The most important thing he had at the moment was this relationship with his girlfriend, and . . . he was on the verge of losing that, at the time the crime was committed." Defendant further volunteered information that before the homicide "he would wake up in the middle of the night with thoughts of killing himself."

Professor Humphrey was prepared to testify that "what struck me is the consistency of Mr. Boyd's life with what we found to be true of homicide offenders in general. It seemed pret-

ty obvious that what was true of the group of people who had killed someone close to them was especially true of Mr. Boyd." This was "[m]ainly . . . the accumulation of loss throughout their lives, and this tendency to be self-destructive."

Professor Humphrey was prepared to testify that people like defendant "who are threatened with loss . . . of someone very close to them, wife, girlfriend, . . . become depressed . . . and depression is in a sense anger turned toward yourself. . . . Those people who destroy someone or something at that point will not destroy a stranger, will not indiscriminately kill. They don't constitute a threat to the public. They constitute a threat to that which they fear losing the most, the person closest to them. And it is that person who is unfortunately in harm's way. And having extended that aggression toward other people they are in fact aggressing toward themselves. They are destroying that which they fear losing the most. . . . A desperately needed part of their life."

Under our rules governing the admissibility of expert testimony, Professor Humphrey's testimony was competent on the question of defendant's motive. He was a duly qualified expert criminologist by training, study and experience, and he was in a better position to have opinions on this question than the jury. The jury, of course, would have been free to reject his opinions. There is, however, no legal reason for excluding them from the jury's consideration.

Decisions of the United States Supreme Court have been replete with references which point consistently to the proposition that a death sentence may not be constitutionally carried out if the sentencing authority is not permitted to consider all aspects of a defendant's character, mentality, emotional makeup, record, and circumstances of the crime which might tend to mitigate the offense in the eyes of the jury. *Eddings v. Oklahoma*, 455 U.S. 104, 116 (1982) ("background and mental and emotional development of a youthful defendant [must] be duly considered in [a capital sentencing proceeding]"); *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) ("[T]he Eighth and Fourteenth Amendments require that the sentencer [in a capital sentencing proceeding] not be precluded from considering, as a mitigating factor, any aspect of the defendant's character or record or any of the circumstances of the offense that the defendant proffers as a basis for a sentence less

than death"); *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) (a process for imposing a death penalty is unconstitutional if it "excludes from consideration in fixing the ultimate penalty of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of human kind").

This Court in interpreting our statute has said: "The circumstances of the offense and the defendant's age, character, education, environment, habits, mentality, propensities and criminal record are generally relevant to mitigation," recognizing, of course, that evidence which is "repetitive or unreliable . . . or lacking in an adequate foundation" may be excluded. *State v. Pinch*, 306 N.C. 1, 19, 292 S.E. 2d 203, 219 (1982). The Court has further said, "Evidentiary flexibility is encouraged in the serious and individualized process of life or death sentencing. *See Williams v. New York*, 337 U.S. 241, 69 S.Ct. 1079, 93 L.Ed. 1337 (1949). However, as in any proceeding, evidence offered at sentencing must be pertinent and dependable, and, if it passes this test in the first instance, it should not ordinarily be excluded." *Id.* at 19, n. 9.

Professor Humphrey's testimony meets all these requirements for admissibility. It was not repetitive. It was based on scientifically conducted criminological studies, including an interview with defendant, done in accordance with the dictates and discipline of this science. It was pertinent and no less reliable or dependable than similar expert testimony ordinarily admitted every day in courts of law. The testimony was proffered to mitigate the crime. The testimony was sufficient to permit, but not require, the sentencing jury reasonably to infer that defendant did not murder the victim out of meanness or selfishness but rather out of a sense of unbearable personal loss in which the killing was in defendant's mind an act of self-destruction. It was only in the light of Professor Humphrey's testimony that evidence which the jury heard regarding the defendant's other losses made sense. As defendant aptly puts it in his brief, without Professor Humphrey's testimony, "the entire structure of the defendant's theory of mitigation was shattered into little pieces. Presented only as broken bits, there was virtually no hope that the defendant could convince the sentencing jury that his was a case arising out of the 'frailties of human kind' which called for compassion and mitigation of the ultimate penalty of death."

Although it is not entirely clear from its opinion, the majority apparently also holds that even if it was error not to admit Professor Humphrey's testimony, the error did not prejudice defendant. An error of constitutional dimension, as I think this was, is prejudicial, *i.e.* reversible, unless an "appellate court finds that it was harmless beyond a reasonable doubt." N.C. Gen. Stat. § 15A-1443(b). Other errors are reversible if "there is a reasonable possibility that, had the error . . . not been committed, a different result would have been reached at the trial. . . ." N.C. Gen. Stat. § 15A-1443(a). Since Professor Humphrey's testimony was the linchpin of defendant's theory of mitigation and given his impressive academic credentials, there is a reasonable possibility that admission of his testimony would have produced a different result at trial. Clearly, I cannot conclude beyond a reasonable doubt that its exclusion was harmless.

Because of the exclusion of Professor Humphrey's testimony, defendant is entitled to a new sentencing hearing.

Justice MARTIN joins in this dissenting opinion.

STATE OF NORTH CAROLINA v. MICHAEL WAYNE MOORE

No. 637A82

(Filed 28 August 1984)

Criminal Law § 163— failure to object to instructions at trial—waiver of appellant review—no "plain error"

Defendant waived appellate review of instructions in a prosecution for first-degree sexual offenses by failing to object at trial, and no "plain error" appeared in the detailed explanation of the elements of first-degree sexual offense.

Justice EXUM dissenting.

Justice MEYER concurring.

Justice MITCHELL and Justice MARTIN join in this concurring opinion.

APPEAL from judgments of *Judge Hal H. Walker* at the 30 August 1982 Criminal Session of GUILFORD Superior Court after defendant was found guilty by a jury of six charges of first

degree sexual offense. The judgments imposed a sentence of life imprisonment for each conviction. Defendant appeals pursuant to N.C. Gen. Stat. § 7A-27(a).

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

Locke T. Clifford and Michael R. Nash, for defendant appellant.

COPELAND, Justice.

The principal question presented by this appeal is whether the trial court clearly instructed the jury on the applicable law so that the verdicts were the result of proper application of that law to the facts as the jury found them.

We believe that the answer to that question must be determined on the basis of whether or not Judge Walker committed "plain error" in the jury charge. We conclude that he made no such "plain error."

The State relied principally upon the evidence of Danny Pruitt who was in an eight-man cell in the Greensboro jail on 1 April 1982. Pruitt had originally been imprisoned for breaking and entering and larceny on 21 May 1981, but was charged with escape when he failed to report after work release on 13 November 1981. After the escape charge was resolved he was sent to the Greensboro jail to await transfer to a prison camp. In the cell with Pruitt were defendant; defendant's brother, Jerry Moore; Sammy Buchanan; James Hodge; Curtis Davis; Sylvester Barnes; and Clifford Belo. All these men were awaiting transfer to various prison facilities.

Witnesses for the State included Pruitt, the victim; Hodge; Davis; Belo; and Barnes. Defendant testified in his own behalf as did his brother, Jerry. The State's evidence and defendant's evidence were in extreme conflict. There is even some conflict among the versions of events given by the State's witnesses.

Pruitt testified that on the evening of 4 April 1982 the following events occurred in the jail cell where the men were placed: Defendant and his brother, Jerry, began pushing him and beating him with their fists while he was playing solitaire. Defendant,

Jerry Moore, and Buchanan, each in turn and aided by the others, forcibly and against Pruitt's will, engaged in anal intercourse with Pruitt. Pruitt was then allowed to use the bathroom. Then defendant and Jerry Moore, each in turn and aided by the other, forcibly made Pruitt engage in fellatio with them by threatening to stab Pruitt in the ear with an ink pen. They then permitted Pruitt to take a shower.

The other witnesses gave various versions of the testimony previously related.

Defendant testified he never engaged in any sexual activity with Pruitt. Jerry Moore, brother of this defendant, admitted having pled guilty to six second degree sex offenses against Pruitt and having received a total prison sentence of forty years.

The crucial issues in this case are whether defendant has waived appellate review of the instructions given by Judge Walker by failing to object at trial and, if not, whether the instructions to the jury were proper. We conclude, by failing to object at trial, appellate review has been waived.

In North Carolina Rule of Appellate Procedure 10(b)(2) the following requirement for appellate review is set forth:

> (2) Jury Instructions; Findings and Conclusions of Judge. No party may assign as error any portion of the jury charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly that to which he objects and the grounds of his objection; provided, that the opportunity was given to the party to make the objection out of the hearing of the jury and on request of any party, out of the presence of the jury.

This requirement was effective for trials beginning on and after 1 October 1981.

Specifically, North Carolina Rule of Appellate Procedure 10(b)(2) prevents a party from assigning "as error any portion of the jury charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict. . . ." Because of the rule's technical exclusionary effect, we mitigated the harshness of the rule in *State v. Odom*, 307 N.C. 655, 300 S.E. 2d 375 (1983). In *Odom*, we did this by adopting the "plain error" rule

which permits review of a very narrow range of errors notwithstanding a defendant's failure to object at trial to the jury charge. Even as we adopted the "plain error" rule, however, we cautioned that:

> (T)he plain error rule . . . is always to be applied cautiously and only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is a '*fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done,' or 'where [the error] is grave error which amounts to a denial of a fundamental right of the accused,' or the error has ' "resulted in a miscarriage of justice or in the denial to appellant of a fair trial" ' or where the error is such as to 'seriously affect the fairness, integrity or public reputation of judicial proceedings' or where it can be fairly said 'the instructional mistake had a probable impact on the jury's finding that the defendant was guilty.'

Id. at 660, 300 S.E. 2d at 378 (quoting *United States v. McCaskill*, 676 F. 2d 995, 1002 (4th Cir. 1982) (footnotes omitted) (emphasis original). In contemplation of these definitions, we must conclude that no plain error appears.

For purposes of guidance during closing arguments by the attorneys and during the trial court's jury instructions, Judge Walker distributed to each of the jurors copies of the six verdict sheets specifying the specific six charges against the defendant. Each verdict sheet bearing the numbered charge included a brief explanation as to the defendant's role as principal or aider and abettor, as well as the specific sexual offense committed and the person victimized. The following information was before the jury:

VERDICT (82CRS27312):	Principal Anal Sex Pruitt
VERDICT (82CRS27313):	Principal Oral Sex Pruitt
VERDICT (82CRS15754):	Aiding and abetting Jerry Moore Anal Sex Pruitt

VERDICT (82CRS15755):	Aiding and abetting Jerry Moore Anal Sex Pruitt
VERDICT (82CRS15756):	Aiding and abetting Jerry Moore Oral Sex Pruitt
VERDICT (82CRS15757):	Aiding and abetting Sammy Buchanan Anal Sex Pruitt

Having distributed the foregoing to each juror he instructed them in pertinent part as follows:

> Now, in these six cases, members of the Jury, and you may use those copies if you want along in this charge, I want to tell you first that you will treat each case separate. By that, I mean that you may find the Defendant not guilty in all six cases, you may find him guilty in all six cases, you may find him guilty of one of the two offenses for which you will render a verdict in part of the cases, and not guilty in part of the others, and so I want to, at the beginning, tell you that you will treat each case separately even though, in my recapitulation, I will group them together for that purpose. But when I charge you as to the law and what the law is, please bear in mind through your deliberations and during my presentation to you of the law that you must consider each case on its own and render a separate verdict in each particular case.
>
> Now, . . . you will find at the top of 27312, that the Defendant is charged with the principal of committing anal sex on the prosecuting witness, Danny Pruitt. You will also find that in 82CRS27313, the Defendant, Michael Moore, is charged as a principal in the commission—alleged commission of oral sex on the prosecuting witness, Danny Pruitt. The other four cases, 15754, the Defendant stands charged with aiding and abetting Jerry Moore in the commission of anal sex between Jerry Moore and Danny Pruitt; and 82CRS-

15755, he is charged with the commission of aiding and abetting Jerry Moore in another charge of the commission of anal sex between Jerry Moore and Danny Pruitt; in 82CRS15756, the charge is aiding and abetting Jerry Moore in the commission of an act of oral sex with Danny Pruitt; and in the last case, 82CRS15757, the commission of aiding and abetting Sammy Buchanan in the commission of an anal sex act with Danny Pruitt. You will notice that the possible verdicts are the same in each case. There are three possible verdicts, guilty of first degree sexual offense, or guilty of second degree sexual offense—and I will tell you the difference—or not guilty. . . .

Now, members of the Jury, in each of these cases, the Defendant, Michael Moore, has been accused of first degree sexual offense, the first possible verdict on each one. I charge you that for you to find the Defendant in each case guilty of first degree sexual offense, the State of North Carolina must prove four things beyond a reasonable doubt.

First, that the Defendant, Michael Moore, engaged in the particular sexual act that you are considering, whether it be the charge of an anal act or an oral act, between the Defendant and Danny Pruitt. . . .

Secondly, that the Defendant, Michael Moore, did or threatened to use force sufficient to overcome any resistance that Danny Pruitt might make.

Third, that Danny Pruitt, the alleged victim, did not consent to an act of sexual activity such as the particular one that you are considering at the time, and that it was against his will. . . .

Fourth, that the Defendant, Michael Moore, employed or displayed a dangerous or deadly weapon. . . .

Now, . . . serious injury means that if a person is injured to the extent that treatment and/or hospitalization is required or medical attention, then you may consider that in determining whether or not there is serious injury existing in the case, or, members of the Jury, if you find that the Defendant committed any of these acts, the particular act that

you are considering, and if he was aided and abetted by one or more other persons.

Now, a Defendant would be aided or abetted by another person if that person, whichever one you are considering, and the names are on there, was present at the time the sexual offense was committed and if that particular person allegedly involved knowingly advised or encouraged the Defendant or if they aided him to commit the particular alleged crime you are considering at the time, then the particular individual involved, if you find that he shares the Defendant's criminal purpose to the Defendant's knowledge, then you can find that the person was aiding, or was in a position to aid him at the time the alleged sexual offense was committed.

Now, members of the Jury, as to the aiding and abetting of the three cases charged against this Defendant, 15755, aiding and abetting Jerry Moore; 15756, aiding and abetting Jerry Moore, 55 being the alleged anal act and 56 being the alleged oral act; and 15757, again, aiding and abetting Buchanan in an anal act, the Court instructs you that a person, in this case, the Defendant, may be guilty of the crime that you are considering, the alleged crime, although he personally did not do any of the acts which I have just finished telling you are necessary to constitute a sexual offense. A person who aids and abets another, in these particular cases you are considering either Jerry Moore or Buchanan, is guilty of that crime. You must clearly understand that if the Defendant, Michael Moore, does aid and abet within the meaning of the law, he is guilty of the act charged against the other person, a sexual offense act, just as if he personally had done all the acts necessary to constitute that crime.

So I charge you that for you to find the Defendant, Michael Moore, guilty of a sexual offense in the three cases because of aiding and abetting, the State must prove beyond a reasonable doubt, first, that the sexual offense was committed by Jerry Moore as to those two cases in which his name appears on the copy, and Sammy Buchanan in 15757; that it was committed by that one that you are considering in each case. Secondly, that the Defendant, Michael Moore, advised or encouraged or aided the particular party charged in that

case and those other companion cases, either Jerry Moore or Buchanan when you are considering that, to commit that crime. . . .

So as to these three cases involving the alleged aiding and abetting of his brother, Jerry Moore, two in that case, and one with Sammy Buchanan, the Court charges you that if you find from the evidence and beyond a reasonable doubt that . . . Michael Moore did commit the act of sexual offense, and that with Jerry Moore when you are considering those two cases or Sammy Buchanan when you are considering that one, did knowingly encourage or aid Jerry Moore and Sammy Buchanan to commit the crime of sexual offense, it would be your duty to return a verdict of guilty of a sexual offense, one of the two sexual offenses in which you are considering; two as to Jerry Moore and one as to Sammy Buchanan. But if you do not so find or if you have a reasonable doubt as to one or more of these things that I have just enumerated to you, it would be your duty to return a verdict of not guilty.

Now, members of the Jury, as to the possible verdicts, again I charge you that if you find from the evidence and beyond a reasonable doubt that on or about the 5th of April, 1982, Michael Moore engaged in a sexual act, as I have defined that, with Danny Pruitt and that he did so as to these two substantive cases, 27312 and 27313, or in the other —Well, I said two cases against Jerry. There are three cases against Jerry, two anal charges and one oral charge; and one against Sammy Buchanan.

Again, I instruct you that if you find that the Defendant, Michael Moore, did participate in and engage in and did meet the essentials and the requirements, as I have defined to you, with Danny Pruitt on this day in question and that he did so by actually having these sex acts with Pruitt; and as to the three cases involving Jerry Moore and the one allegedly involving Sammy Buchanan by aiding and abetting them, as I have defined that; . . . and the Court instructing you further that the State of North Carolina need not show a deadly weapon if you find beyond a reasonable doubt that the defendant, Michael Moore, was aided and abetted by the particular individual involved in the case you are considering

beyond a reasonable doubt, that is all as to that number four essential that the State must prove. So then if you find that these existed beyond a reasonable doubt, all of the elements, it would be your duty to return a verdict in the case you are considering of guilty of first degree sexual offense, which is the first possible verdict on each one.

But if you do not so find or if you have a reasonable doubt as to one or more of the essentials and the elements that I have outlined to you, you would not return a verdict of guilty of first degree sexual offense, but would consider the second possible verdict in each case, which is as to whether or not the Defendant is guilty of second degree sexual offense. . . .

But if you do not so find or if you have a reasonable doubt as to one or more of the elements and essentials I have spelled out to you, it would be your duty to return in that case you are considering a verdict of not guilty.

We realize that in cases, such as this one, involving multiple defendants and multiple offenses, there exists the possibility of confusion among the jurors. In light of the situation, we believe Judge Walker adequately guided the jury on the appropriate legal principles necessary to their decision. The court provided the jury with a detailed explanation of the elements of first degree sexual offense. Included in that charge was a clarification of how the "aiding and abetting" element relates to the first degree sex offense, as well as an instruction with regard to the remaining charges against defendant involving aiding and abetting the co-defendants.

We do not believe as defendant contends that the trial judge's charge could have been interpreted by the jury as requiring it to find that the defendant personally engaged the victim in each of the six sexual offenses in order to find him guilty of each of those charges. The trial judge supplied each juror with a list of the charges against the defendant specifying in which cases the State sought to show that the defendant personally engaged in the sexual offense charged and those in which he acted as an aider and abettor. Even if it is assumed *arguendo* that the jury interpreted the charge as the defendant now argues, the error would seem to have been more favorable to the defendant, as it

required the State to prove more than it was required by law to prove in order to sustain these convictions. When such an erroneous instruction is beneficial to the defendant, a new trial is not to be awarded. *State v. Cox*, 303 N.C. 75, 277 S.E. 2d 376 (1981).

When stripped of artificial complexity, the evidence in this case presented the jury with a straightforward and simple choice. If the jury believed the testimony of the victim Pruitt and the other State's witnesses, then the jury was required to return verdicts of guilty on all charges against the defendant. On the other hand, if the jury believed the defendant and his brother and disbelieved the State's witnesses, then the jury was required to find the defendant not guilty. These would have been the choices the jury faced in any event without regard to the instruction. Clearly, the outcome of the trial rested upon the witnesses' credibility.

We recognize that the defendant was represented at trial by an able and experienced attorney, who has been practicing at the Bar of Guilford County and other counties of the State as well as in the Appellate Division for more than twenty-five years. Being experienced, he probably recognized that the real question for the jury was a simple question of the credibility of witnesses. Recognizing this fact, this able and experienced attorney certainly would have been justified in concluding that it would be a sound trial tactic not to object to the jury charge. Counsel certainly would have recognized that such a tactic could well have served the defendant's interests, since a lack of clarity in the jury instructions might very well have led to confusion, possibly resulting in a hung jury or an acquittal, even though the jury disbelieved the defendant and believed the State's witnesses.

Defendant raises additional assignments of error with regard to the trial court's charge to the jury. Again, we note that defendant did not bring these matters to the attention of the trial court during the trial. After close consideration of these issues, we find that the errors, if any, do not rise to the level of "plain error."

We must conclude that the instructions of the trial judge to the jury did not amount to fundamental error so prejudicial that justice could not have been done. Neither did the instructions amount to a denial of a fundamental right of defendant or result in a miscarriage of justice or the denial of a fair trial. We do not

believe that any mistake in the instructions had a probable impact on the jury's finding that the defendant was guilty of the crimes charged. *See: State v. Odom*, 307 N.C. at 600, 300 S.E. 2d at 378. Whether "letter perfect" instructions were given, or those that were actually given by Judge Walker, we believe the jury in this case would have reached the same result for or against the defendant based upon whether it believed Pruitt or believed the defendant.

Defendant finally challenges the trial court's refusal to allow him to ask the prosecuting witness certain questions with respect to a civil lawsuit the prosecuting witness intended to file. The record reveals that the trial court permitted defendant to make a reasonable inquiry into the prosecuting witness's pecuniary interest in the outcome of this case. The well-established rule is that trial judges have wide latitude in determining the questions allowed on cross-examination. Their rulings will not be held to be prejudicial error in the absence of a showing that the verdict was improperly influenced by his ruling. *State v. Edwards*, 305 N.C. 378, 289 S.E. 2d 360 (1982). We hold that no prejudicial error resulted.

The trial and judgment in all respects is free from prejudicial error.

No error.

Justice EXUM dissenting.

Believing that fundamental, or "plain," error occurred in the jury instructions as this concept was defined in *State v. Odom*, 307 N.C. 655, 300 S.E. 2d 375 (1983), I respectfully dissent.

The first error in the instructions flows from a variance between the factual basis of defendant's guilt specified in the indictments and the instructions.

In the instant case all six indictments specify that defendant committed "a sexual act with . . . Pruitt by force and against that victim's will, *aided and abetted by one or more other persons*, in violation of the following law: G.S. 14-27.4." (Emphasis supplied.) Thus, the prosecutor specified in the indictments the particular factual basis by which he planned to prove the offenses. Further,

the prosecutor informed the trial court at the close of the state's evidence that the acts forming the bases of the charges against defendant were as follows:

Case No. 82CRS27312:	Act of anal intercourse by defendant
Case No. 82CRS27313:	Act of oral sex by defendant
Case No. 82CRS15754:	Aiding and abetting Jerry Moore in act of anal intercourse
Case No. 82CRS15755:	Aiding and abetting Jerry Moore in act of anal intercourse
Case No. 82CRS15756:	Aiding and abetting Jerry Moore in act of oral sex
Case No. 82CRS15757:	Aiding and abetting Sammy Buchanan in act of anal intercourse.

By reading the indictments together with the prosecutor's list of the facts sought to be proved under each charge, the ultimate facts alleged and sought to be proved by the state are as follows: In one case defendant, aided and abetted by others, engaged in anal intercourse with Pruitt by force and against Pruitt's will. In the second case defendant, aided and abetted by others, made Pruitt perform oral sex on him by force and against his will. These two offenses were first degree offenses because defendant was "aided and abetted by one or more other persons." N.C. Gen. Stat. § 14-27.4(a)(2)c. In four of the cases defendant was not the principal in the first degree; rather he *was* an aider and abettor, or a principal in the second degree. As such his guilt was equal to that of the person actually committing the sexual act.[1]

1. This Court has explained the relationship between a principal in the first degree and an aider and abettor as follows: "A principal is one who is present at and participates in the commission of the crime charged. He who actually perpetrates the crime either by his own hand or through an innocent agent, or who

Jerry Moore forced Pruitt to engage in two acts of anal intercourse and to perform one act of oral sex. Sammy Buchanan forced Pruitt to engage in one act of anal intercourse. Because Jerry Moore and Buchanan were aided and abetted by others, including defendant, when they committed the sexual acts, they are guilty of first degree sex offenses in all four cases. Thus, defendant is guilty of four counts of first degree sex offense because he aided and abetted Buchanan and Jerry Moore in their commission of these first degree sex offenses. *See State v. Polk*, 309 N.C. 559, 567-70, 308 S.E. 2d 296, 300-02 (1983).

By alleging in the indictments the factual basis by which the state would seek to prove the first degree sex offenses, *i.e.*, their commission was aided and abetted by others, the prosecutor limited the state to that factual basis at trial, even if the evidence might have supported other theories of guilt. *State v. Taylor*, 301 N.C. 164, 270 S.E. 2d 409 (1980); *State v. Dammons*, 293 N.C. 263, 237 S.E. 2d 834 (1977). Yet in this case the trial court instructed the jury that it could return verdicts of guilty as charged in all the cases if, among other things, it found that defendant used a deadly weapon *or* inflicted serious personal injury on Pruitt *or* was aided and abetted by other persons. This instruction was erroneous even if such theories might have been supported by the evidence.

In *Taylor* we held that instructions to the jury on a kidnapping charge were erroneous because they "allowed the jury to convict on grounds other than those charged in the indictment." The instructions in *Taylor* presented several possible theories of conviction which were not charged in the bill of indictment. "The State's theory, under the bill of indictment, was that defendant had unlawfully removed [the victim] from one place to another for the express purpose of facilitating his flight from the commission of the felony of rape." *Id.* at 171, 270 S.E. 2d at 414. The Court

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acts in concert with the principal perpetrator, is a principal in the first degree. Any other person who is actually or constructively present at the place and time of the crime and who aids, abets, assists, or advises in its commission, is a principal in the second degree. Principals in the first degree and those in the second degree are equally guilty of the offense committed and may be punished with equal vigor." *State v. Small*, 301 N.C. 407, 412-13, 272 S.E. 2d 128, 132 (1980) (footnote omitted). *See also State v. Benton*, 276 N.C. 641, 174 S.E. 2d 793 (1970); *State v. Powell*, 168 N.C. 134, 83 S.E. 310 (1914).

held it was prejudicial error for the trial court to instruct that the jury should convict if it found "the defendant confined or restrained [the victim] for the purpose of facilitating his flight from apprehension for another crime, or to obtain the use of her vehicle," *id.* at 170-71, 270 S.E. 2d at 412-13 (emphasis omitted), even though there was evidence to support the instruction.

The Court in *Dammons* dealt with another kidnapping case in which the defendant was indicted for "unlawfully, wilfully, and feloniously kidnap[ping the victim] . . . by unlawfully removing her from one place to another, for the purpose of facilitating the commission of a felony, to wit: Assault With a Deadly Weapon, With Intent to Kill, Inflicting Serious Injury, for the purpose of doing serious bodily injury to her, and for the purpose of terrorizing her." *Id.* at 269, 237 S.E. 2d at 838-39. The trial court, however, instructed the jury it could find defendant guilty of "aggravated kidnapping" if it found he "unlawfully *confined* or *restrained* or removed [the victim] and that when he did so, that he did it for the purpose of committing an assault, a felonious assault, that he did so for the purpose of *either assaulting her sexually* or assaulting her with a shotgun . . . ." *Id.* at 271, 237 S.E. 2d at 840 (emphases in original). When the jury asked for further instructions, the trial court charged that the state must prove "that this defendant did *confine or restrain* in some manner or remove from one place to another [the victim] and the defendant did this unlawfully, and . . . that *he did this for the purpose of holding this girl as a hostage* . . . ." *Id.* at 272, 237 S.E. 2d at 840 (emphases in original).

The Court in *Taylor* and *Dammons* applied the rule that it is generally reversible error for the trial court to permit the jury to convict a defendant on an abstract legal theory not supported by the indictment. *See also State v. Thorpe*, 274 N.C. 457, 164 S.E. 2d 171 (1968); *State v. Davis*, 253 N.C. 86, 116 S.E. 2d 365 (1960); *State v. Jones*, 227 N.C. 94, 40 S.E. 2d 700 (1946). *But see State v. Moore*, 284 N.C. 485, 202 S.E. 2d 169 (1974).

In *Moore* the indictment charged that defendant "unlawfully, willfully, feloniously and of his malice aforethought did kill and murder William J. Casey with premeditation and deliberation. . . ." This indictment was joined for trial with another indictment charging defendant with the armed robbery of William J. Casey.

Both crimes were alleged to have been committed on 1 January 1973. The Court held under these circumstances that it was not error for the trial court to instruct the jury that it could convict defendant of first degree murder on theories of both felony murder and premeditation. The Court treated the language "with premeditation and deliberation" in the murder indictment as mere surplusage since the indictment also alleged the murder was committed "with malice aforethought" and this allegation would support a verdict of first degree murder under either or both theories. Before *Moore* the Court in *Davis* had said: "By specifically alleging the offense [first degree murder] was committed in the perpetration of rape the State confines itself to that allegation in order to show murder in the first degree. Without a specific allegation, the state may show murder by any of the means embraced in the statute." 253 N.C. at 99, 116 S.E. 2d at 373. In *Moore* the Court distinguished *Davis* on the ground that the *Davis* indictment did not contain the words "with malice aforethought."

In the instant case defendant had noticed by way of the indictments only that the factual basis for the first degree sexual offenses was that they were aided and abetted by others. In *Moore* defendant had notice by way of the indictments that he was charged not only with murdering William J. Casey but also with having robbed Casey with a firearm. Further, the allegation in the *Moore* murder indictment, "with malice aforethought," permitted conviction on both theories of premeditation and felony murder. There is no comparable allegation in the instant case. This case, therefore, is governed by *Taylor, Dammons, Thorpe, Davis,* and *Jones* and not by *Moore.*

It is not necessary to determine whether this error, standing alone, was of such a fundamental nature as to constitute the "plain error" necessary to overcome defendant's procedural default in failing to object at trial. The instructions on crucial aspects of the case are confusing to the extent that the jury's verdict could not have resulted from an application of appropriate legal theories to the facts.

"The chief purpose of the charge is to give a clear instruction which applies the law to the evidence in such manner as to assist the jury in understanding the case and in reaching a correct ver-

dict. *State v. Biggs*, 224 N.C. 722, 32 S.E. 2d 353 . . . ." *State v. Williams*, 280 N.C. 132, 136, 184 S.E. 2d 875, 877 (1971). Stated differently, "[t]he chief object contemplated in the charge is to explain the law of the case, to point out the essentials to be proved on the one side and on the other, and to bring into view the relation of the particular evidence adduced to the particular issue involved." *State v. Friddle*, 223 N.C. 258, 261, 25 S.E. 2d 751, 753 (1943), *quoted in State v. Ardrey*, 232 N.C. 721, 723, 62 S.E. 2d 53, 55 (1950).

In the instant case, the able trial judge fairly conducted a lengthy trial. He attempted to impress upon the jury that it must consider each charge against defendant separately from the others in determining his guilt or innocence. He even provided each juror with a list of the charges, giving the possible verdicts in each case and specifying in which cases the state sought to prove defendant acted as a principal and in which as an aider and abettor.

But the trial court erred when in its final mandate it attempted to submit the ultimate question of defendant's guilt in all six offenses simultaneously. Although all six offenses were sexual ones involving the same victim, different acts and different actors were involved in each case. Each witness for the state gave a slightly different version of the events. For example, the reports differed on exactly how many sexual acts occurred and whether an ink pen was employed in given offenses. By submitting the question of defendant's guilt in all six cases simultaneously, the trial court created the possibility that the jury would consider evidence going to one offense in its deliberations on another.

This was especially prone to yield confusion in the instant case because of the particular legal theory involved. The only element on which the jury could properly be charged, for the reasons set forth above, which distinguishes first degree sex offense from second degree, is that the perpetrator was "aided and abetted by one or more other persons." This was complicated by the fact that proof of defendant's guilt in four of the cases was predicated on the theory that he was an aider and abettor of the person actually engaging in the sexual act. Clearly explaining the two different meanings of the words "aided and abetted" to a lay jury is a difficult undertaking; doing so when the cases in which

defendant acted as an aider and abettor are lumped with the cases in which he acted as a principal in the first degree appears to be impossible.

That the jury was confused is beyond question. After deliberating for an unspecified length of time the jury requested additional instructions. The following exchange is illustrative:

> THE FOREMAN: If we may have a redefinition between first and second aiding and abetting.
>
> THE COURT: There is no first and second aiding and abetting. There is aiding and abetting for either the first degree or for the second degree. It's the same definition. Aiding and abetting is the same definition whichever possible verdict you consider it.
>
> THE FOREMAN: So it's the principal?
>
> THE COURT: The first two cases are the principal cases.
>
> THE FOREMAN: But the aiding and abetting where the Defendant is not the principal, it hinges on whether or not it's first degree or second degree—
>
> THE COURT: That's correct.
>
> THE FOREMAN: —for the person who is the principal?
>
> THE COURT: Right.
>
> THE FOREMAN: So aiding and abetting is aiding and abetting—
>
> THE COURT: Either first degree if you consider that, and second degree if you reached that possible verdict.
>
> Let me tell you this. There is no such crime in North Carolina as aiding and abetting. The fact that you may be participating by reason of aiding and abetting applies to whatever crime you are considering. If I have instructed you that you will consider aiding and abetting you consider it for all possible guilty verdicts in this case, first degree or second degree.
>
> Does that help you? I'm afraid that's about as simple as I can get.

This Court held in *State v. Parrish*, 275 N.C. 69, 76-77, 165 S.E. 2d 230, 235-36 (1969), that where several defendants are joined for trial and "the evidence against each . . . is not identical, the trial court should submit the question of guilt or innocence of each separately." Similarly as in the instant case where several indictments are joined for trial against a single defendant and the evidence supporting each charge, as it usually will be, is different, the trial court should submit the question of defendant's guilt on each indictment separately.

Defendant failed to object at trial to either of the errors discussed above. But these two errors resulted in instructions on essential elements of the various offenses which were not authorized under our case law and which failed properly to clarify for the jury the nature of the aiding and abetting theories relied on by the state. Although under Rule 10(b)(2) of the North Carolina Rules of Appellate Procedure defendant bears the burden of objecting to the instructions, an objection in this case to any single part of the charge or to a particular omission would not have corrected the overall confused thrust of the instructions.

Under the test set forth in *Odom*, an error is "plain error" if "fundamental" or where it "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings" or where "the instructional mistake had a probable impact on the jury's finding that the defendant was guilty." 307 N.C. at 660, 300 S.E. 2d at 378 (quoting *United States v. McCaskill*, 676 F. 2d at 1002). When instructions not only lack essential clarity but also permit guilt to be predicated on theories not permitted under the indictments, they abrogate their very purpose. The purpose of jury instructions is to enable the jury to decide certain disputed facts, and then to apply governing principles of law to those facts. When the jury has no clearly explained legal principles for guidance, the integrity of the entire proceeding has been seriously compromised. Thus, the errors in the instant case considered together are "plain," and defendant should be given a new trial on all charges.

Justice MEYER concurring.

I concur fully in both the reasoning and the result reached by the majority. I file this concurring opinion for the sole purpose of addressing an issue neither raised nor argued by the defendant, but addressed in some detail by the dissenting opinion.

The dissenting opinion states that "[b]y alleging in the indictments the factual basis by which the State would seek to prove the first degree sex offense, *i.e.*, their commission was aided and abetted by others, the prosecutor limited the State to that factual basis at trial even if the evidence might have supported other theories of guilt." Thus, argues the dissent, the trial judge committed error by instructing the jury "that it could return verdicts of guilty as charged in all cases if, among other things, it found that defendant used a deadly weapon, *or* inflicted serious personal injury on Pruitt, *or* was aided and abetted by other persons." I find this conclusion legally unsupportable.

Factual allegations unnecessary to an indictment for rape or sex offense should be treated as surplusage. *See State v. Moore*, 284 N.C. 485, 202 S.E. 2d 169 (1974); *see also State v. Lewis*, 58 N.C. App. 348, 293 S.E. 2d 638 (1982) (an averment in an indictment or warrant not necessary in charging the offense should be disregarded). In *Moore*, this Court was asked to consider whether the trial judge erred in charging the jury on both the theory of premeditation and deliberation and felony murder although the indictment specified only that the murder was committed with premeditation and deliberation. We upheld the instruction based on the fact that G.S. § 15-144, authorizing the short-form indictment for homicide, would support a verdict of murder in the first degree without further allegation of premeditation and deliberation or in the perpetration or attempt to perpetrate a felony. This Court stated in *Moore* that "[a]ny allegations in a bill of indictment over and above that which is held sufficient may be treated as surplusage." *Id.* at 493, 202 S.E. 2d at 174. We cited numerous cases in *Moore* in support of this conclusion and properly distinguished *State v. Davis*, 253 N.C. 86, 116 S.E. 2d 365 (1960), a case in which the indictment *failed to allege malice*. We had held in *Davis* that "[b]y specifically alleging the offense was committed *in the perpetration of rape*, the State confines itself to that allegation in order to show murder in the first degree." *Id.* at 99, 116 S.E. 2d at 373. However, as explained in *Moore*,

> Judge Campbell was correct in charging the jury in the *Davis* case that a verdict of guilty of murder in the first degree could be rendered *only* upon a finding that Davis killed Mrs. Cooper in perpetrating or attempting to perpetrate the crime of rape. Our holding in *Davis* that the State

> was confined to its allegation in the indictment that the killing occurred *in the perpetration of rape was correct.* This Court could have said, but did not say, the indictment failing to charge malice, required the State to make out its case of murder in the first degree upon a showing the killing was done in the perpetration or attempt to perpetrate the crime of rape. The indictment, *omitting malice*, was insufficient to elevate the killing above the crime of manslaughter, *except for the "felony murder"* rule which Judge Campbell submitted to the jury.

Id. at 495, 202 S.E. 175.

Because the indictment in *Moore* fully complied with the requirements of G.S. § 15-144, it did not depend for its sufficiency upon additional factual allegations, and therefore this Court treated the additional factual allegations as surplusage.

The short-form indictment for homicide in G.S. § 15-144 is the model upon which G.S. § 15-144.1 (Essentials for a Bill of Rape) and G.S. § 15-144.2 (Essentials for a Bill of Sex Offense) were drafted. Just as we have held that an indictment for murder need not allege the theory or factual basis under which the State intends to proceed, *see State v. Duncan*, 282 N.C. 412, 193 S.E. 2d 65 (1972) (premeditation and deliberation); *State v. Smith*, 223 N.C. 457, 27 S.E. 2d 114 (1943) (felony murder), we have likewise held that indictments for rape or sex offense need not include averments (1) that the offense was perpetrated with a deadly weapon, (2) that the victim suffered serious personal injury, or (3) that the person who committed the offense was aided and abetted by one or more persons—theories under which the State might proceed to seek a first degree conviction. *See State v. Whitfield*, 310 N.C. 608, 313 S.E. 2d 790 (1984); *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).

G.S. § 15-144 states that "it is sufficient in describing murder to allege that the accused person feloniously, willfully, and of his malice aforethought, did kill and murder (naming the person killed). . . ." G.S. § 15-144.1 states that "it is sufficient in describing rape to allege that the accused person unlawfully, willfully, and feloniously did ravish and carnally know the victim, naming her, by force and against her will. . . ." G.S. § 15-144.2 states "it

is sufficient in describing a sex offense to allege that the accused person unlawfully, willfully, and feloniously did engage in a sex offense with the victim, naming the victim, by force and against the will of such victim. . . ." Clearly, the reasoning we applied in *Moore* respecting the short-form indictment for murder applies with equal force to G.S. § 15-144.1 and -144.2, short-form indictments for rape and sex offense. That is, an indictment which meets the statutory requirements for sufficiency need not include additional allegations of fact or theory *and, if included, these should be treated as surplusage.* Furthermore, where the evidence supports several theories of guilt authorized by statute, the trial judge may instruct on more than one theory. *See State v. Foust*, 311 N.C. 351, 317 S.E. 2d 385 (1984).

The dissent argues that the short-form indictment for murder (without any statement of which theory will be relied upon) is sufficient only because it contains the magic saving language "with malice aforethought." I argue that both G.S. § 15-144.1 and -144.2 contain comparable saving language. In G.S. § 15-144.1 the language is "unlawfully, willfully, and feloniously did ravish and carnally know" . . . "by force and against her will." In G.S. § 15-144.2 the language is "unlawfully, willfully and feloniously did engage in a sex offense . . . by force and against the will of such victim." In the instant case, each of the indictments included the necessary statutory language that the defendant "unlawfully and wilfully did feloniously engage in a sexual act with Danny Pruitt by force and against that victim's will." Thus, under the authority of *State v. Moore*, whatever additional information that was included in the indictment is surplusage and should be treated as such. As there was evidence to support not only a theory of aiding and abetting, but also that the offense was committed by use of a deadly weapon or that the victim suffered serious bodily injury, the trial judge properly instructed on these theories.

Quite obviously the cases cited by the dissenting opinion in support of its conclusion are readily distinguishable. *State v. Taylor*, 301 N.C. 164, 270 S.E. 2d 409 (1980) and *State v. Dammons*, 293 N.C. 263, 237 S.E. 2d 834 (1977) involved indictments for kidnapping. In *State v. Jerrett*, 309 N.C. 239, 259, 307 S.E. 2d 339, 350 (1983) we noted that

> The established rule is that an indictment will not support a conviction for a crime unless all the elements of the crime are accurately and clearly alleged in the indictment. *State v. Perry*, 291 N.C. 586, 231 S.E. 2d 262 (1977); *State v. Taylor*, 280 N.C. 273, 185 S.E. 2d 677 (1972). The Legislature may prescribe a form of indictment sufficient to allege an offense even though not all of the elements of a particular crime are required to be alleged. *See, e.g.*, G.S. 15-144.1 (authorizing a short-form indictment for rape) and G.S. 15-144 (authorizing a short-form indictment for homicide). The Legislature has not, however, established a short-form indictment for kidnapping. Accordingly, the general rule governs the sufficiency of the indictment to charge the crime of kidnapping.

G.S. § 15A-644, under which indictments for kidnapping are now brought, unlike the short-form indictments authorized for homicide, rape and sex offense, requires that the indictment charge all the essential elements of the offenses, or with respect to statutory offense, the indictment will be sufficient as a general rule if it charges the offense in the language of the statute. *See State v. Jerrett*, 309 N.C. 239, 307 S.E. 2d 339; *State v. Norwood*, 289 N.C. 424, 222 S.E. 2d 253 (1976); *State v. Lewis*, 58 N.C. App. 348, 293 S.E. 2d 638. In fact, in *Jerrett* we held that in order to support a conviction for first degree kidnapping it was necessary to allege that the victim was not released in a safe place and was either sexually assaulted or physically harmed, G.S. § 14-39(b). In short, in order to support a conviction for first degree kidnapping the indictment must include information regarding the factual basis under which the State intends to proceed and, under the authority of *Taylor* and cases cited therein the State is limited to that factual basis at trial.[1]

The dissenting opinion also cites to *State v. Thorpe*, 274 N.C. 457, 164 S.E. 2d 171 (1968) as authority. In *Thorpe* we held that in a prosecution for first degree burglary upon an indictment charging that defendant broke and entered with a felonious intent to ravish and carnally harm the victim by force and against her will,

1. I would point out that while a trial judge may err in instructing on theories not alleged in an indictment for kidnapping, the error is not necessarily prejudicial. Whether the error in *Taylor* was prejudicial was not addressed in *Taylor*. My reading of that case suggests that, in fact, it was not.

the trial court erred in merely instructing the jury that they must find that the breaking and entering was done "with the intent to commit a felony," it being necessary that the court charge on intent to commit a felony described in the indictment. Once again, I find *Thorpe* distinguishable. An indictment for first degree burglary, like that for kidnapping, requires specific allegations of fact to support a conviction. That is, the indictment must specify the particular felony which the defendant intended to commit at the time of the breaking and entering. *State v. Norwood*, 289 N.C. 424, 222 S.E. 2d 253. Having so specified, the State is limited to proof of that felony and it is error, although not necessarily prejudicial error, for the trial judge to instruct on a theory not alleged in the indictment.

Finally, I would add that although the information is available through a Bill of Particulars since the enactment of G.S. § 15-144.1 and -144.2, criminal defendants have consistently indicated a strong preference to be supplied in the indictment with information concerning the theory under which they will be tried. *See State v. Whitfield*, 310 N.C. 608, 313 S.E. 2d 790; *State v. Roberts*, 310 N.C. 428, 312 S.E. 2d 477; *State v. Effler*, 309 N.C. 742, 309 S.E. 2d 203; *State v. Lowe*, 295 N.C. 596, 247 S.E. 2d 878 (1978). Although not legally required to do so, in this case the State responded by including in the indictment additional information respecting the most likely theory upon which it would seek a conviction for the first degree sex offense. It seems inconceivable to me that the State should thereby be penalized—told that it may accommodate the defendant's perceived need for this information in an indictment rather than a Bill of Particulars, but it does so at the risk of being bound by its "election."

Justices MITCHELL and MARTIN join in this concurring opinion.

STATE OF NORTH CAROLINA v. ELDRED LEON HILL

No. 599A82

(Filed 28 August 1984)

1. **Homicide § 18.1— first-degree murder—sufficiency of evidence of premeditation and deliberation**

In a prosecution for first-degree murder, there was sufficient evidence of premeditation and deliberation where the evidence tended to show that an officer stopped to investigate a suspicious vehicle; as he looked into the window of the car, a black man appeared and took off running; the officer on two occasions said something, but the man kept on running; the officer ran after him and tackled him; as the two struggled, the man managed to get up; the officer was still on the ground; the black man, who had possession of the gun, was "looking down at his face and . . . said something like 'let me go' "; a shot was fired and the officer fell to the ground; immediately following the shooting, the man turned and pointed the gun at another man, an eyewitness, who was seated in his automobile at the time; and the black man then fled the scene in the blue GTO "going faster than the speed limit."

2. **Homicide § 30.3— failure to instruct on involuntary manslaughter proper**

The trial judge properly failed to instruct on involuntary manslaughter where the evidence tended to show that in the course of a struggle in which defendant was trying to get away from a police officer, defendant stood up and looked down at the officer; at that point defendant said "let me go" and a gun in his possession went off; the gun was pointed at the officer and was fired at extremely close range; the officer fell to the ground and immediately thereafter defendant turned toward an eyewitness and pointed the gun at him; and the defendant then fled the scene in a blue GTO. There was no evidence of an unintentional discharge of the weapon.

3. **Criminal Law § 102— closing argument—not so improper as to require trial court to take corrective action on its own motion**

There was nothing so grossly improper in the prosecutor's closing argument as to require the trial court to have taken corrective action on its own motion. The challenged portions of the argument were either supported by the evidence or reasonable inferences therefrom or they were of the same nature as arguments already found by the Court not to be grossly improper *per se*.

4. **Criminal Law § 102.8— argument in penalty phase—comment on failure to testify—not requiring trial court to act on own initiative**

A prosecutor's challenge to defendant's evidence, put on during the penalty phase of the trial, that defendant had become a born-again Christian while in jail awaiting trial was not so grossly improper as to require the trial court's acting on its own initiative to instruct the jury that defendant had the right not to testify even though the argument may have tended to comment upon defendant's failure to testify.

5. Criminal Law § 102.12— comment on deterrent effect of death penalty in argument

A prosecutor's argument during the penalty phase of the trial which referred to the deterrent effect of the death penalty was not so egregious as to warrant *ex mero motu* action by the court.

6. Criminal Law § 135.10— proportionality review of death sentence—finding that sentence of death disproportionate

Given the somewhat speculative nature of the evidence surrounding the murder, the apparent lack of motive, the apparent absence of any simultaneous offenses, and the incredibly short amount of time involved, together with the jury's finding of three mitigating circumstances tending to show defendant's lack of past criminal activity and his being gainfully employed, and the unqualified cooperation of defendant during the investigation, the death sentence imposed in this prosecution for first-degree murder of a police officer was disproportionate within the meaning of G.S. 15A-2000(d)(2).

Justice EXUM dissenting in part and concurring in part.

Justice MEYER dissenting.

Justice MITCHELL and Justice MARTIN join in this dissenting opinion.

Justice MITCHELL concurring in part and dissenting in part.

Justice MEYER and Justice MARTIN join in this opinion.

APPEAL by defendant from the judgment of *Thornburg, Judge*, entered at the 27 September 1982 Criminal Session of HENDERSON County Superior Court.

Defendant was charged in a bill of indictment, proper in form, with the first-degree murder of Dennie Enevold. Defendant entered a plea of not guilty.

At the guilt determination phase of the trial, the State offered evidence tending to show the following:

Deborah Kitchen, a friend of defendant, owned a dark blue Pontiac GTO which had no rear hubcaps. She loaned the car to defendant on Saturday evening, 21 November 1981, so that he could go to Hendersonville. Ms. Kitchen testified that the keys to the GTO were on a key ring to which an orange Coke bottle ornament was attached. The ornament had a picture of a green marijuana leaf on it. The witness also testified that defendant owned a big green comb.

Sonny Martin testified that he saw defendant at about 2:30 a.m. Sunday, 22 November 1981, in a neighborhood pub in Hen-

dersonville called "Allen Brown's." Defendant went with Sonny and two sisters, Barbara and Linda Waters, to Waffle World to eat. The group then returned to Allen Brown's at approximately 3:15 a.m. and let defendant out at a blue car. Defendant asked Linda Waters what she was going to do, and upon her reply that she was going home, defendant said, "I might be down there." Linda Waters lived on Woodcock Drive.

Anthony McMinn, who lived at 710 Woodcock Drive next door to Linda Waters' house, testified that shortly before 5:00 a.m. on 22 November 1981, he was awakened by the ringing of his doorbell. He got up and saw a man standing at the door and a blue GTO in the driveway. After awhile, a police car drove slowly by the house, and the man went back to his car and drove off in the direction of the police car. A few minutes later, McMinn saw flashing blue lights and heard a shot.

Earlier that evening, Dennie Enevold, a Hendersonville police officer, had left home to begin work as one of three officers assigned to third shift. Shortly before 5:00 a.m., he radioed the station that he was at the intersection of Ash and Woodcock and was with a suspicious car that had been circling the block. Officer Enevold indicated that he had not obtained any identification of the driver.

Daniel Edward Gilliam, a resident of a house located on the corner of Woodcock and Ash who had just let his cat into the house, noticed a blue light flashing outside his bedroom window at about 4:45 a.m. on the morning of 22 November 1981. Gilliam got up and went to his window and saw a police officer shining his flashlight into the driver's side of an automobile parked near Southern Burglar Alarm. Gilliam testified that a man came from the direction of Southern Burglar Alarm and that the man kept running despite the officer's saying something to him. The officer then tackled the man and a struggle ensued. Gilliam heard a shot and ducked. When he looked back out the window, the officer was lying on the ground.

Also at around 4:45 a.m. on this morning, Ricky Edwards was driving down Ash Street and stopped at the traffic light at the intersection of Ash Street and 7th Avenue. He saw a blue light flashing near the intersection of Ash and Woodcock. He also noticed a blue GTO parked near the same intersection. A man "struck out running" and an "officer started chasing after him." According to Edwards, the officer tackled the man, and, as the

two came up, the man stood over the officer who was on one knee. Edwards then saw fire come from a gun and saw the officer fall to the ground. The man, described by Edwards as a black man, pointed the gun at Edwards who began to back up. At that time Edwards saw another police car drive up. The driver, Officer Kraus, had been in the neighborhood, had heard Officer Enevold's radio message about the suspicious car, and had arrived to assist Enevold. Edwards told Officer Kraus that he had just seen an officer shot. As Kraus started towards the scene, Edwards saw the blue GTO pass by them "going faster than the speed limit." Edwards noticed that the GTO had no rear hubcap on.

Officer Enevold was found lying face down in a pool of blood. Underneath his body was found an orange key chain ornament, shaped like a Coke bottle with a picture of a green marijuana leaf on it. Also discovered near Officer Enevold's body was a green comb.

Officer Enevold was transported to the hospital where he subsequently died. He had been shot at close range with his own weapon, a .38 caliber Smith and Wesson service revolver which was never found. Dr. Richard L. Landau, expert witness in the field of pathology, testified that the cause of death was a single gunshot wound to the head below the left eye.

Shortly after Officer Enevold was shot, Officer Bennett was called to the scene and given a description of the late model, dark blue GTO. After driving around the area he passed Allen Brown's and saw an automobile parked there that matched the description given to him. Unlike the other cars in the area, the GTO had no frost on either the front or the rear windshield. Officer Bennett waited for other officers to arrive and at approximately 6:45 a.m. they all entered Allen Brown's establishment. There were three black males inside and one black female. All had identification except one, the defendant. After consenting to accompany the officers to the station, defendant admitted to them that he had arrived there in the blue Pontiac GTO parked outside.

Subsequently, at the police station, defendant was placed under arrest. Hairs taken from defendant's head matched those taken from the green comb. Defendant's fingerprints were found on the blue GTO. In addition, handwipings collected from the defendant indicated traces of lead, barium and antimony consistent with his having fired a weapon.

Defendant offered no evidence during the guilt phase. The jury returned a verdict of guilty of first-degree premeditated murder.

During the sentencing phase, the State offered no additional evidence. Defendant offered evidence that he had a good reputation in the community, that he had never been in any significant trouble, that he was gainfully employed at the time of his arrest, and that since his arrest he had become a born-again Christian.

The only aggravating circumstance submitted to the jury was "whether the murder was committed against a law enforcement officer while engaged in the performance of his official duties." The jury found the existence of this factor and also found the existence of one statutory mitigating circumstance, that the defendant had no significant history of prior criminal activity. The jury in addition found two non-statutory mitigating circumstances. Nevertheless, the jury concluded that the aggravating circumstance outweighed the mitigating circumstances and recommended the death penalty.

Rufus L. Edmisten, Attorney General, by Barry S. McNeill, Assistant Attorney General, for the State.

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

BRANCH, Chief Justice.

[1] Defendant first assigns as error the denial of his motions to dismiss the charge of first-degree murder on the ground that there was insufficient evidence of premeditation and deliberation.

In *State v. Corn*, 303 N.C. 293, 278 S.E. 2d 221 (1981), we stated the familiar standards governing the sufficiency of evidence of premeditation and deliberation:

> In order for the trial court to submit a charge of first degree murder to the jury, there must have been substantial evidence presented from which a jury could determine that the defendant intentionally shot and killed the victim with malice, premeditation and deliberation. *State v. Horton*, 299 N.C. 690, 263 S.E. 2d 745 (1980); *State v. Heavener*, 298 N.C. 541, 259 S.E. 2d 227 (1979); *State v. Baggett*, 293 N.C. 307, 237 S.E. 2d 827 (1977). "Substantial evidence" is that amount of

relevant evidence that a reasonable mind might accept as sufficient to support a conclusion. *State v. Smith*, 300 N.C. 71, 265 S.E. 2d 164 (1980); *State v. Powell*, 299 N.C. 95, 261 S.E. 2d 114 (1980). In ruling upon defendant's motion to dismiss on the grounds of insufficient evidence, the trial court is required to interpret the evidence in the light most favorable to the State, drawing all reasonable inferences in the State's favor. *State v. Fletcher*, 301 N.C. 709, 272 S.E. 2d 859 (1981); *State v. King*, 299 N.C. 707, 264 S.E. 2d 40 (1980).

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

Id. at 296-97, 278 S.E. 2d at 223. Furthermore, as we noted in *State v. Judge*, 308 N.C. 658, 303 S.E. 2d 817 (1983),

[t]he term "cool state of blood" does not mean that the defendant must be calm or tranquil or display the absence of emotion; rather, the defendant's anger or emotion must not have been such as to disturb the defendant's faculties and reason. *State v. Myers*, 299 N.C. 671, 263 S.E. 2d 768 (1980); *State v. Britt*, 285 N.C. 256, 204 S.E. 2d 817 (1974). The fact that there was a quarrel does not preclude the possibility that the defendant formed the intent to kill with premeditation and deliberation. *State v. Tysor*, 307 N.C. 679, 300 S.E. 2d 366 (1983); *State v. Misenheimer*, 304 N.C. 108, 282 S.E. 2d 791 (1981).

308 N.C. at 662, 303 S.E. 2d at 820.

In the instant case, the evidence, taken in the light most favorable to the State, tends to show that Officer Enevold

stopped to investigate a suspicious vehicle, and as he looked into the window of the car, a black man appeared and took off running. The officer on two occasions said something, but the man kept on running. Officer Enevold ran after him and tackled him. As the two struggled, the man managed to get up. The officer was still on the ground. The black man, who had possession of the gun, was "looking down at his face and . . . said something like, 'Let me go.'" A shot was fired and the officer fell to the ground. Immediately following the shooting, the man turned and pointed the gun at Ricky Edwards, an eyewitness who was seated in his automobile at the time. The man then fled the scene in the blue GTO, "going faster than the speed limit." This evidence was sufficient to permit the issues of premeditation and deliberation to go to the jury.

[2] Defendant next assigns as error the failure of the trial court to instruct the jury on the lesser-included offense of involuntary manslaughter. At trial, defendant submitted a written request for a jury instruction on involuntary manslaughter. The trial court denied the request and charged the jury on the offenses of first-degree murder, second-degree murder, and voluntary manslaughter. In support of his contention, defendant argues that the evidence permits an inference that the officer's gun went off accidentally as a result of defendant's negligent handling of it. We disagree.

As we stated in *State v. Redfern*, 291 N.C. 319, 230 S.E. 2d 152 (1976),

> [i]nvoluntary manslaughter is the unintentional killing of a human being without malice, proximately caused by (1) an unlawful act not amounting to a felony nor naturally dangerous to human life, or (2) a culpably negligent act or omission. *State v. Ward*, 286 N.C. 304, 210 S.E. 2d 407.

Id. at 321, 230 S.E. 2d at 153. In the instant case, defendant did not testify or put on any evidence. The State's evidence tends to show that in the course of a struggle in which defendant was trying to get away, defendant stood up and looked down at the officer. At that point defendant said "Let me go" and a gun in his possession went off. The gun was pointed at Officer Enevold and was fired at extremely close range. The officer fell to the ground and immediately thereafter defendant turned toward Ricky Edwards and pointed the gun at him. Defendant then fled the scene in the blue GTO. There is no evidence of an unintentional dis-

charge of the weapon and hence there was no error in the failure of the trial judge to instruct on involuntary manslaughter. *See State v. Robbins*, 309 N.C. 771, 309 S.E. 2d 188 (1983).

[3] Defendant next contends that he was denied his right to a fair trial by the prosecutor's closing argument during the guilt phase of the trial. Defendant maintains that certain portions of the prosecutor's closing argument improperly appealed to the passions and prejudices of the jurors. Although conceding he made no objections to the challenged portions, defendant argues that the remarks were so prejudicial and grossly improper as to require corrective action by the trial court *ex mero motu*.

The rules applicable to the scope of the prosecutor's closing argument were recently summarized by this Court in *State v. Kirkley*, 308 N.C. 196, 302 S.E. 2d 144 (1983):

> Prior to discussing the merits of each contended error during the prosecutor's argument to the jury, we must set forth the standard of review to be employed. The defense counsel at trial failed to object to or take exception to any part of the prosecutor's final argument to the jury. If a party fails to object to a jury argument, the trial court may, in its discretion, correct improper arguments. *State v. Johnson*, 298 N.C. 355, 259 S.E. 2d 752 (1979). When a party fails to object to a closing argument we must decide whether the argument was so improper as to warrant the trial judge's intervention *ex mero motu*. We are therefore reviewing the judge's action and must decide if he abused his discretion. In *State v. Johnson*, 298 N.C. 355, 259 S.E. 2d 752 (1979), Chief Justice Branch stated:
>
> > In capital cases, however, an appellate court may review the prosecution's argument, even though defendant raised no objection at trial, but the *impropriety* of the argument must be *gross* indeed in order for this Court to hold that a trial judge abused his discretion in not recognizing and correcting *ex mero motu* an argument which defense counsel apparently did not believe was prejudicial when he heard it.
>
> 298 N.C. at 369, 259 S.E. 2d at 761. (Emphasis added.)
>
> * * * *
>
> In North Carolina it is well settled "that counsel is allowed wide latitude in the argument to the jury." *State v.*

> *Johnson*, 298 N.C. 355, 368, 259 S.E. 2d 752, 761 (1979); see also: *State v. Covington*, 290 N.C. 313, 226 S.E. 2d 629 (1976). "Even so, counsel may not, by argument or cross-examination, place before the jury incompetent and prejudicial matters by injecting his own knowledge, beliefs, and personal opinions not supported by the evidence." (Citations omitted.) *State v. Britt*, 288 N.C. 699, 711, 220 S.E. 2d 283, 291 (1975). A prosecutor must present the State's case vigorously while at the same time guarding against statements which might prejudice the defendant's right to a fair trial.

308 N.C. at 209-211, 302 S.E. 2d at 152-53.

We have carefully and thoroughly reviewed the prosecutor's closing argument in this case and we find nothing so grossly improper as to require the trial court to take corrective action on its own motion. The challenged portions of the argument were either supported by the evidence or reasonable inferences therefrom, *e.g., State v. Pinch*, 306 N.C. 1, 292 S.E. 2d 203, *cert. denied*, 103 S.Ct. 474 (1982), or they were of the same nature as arguments already found by this Court not to be grossly improper *per se*. *E.g., State v. Kirkley*, 308 N.C. 196, 302 S.E. 2d 144 (1983); *State v. Oliver and Moore*, 302 N.C. 28, 274 S.E. 2d 183 (1981); *State v. Barfield*, 298 N.C. 306, 259 S.E. 2d 510 (1979), *cert. denied*, 448 U.S. 907 (1980); *State v. Britt*, 291 N.C. 528, 231 S.E. 2d 644 (1977). This assignment is overruled.

[4] Defendant's fourth contention challenges the prosecutor's remarks during the penalty phase of the trial. During the penalty phase, defendant put on evidence that, while he was in jail awaiting trial, he had become a born-again Christian. During their arguments at this phase, the prosecutor and his assistant vigorously challenged the fact of defendant's conversion. Among the statements made were the following:

> I don't know lots about religion. I don't know lots about religion, but I was brought up in a Christian home, and I was always taught by my parents that you must confess your wrong, you must ask for forgiveness. And when I read the scripture, I find words similar to these: "If you will confess me before man, I will acknowledge you before my Father, who is in heaven." What does that mean? That means if a person has a real, true Christian conversion, he must be honest and sincere with himself and with his fellow man. He must confess his wrong before man and acknowledge that

> before his Christ, and Jesus Christ will acknowledge him before our Heavenly Father. One of the most beautiful things that I ever learned as a youngster was the story of George Washington in chopping down the cherry tree. I don't have to repeat that. That was a story that I was taught.
>
> I believe that the God that I know and that I have accepted can perform miracles. I believe He did perform miracles. I believe He can change a man's life. But I say that before He can change a man's life, that man must confess Him before his fellow man, and then God or Jesus will acknowledge him before God who's in heaven.
>
> * * * *
>
> [I]f he hasn't got a true conversion, he can get it. He's got to ask the Good Master. He's got to be sincere. He's got to have a true repentance. It doesn't take long, but you must be sincere. You must be sincere. There must be a true repentance. You must confess before man, and then Jesus Christ will confess or acknowledge you before God himself.
>
> * * * *
>
> I submit that there is nothing in this man's background or in his personality that can justify or outweigh what he did. And to this day, as far as we know, there's been no confession, no remorse.

Defendant maintains that, although he did not object to the above-quoted statements, they were improper comments upon his failure to testify at the penalty phase and hence were egregious enough to require corrective action by the trial court *ex mero motu*. Defendant contends that the court should have instructed the jury during the penalty phase that defendant had the right not to testify.

At the outset, we note that the well-established rules pertaining to the prosecutor's arguments during the guilt phase of the trial apply equally to the arguments during the penalty phase. *State v. Pinch*, 306 N.C. 1, 292 S.E. 2d 203. Thus, we must determine if the remarks here were so extreme or prejudicial as to require the trial court to recognize and correct *ex mero motu* "an argument which defense counsel apparently did not believe was prejudicial when he heard it." *State v. Johnson*, 298 N.C. at 369,

259 S.E. 2d at 761. We have examined the prosecutor's remarks contextually, and in light of the fact that defendant initially introduced the topic of his religious experience and thus hoped for favorable inferences flowing therefrom, we cannot say that the prosecutor's exploration of and attack on this subject was so grossly improper as to require the trial court's acting on its own initiative. *See State v. Albert*, 303 N.C. 173, 277 S.E. 2d 439 (1981).

[5] Defendant's next assignment is likewise addressed to the prosecutor's argument during the penalty phase. The bulk of defendant's argument here challenges the prosecutor's reference to the deterrent effect of the death penalty. It is well settled that criminal defendants in North Carolina may not offer evidence during the penalty phase to show that the capital punishment does not have any deterrent effect. *E.g., State v. Cherry*, 298 N.C. 86, 257 S.E. 2d 551 (1979). Similarly, we held in *State v. Kirkley*, 308 N.C. at 215, 302 S.E. 2d at 155, that it was improper for the prosecutor to argue the deterrent effect of capital punishment. Nevertheless, we held in *Kirkley* that the argument was not so egregious as to require corrective action by the trial judge *sua sponte*. *Id.* We likewise do not find the prosecutor's arguments here to be so offensive as to warrant *ex mero motu* action by the court.

Of the defendant's eight remaining assignments of error, seven are addressed to questions previously decided adversely to defendant and defendant so concedes. We have reviewed defendant's arguments on these questions and are not persuaded that prejudicial error occurred so as to warrant a new trial.

[6] We thus turn to the final remaining assignment of error dealing with the question of proportionality of the sentence imposed in the instant case. Pursuant to G.S. 15A-2000(d)(2), we are required in every capital case to review the record and determine

> (1) whether the record supports the jury's findings of any aggravating circumstance or circumstances upon which the sentencing court based its sentence of death, (2) whether the sentence was imposed under the influence of passion, prejudice or any other arbitrary factor, and (3) whether the sentence of death is excessive or disproportionate to the

> penalty imposed in similar cases, considering both the crime and the defendant.

State v. Bondurant, 309 N.C. 674, 692, 309 S.E. 2d 170, 181 (1983). The Court thus is charged with conducting a three-pronged test, and after a careful review of the record, we find that the evidence supports the sole aggravating factor found by the jury. *See State v. Jackson*, 309 N.C. 26, 305 S.E. 2d 703 (1983). In addition, we cannot say that the jury imposed the death penalty "under the influence of passion, prejudice, or any other arbitrary factor." *Id.*

The third prong of the statutory test requires the Court to compare similar cases to determine whether the sentence here imposed is disproportionate. The now familiar "pool" of cases, as established in *State v. Williams*, 308 N.C. 47, 301 S.E. 2d 335, *cert. denied*, 104 S.Ct. 202 (1983), includes

> *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. Further, we stated in *Jackson*, 309 N.C. at 45, 305 S.E. 2d at 717, that the pool "includes only those cases which have been affirmed by this Court." *Id.*

We have recognized, and continue to recognize the gravity of the duty imposed upon us by statute. As we stated in *State v. Jackson*,

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

309 N.C. at 46, 305 S.E. 2d at 717.

With the magnitude and seriousness of our task in mind, we have reviewed the facts and circumstances of this case and compared them to the other cases in the proportionality pool. Our careful comparison of the cases has led us to conclude that, while the crime here committed was a tragic killing, "it does not rise to the level of those murders in which we have approved the death sentence upon proportionality review." *State v. Jackson*, 308 N.C. at 46, 305 S.E. 2d at 717.

In comparing this case "with other cases in the pool which are roughly similar with regard to the crime and the defendant," *State v. Lawson*, 310 N.C. 632, 648, 314 S.E. 2d 493, 503 (1984), we find only two such cases in which the jury found as an aggravating factor that the murder was committed against a law enforcement officer. In *State v. Hutchins*, 303 N.C. 321, 279 S.E. 2d 788 (1981), we affirmed the jury's recommendation of the death sentence. In *Hutchins*, the defendant was convicted of the murders of three police officers, two of which were first-degree murder convictions. The jury found three aggravating factors: (1) the murder was committed to avoid or prevent arrest; (2) the murder was committed against a law enforcement officer while engaged in the performance of his duties; and (3) the murder was part of a course of conduct involving crimes of violence against others. The jury found one mitigating factor: that, at the time of the crimes, defendant was under the influence of a mental or emotional disturbance.

On the other hand, the jury in *State v. Abdullah*, 309 N.C. 63, 306 S.E. 2d 100 (1983), recommended a life sentence despite having found four aggravating circumstances and only one unspecified mitigating circumstance. The defendant in *Abdullah* had conspired with five others to commit armed robbery and in the process of carrying out the robbery, defendant shot an officer who had just entered the store. *Id.*

The facts and circumstances of the instant case simply do not rise to the magnitude of those in *Hutchins* and *Abdullah*. Moreover, the great disparity of sentences in those two cases renders any meaningful comparison in this limited pool virtually impossible.

Even so, comparing this crime and this defendant to those in other cases in the entire pool in which the death penalty has been affirmed leads us to conclude that the killing in this case, though, as all murders, senseless, was not especially heinous, atrocious or cruel. *E.g., State v. McDougall*, 308 N.C. 1, 301 S.E. 2d 308, *cert. denied*, 104 S.Ct. 197 (1983); *State v. Pinch*, 306 N.C. 1, 292 S.E. 2d 203; *State v. Martin*, 303 N.C. 246, 278 S.E. 2d 214, *cert. denied*, 454 S.Ct. 933 (1981). Neither was the crime here of a torturous, sadistic or "bloodthirsty" nature. *E.g., State v. Williams*, 308 N.C. 47, 301 S.E. 2d 335; *State v. Brown*, 306 N.C. 151, 293 S.E. 2d 569, *cert. denied*, 103 S.Ct. 503 (1982); *State v. Rook*, 304 N.C. 201, 283 S.E. 2d 732. This shooting was not part of a violent course of conduct by defendant. *E.g., State v. Lawson; State v. Craig & Anthony*, 308 N.C. 446, 302 S.E. 2d 740, *cert. denied*, 104 S.Ct. 263 (1983); *State v. McDougall; State v. Smith*, 305 N.C. 691, 292 S.E. 2d 264, *cert. denied*, 103 S.Ct. 474 (1982); *State v. McDowell*, 301 N.C. 279, 271 S.E. 2d 286 (1980), *cert. denied*, 450 U.S. 1025 (1981). Nor was this shooting committed in the perpetration of another felony such as in *State v. Craig & Anthony; State v. Williams; State v. Smith*, and *State v. Rook*. Furthermore, there is no evidence that defendant coldly calculated or planned the commission of this crime over a period of time as did the defendant in *State v. Barfield*, 298 N.C. 306, 259 S.E. 2d 510.

The record in this case reveals that defendant had been drinking on the evening in question, and that he apparently went out in search of one of the Waters sisters with whom he had been earlier and who lived on Woodcock. Officer Enevold noticed a suspicious car in that area and proceeded to investigate. The evidence is unclear as to what happened between the time the officer radioed his message to the station and the time at which he was shot. One eyewitness testified that the officer shone his flashlight into a car parked near the Southern Burglar Alarm Building. The record of this eyewitness's testimony reveals the following, less than crystal clear, account of the events:

> Q. And at that point in time another man approached the officer from behind or from the officer's side?
>
> A. The officer was looking in the driver's side, and this person was up on the corner—must have been coming over the fence or something because the officer didn't see him until he

hit the curb and that's when the officer saw him and that's when I seen him.

Q. At that point in time did the officer turn around and look at him? Could you tell when the officer realized he was there?

A. I can't really recall that.

Q. Could you see him coming over the fence, the man?

A. It was dark at the time and there was no place for him to have hid there unless he did come over the fence.

The testimony concerning exactly how defendant approached the officer admits of some confusion and is certainly speculative at best. Thus, there is some doubt not only as to defendant's whereabouts but also as to what he might have been doing just prior to his encounter with the officer. In addition, there is no evidence as to whether the officer drew his gun first, or whether defendant managed to grab the gun from Officer Enevold's holster in the first instance. The issue of whether or not Officer Enevold was in the process of effecting a valid arrest was not submitted to the jury. Likewise, the aggravating circumstance found in G.S. 15A-2000(e)(4), that the murder "was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody" was not submitted to the jury. Finally, the entire course of events in this case, from Officer Enevold's radio communication until Officer Kraus's message that an officer was down, lasted approximately 80 seconds.

Given the somewhat speculative nature of the evidence surrounding the murder here, the apparent lack of motive, the apparent absence of any simultaneous offenses, and the incredibly short amount of time involved, together with the jury's finding of three mitigating circumstances tending to show defendant's lack of past criminal activity and his being gainfully employed, and the unqualified cooperation of defendant during the investigation, we are constrained to hold as a matter of law that the death sentence imposed here is disproportionate within the meaning of G.S. 15A-2000(d)(2). We are therefore required by statute to sentence defendant to life imprisonment in lieu of the death sentence.

The sentence of death is vacated and defendant is hereby sentenced to imprisonment in the State's prison for the remainder

of his natural life. Defendant is entitled to credit for days spent in confinement prior to the date of judgment.

Guilt-Innocence Phase: No error;

Sentencing Phase: Death sentence vacated, sentence of life imprisonment imposed.

Justice EXUM dissenting in part and concurring in part.

I must respectfully dissent from that portion of the majority opinion which concludes that the evidence was sufficient to sustain a verdict of first degree murder on the theory of premeditation and deliberation. In order for deliberation to be present, the specific intent to kill necessary for first degree murder, as the majority notes, "must arise from 'a fixed determination previously formed after weighing the matter.'" *State v. Corn*, 303 N.C. 293, 296-97, 278 S.E. 2d 221, 223 (1981). "Deliberation means that the intent to kill was formed while defendant was in a cool state of blood and not under the influence of a violent passion suddenly aroused by sufficient provocation." *State v. Misenheimer*, 304 N.C. 108, 113, 282 S.E. 2d 791, 795 (1981). An intent to kill suddenly formed in the course of a quarrel or struggle with another and which is the product of that quarrel or struggle is not formed in a cool state of blood and cannot be the basis for a conviction of first degree murder. *State v. Corn, supra; see also State v. Misenheimer, supra.* In *Corn* this Court said:

> After carefully considering the evidence presented in the case *sub judice* in the light most favorable to the State, we find that the State has failed to show by substantial evidence that defendant killed Lloyd F. Melton with premeditation and deliberation. The shooting was a sudden event, apparently brought on by some provocation on the part of the deceased. The evidence is uncontroverted that Melton entered defendant's home in a highly intoxicated state, approached the sofa on which defendant was lying, and insulted defendant by a statement which caused defendant to reply 'you son-of-a-bitch, don't accuse me of that.' Defendant immediately jumped from the sofa, grabbing the .22 caliber rifle which he normally kept near the sofa, and shot Melton several times in the chest. The entire incident lasted only a few moments.

> There is no evidence that defendant acted in accordance with a fixed design or that he had sufficient time to weigh the consequences of his actions. Defendant did not threaten Melton before the incident or exhibit any conduct which would indicate that he formed any intention to kill him prior to the incident in question. There was no significant history of arguments or ill will between the parties. Although defendant shot deceased several times, there is no evidence that any shots were fired after he fell or that defendant dealt any blows to the body once the shooting ended.
>
> All the evidence tends to show that defendant shot Melton after a quarrel, in a state of passion, without aforethought or calm consideration. Since the evidence is insufficient to show premeditation and deliberation, we find that the trial court erred in instructing the jury that they could find defendant guilty of first degree murder and defendant is awarded a new trial for a determination of whether or not defendant is guilty of second degree murder, voluntary manslaughter or not guilty.

303 N.C. at 297-98, 278 S.E. 2d at 223-24.

I find the case at bar indistinguishable from *Corn.* Here, too, all the evidence tends to show defendant's intent to kill was the product of the sudden struggle in which he and deceased were engaged and was formed suddenly while defendant was "in a state of passion, without aforethought or calm consideration." In my view it was error to submit first degree murder to the jury, and I vote to remand, as we did in *Corn,* for a new trial on the question of defendant's guilt of second degree murder or manslaughter.

I concur fully in all other aspects of the majority's opinion.

Justice MEYER dissenting.

I concur in all respects with the dissenting opinion by Justice Mitchell but wish to add the following:

The United States Constitution does not require a comparative proportionality review. *Pulley v. Harris,* --- U.S. ---, 79 L.Ed. 2d 29 (1984). The requirement of a formal proportionality

review was imposed by our Legislature in the adoption of G.S. § 15A-2000(b)(2). It has become a prime feature in the appellate review of every death case, imposing a grave responsibility upon this Court which rightfully demands the expenditure of substantial effort and time in each such case. We do not treat this obligation lightly. Each case presents anew the consideration of which cases in the pool are "similar" considering both the crime and the defendant.

The majority correctly recognizes that since the enactment of G.S. § 15A-2000, in only two cases has a jury been called upon to consider imposing the death penalty for the murder of a law enforcement officer while engaged in the performance of his duties. Equally true is that in *State v. Hutchins*, 303 N.C. 321, 279 S.E. 2d 788 (1981), two additional aggravating factors were found: that the murder was committed to avoid or prevent arrest, and that the murder was part of a course of conduct involving crimes or violence against others. We affirmed the death sentence in *Hutchins*. As discussed below, I believe that the majority places undue emphasis on the fact that in *Hutchins* the jury found more than one aggravating factor and I therefore find that the present case is comparable to *Hutchins*.

State v. Abdullah, 309 N.C. 63, 306 S.E. 2d 100 (1983), the second case involving the murder of a police officer, is clearly distinguishable. *Abdullah* came to this Court as a life sentence case and there were no death sentence issues involved. In *Abdullah* the jury answered the issue of whether the aggravating factors were sufficient to call for the imposition of the death penalty "No" and recommended a life sentence. In *Abdullah* three codefendants who testified against Abdullah were allowed to enter pleas and later received prison sentences of no more than fifteen years and all were recommended for work release. The fact that the codefendants would not receive the death penalty was made known to the *Abdullah* jury. One of the issues at trial and brought forward on appeal in *Abdullah* concerned the credibility of the three codefendants in light of their agreement to testify in exchange for sentence concessions. *See State v. Abdullah*, 309 N.C. at 72-73, 306 S.E. 2d at 105-106. The fact that the three codefendants would not receive the death penalty was further emphasized to the jury through an additional mitigating factor which was added by handwriting on the jury form as No. XIV

in this language: "Will three co-defendants or accomplices in the crimes for which the defendant has been convicted avoid the death penalty?" In my view this was a completely improper circumstance to be included on the jury form and, had the jury form been before this Court on the direct appeal, I believe this Court would have so found. While the jury failed to answer that issue, I believe it necessarily strongly influenced the jury's decision to recommend a life sentence. I consider *Abdullah* an aberration brought about by the peculiar circumstances of that case.

Because we have no case "on point," against which to measure this case, the majority turns to the other cases in the "pool" to determine whether the death sentence in this case is proportionate. In so doing the majority imposes a standard that is neither required under the statute, nor appropriate under the circumstances.

Many of the cases in the "pool," as the majority points out, involve brutal, atrocious murders in which the victims were tortured, the bodies were mutilated, and the victims clearly underwent unnecessary physical pain and psychological suffering. Surely the majority does not intend to suggest that this sentence is disproportionate because the murder did not meet the single aggravating circumstance of being "heinous, atrocious or cruel."

Also in the "pool" are murders in which more than one aggravating factor was found. Surely the majority does not intend to hold that unless more than one aggravating factor was found, the penalty of death is not appropriate.

The statute does not require that the murder be gruesome or brutal in order to justify a penalty of death. The statute does not require that the jury find more than one aggravating factor in order to justify the penalty of death. The statute *requires* that the jury find only *one* statutory aggravating factor, that the mitigating factor or factors not outweigh the aggravating factor, and that the aggravating factor, considering the mitigating factor or factors, be sufficiently substantial to call for the penalty of death. This the jury did.

Rather than placing undue emphasis on the excessive brutality of some of our capital cases, or engaging in a numerical counting of aggravating factors, I would consider, as we did in *State v.*

Oliver II, 309 N.C. 326, 307 S.E. 2d 304 (1983) and *State v. Maynard*, 311 N.C. 1, 316 S.E. 2d 197 (1984), the policies underlying our capital sentencing scheme and the impact of today's decision upon the effectiveness of our criminal justice system. In *Oliver II* we did not attempt to engage in a futile comparison of all unrelated cases in the "pool." We had earlier affirmed the sentence of death in *State v. Williams*, 305 N.C. 656, 292 S.E. 2d 243 (1982), also an armed robbery case, and we simply reiterated that the sentence of death is not excessive or disproportionate when the motive for the murder is witness elimination.

Of even more significance is our recent holding in *State v. Maynard*, 311 N.C. 1, 316 S.E. 2d 197 (1984). There we noted that "the present case represents the first in North Carolina in which a potential witness, pursuant to a plea arrangement, had agreed to testify against the defendant at trial and was murdered solely for the purpose of preventing his testimony." *Id.* at 35, 316 S.E. 2d at 216. Rather than attempting to compare *Maynard* with other cases, totally unrelated on their facts, we again focused on the targeted victim, the motive for the killing, and important policy considerations. In this regard, we cited to other witness elimination cases [*Oliver II* and *State v. Barfield*, 298 N.C. 306, 259 S.E. 2d 510 (1979)]. These cases, while in most respects distinguishable from *Maynard*, as the present case is in some respects distinguishable from *Hutchins*, nevertheless shared the common thread of witness elimination as the motive for the murder. In *Maynard* we noted that "both Congress and our State legislature have recently recognized the serious consequences to the effective administration of our criminal justice system in the continuing efforts of those charged with crimes to threaten or intimidate witnesses." *Id.* at 35, 316 S.E. 2d at 216, and we upheld Maynard's sentence of death "[b]ased upon compelling policies which encourage witnesses to testify in criminal trials without fear. . . ." *Id.* at 36, 316 S.E. 2d at 216.

Here, the victim was Officer Enevold, a young police officer murdered while he was engaged in the performance of his duties. As Justice Mitchell has succinctly stated in his dissenting opinion, "[t]he murder of a law enforcement officer engaged in the performance of his duties in the truest sense strikes a blow at the entire public—the body politic—and is a direct attack upon the

rule of law which must prevail if our society as we know it is to survive." Surely the same policy considerations upon which we based our decision in *Oliver* and *Maynard* apply with equal force to this case. In the absence of compelling circumstances which would militate against a sentence of death when the victim is a police officer (and here I find none), this Court should recognize, as it has done previously in *Hutchins*, *Oliver*, and *Maynard*, that the effective administration of justice requires that some murders must indeed be treated as different "in kind and not merely in degree from other murders." *See* Mitchell, J., dissenting.

Finally, I feel compelled to clarify certain facts regarding this murder which leave no doubt that the jury's decision to impose a sentence of death was surely appropriate under the circumstances.

The evidence presented in this case tends to show that on the fateful morning of Sunday, 22 November 1981, at approximately 4:48 a.m., Officer Enevold radioed the Hendersonville Police Department dispatcher that he was at the intersection of Ash and Woodcock Streets, and that he was "with a suspicious car . . . reference to circling the block." Officer Enevold reported he was with the driver but had not obtained the driver's identification yet. The "suspicious car" was parked at the gate to Southern Burglar Alarm, a business on Ash Street, across from the residence of Daniel Gilliam and his family.

According to Gilliam, an eyewitness, he observed Officer Enevold out of the police car, shining a flashlight into the driver's window of the suspicious car, when a man, identified at trial by circumstantial evidence as defendant, suddenly approached from the direction of Southern Burglar Alarm, apparently by climbing over the fence. When Officer Enevold spoke to him, defendant stopped at the curb about ten feet away, and then began to run. Officer Enevold said something to him again, but defendant kept running. Officer Enevold then gave chase and tackled defendant near the middle of the intersection.

After Officer Enevold tackled defendant, they struggled in the street for a few minutes. Defendant somehow managed to obtain Officer Enevold's .38 caliber Smith and Wesson service revolver, and stood up looking down on the officer. According to Gilliam, Officer Enevold was lying on the ground with his hands

raised, apparently attempting to hold onto defendant's waist. Defendant then said something like, "Let me go," and Gilliam heard a gunshot.

Ricky Edwards, another eyewitness, testified that he saw defendant get up from the struggle and stand over Officer Enevold, pointing a gun at the officer. Officer Enevold was kneeling on one knee when Edwards saw the flash of a gunshot. Officer Enevold then fell to the ground, mortally wounded by his own service revolver.

After defendant shot the officer, he turned and pointed the gun at Edwards, who was approximately 150 to 200 feet away. Edwards stopped, put his car in reverse and backed up to the 7th Avenue intersection, where he told Officer Paul Kraus that an officer had been shot. As Officer Kraus and Edwards started toward the intersection of Ash and Woodcock, defendant sped past them in the automobile Officer Enevold had been investigating.

Officer Kraus found his fellow officer lying face down in a pool of blood.

An autopsy showed that Officer Enevold died as a result of a gunshot wound to his left cheek, just below the left eye. There were extensive powder burns on his face from the nose to the ear. The bullet was recovered from the base of Officer Enevold's neck, and the path of the bullet was slightly downward.

This evidence is sufficient to support reasonable inferences that: (1) Officer Enevold was on duty and was investigating a "suspicious car" when defendant suddenly appeared, apparently having climbed over the fence of a nearby business. (2) Officer Enevold ordered defendant to halt. However, defendant ran, trying to elude the officer. Officer Enevold again said something to defendant, but defendant continued running. (3) Defendant was trying to avoid apprehension and arrest when he ran from the scene. (4) Without escalating the confrontation by drawing his revolver or firing a warning shot to halt, Officer Enevold chased and tackled defendant in the middle of the intersection. (5) Officer Enevold was engaged in the performance of his official duty and himself did nothing to provoke the shooting. (6) During the struggle, defendant obtained Officer Enevold's service revolver, stood

up, and pointed it at the officer's face. (7) Officer Enevold was unarmed and defenseless under the circumstances. When Officer Enevold was shot, defendant had gained a superior position and advantage over the officer. He was standing, pointing the service revolver at the unarmed officer. For all intents and purposes, the struggle between defendant and the officer had ended. At that point in time, defendant literally held the officer's life or death in his hands, and chose to take it so he could escape. (8) Officer Enevold was shot by defendant at close range, while the officer was on the ground, apparently kneeling on one knee, and with his hands on or around defendant's waist; because of the location of the wound and downward path of the bullet, Officer Enevold must have been facing defendant and looking up into the barrel of his own service revolver, aware but helpless to prevent his impending death. (9) Without any signs of a struggle over the weapon or accidental shooting, defendant applied the necessary pressure on the trigger to discharge the revolver slightly downward into Officer Enevold's face. (10) Defendant shot Officer Enevold after demanding that the officer let him go, and in order to effectuate his escape. (11) Defendant then turned and pointed the revolver at Ricky Edwards, an eyewitness. (12) Defendant himself offered no assistance to the mortally wounded officer, and fled the scene without notifying the police or calling for medical attention.

Upon the foregoing facts and the reasonable inferences which may be drawn therefrom, I fail to see how the majority can overturn the death penalty imposed by the jury for the reason that the sentence is excessive and disproportionate. It clearly is not.

I would vote to affirm both the finding of guilt and the sentence of death.

Justices MITCHELL and MARTIN join in this dissenting opinion.

Justice MITCHELL concurring in part and dissenting in part.

I concur in the majority's holding that there was no error in the guilt-innocence determination phase of the defendant's trial. As I believe the death penalty entered by the trial court was proper in this case, I dissent from the action of the majority in vacating the sentence of death and imposing a life sentence.

The jury in this case specifically found as an aggravating circumstance that the murder was committed against a law enforcement officer while engaged in the performance of his official duties. G.S. 15A-2000(e)(8). The jury then found that this statutory aggravating circumstance outweighed the mitigating circumstances and that the defendant should be sentenced to death. As a result, Judge Thornburg was required to and did sentence the defendant to death.

I am not willing to say that the sentence of death in this case is excessive or disproportionate to the penalty imposed in *similar cases* considering both the crime and the defendant. G.S. 15A-2000(d)(2). Given the fact that there are almost no cases in the "pool" we use for proportionality review which involve the killing of a law enforcement officer *engaged in the performance of his official duties*, I agree with the majority that any meaningful comparison in this limited pool is "virtually impossible." Given this state of affairs, I am entirely unwilling to set aside a verdict of twelve citizens recommending death.

The murder of a law enforcement officer *engaged in the performance of his official duties* differs in kind and not merely in degree from other murders. When in the performance of his duties, a law enforcement officer is the representative of the public and a symbol of the rule of law. The murder of a law enforcement officer engaged in the performance of his duties in the truest sense strikes a blow at the entire public—the body politic—and is a direct attack upon the rule of law which must prevail if our society as we know it is to survive.

A jury having found after solemn consideration that the defendant killed a law enforcement officer engaged in the performance of his official duties and that this aggravating circumstance outweighed the mitigating circumstances and called for the penalty of death, I do not believe that we should hold the penalty disproportionate. I vote to find no error in either the verdict or the sentence of death.

Justices MEYER and MARTIN join in this opinion.

STATE OF NORTH CAROLINA v. JOHN STERLING GARDNER, JR.

No. 29A84

(Filed 28 August 1984)

1. Criminal Law § 15.1— denial of pretrial motion for change of venue—failure to show abuse of discretion

In a prosecution for first-degree murder, defendant failed to show the trial court abused its discretion in failing to grant his motion for a change of venue pursuant to G.S. 15A-957. While the media coverage of the crimes committed in the case was pervasive, the articles appearing in local newspapers and the broadcasts on local radio and television stations were factual and non-inflammatory news accounts of the murders. Further, defendant exercised only half of his available peremptory challenges to the jury, and the transcript of the jury selection process revealed that while numerous jurors had heard about the case through television or newspaper accounts of the killings, only one juror had tentatively formed an opinion about defendant's guilt and that juror was immediately excused by defense counsel.

2. Constitutional Law § 31— denial of funds for private investigator—no abuse of discretion

The trial judge did not abuse his discretion in failing to appoint a private investigator for defendant pursuant to G.S. 7A-450(b) and G.S. 7A-454 where the gist of defendant's argument was that a private investigator would be helpful as a witness coordinator and would be useful in determining which witnesses should be called to establish defendant's alibi defense, and such an assertion did not rise to the level of showing a reasonable likelihood that the efforts of an investigator would discover additional evidence helpful to defendant.

3. Constitutional Law § 31— denial of motion for funds to hire private psychiatrist—no abuse of discretion

The trial judge correctly denied defendant's motion for funds to pay for additional psychiatric testing where there was no serious contention that defendant lacked the capacity to stand trial or was insane at the time he allegedly committed the offenses, and where defendant did not meet his burden of showing a reasonable likelihood that the expert would materially aid in the preparation of the case.

4. Constitutional Law § 63— exclusion of jurors opposed to death penalty—no violation of Witherspoon principles

In a prosecution for first-degree murder, all jurors excused for cause as being opposed to the death penalty were properly excluded under the requirements of *Witherspoon v. Illinois*, 391 U.S. 510 (1978) and G.S. 15A-1212(8). Each one of them emphatically stated that under no circumstances would he or she return a verdict of death.

5. **Constitutional Law § 62— no impermissible restriction of voir dire of prospective jurors by defense counsel**

There was no impermissible restriction of *voir dire* of prospective jurors by defense counsel by the refusal of the trial court to permit defense counsel to require prospective jurors to name the three persons, living or dead, that person most admired.

6. **Criminal Law § 75.1— confession—not result of "fruit of poisonous tree"**

Defendant's confession was not obtained in violation of *Dunaway v. New York*, 442 U.S. 200 and was properly not suppressed as "the fruit of the poisonous tree" where defendant was already in custody and hence there was no seizure within the meaning of the Fourth Amendment, and where the trial court specifically concluded, upon ample supporting evidence, that the officers had "probable cause to interrogate the defendant."

7. **Criminal Law § 75.2— confession—made freely, voluntarily and after knowingly waiving rights**

The trial court properly found that defendant's statement was made freely, voluntarily and after knowingly waiving his *Miranda* rights where the trial court specifically found that an officer only promised defendant to be present at defendant's trial and that defendant's cooperation would be communicated to the district attorney.

8. **Constitutional Law § 30— disclosure of statements pursuant to voluntary discovery—no evidence of violation of discovery provisions**

In a prosecution for first-degree murder, it was not evident from the record or from defendant's brief that there was a violation of the discovery provisions concerning production of statements made by defendant. However, assuming that a statement was not provided as required by G.S. 15A-903(a), it was inconceivable that it could have been sufficiently prejudicial as to warrant awarding defendant a new trial and defendant failed to show any abuse of discretion in the failure of the trial judge to impose sanctions pursuant to G.S. 15A-910 assuming there was a violation of discovery provisions.

9. **Criminal Law § 114.2— instructions—no expression of opinion in instructions concerning defendant's contentions and theory of aiding and abetting**

There was no merit to defendant's contention that the trial court improperly expressed an opinion in its charge to the jury concerning defendant's first written statement in which he contended another person committed the robbery and murder since the judge's charge was supported by the evidence and was accurate and fair in every respect.

10. **Criminal Law § 66.9— denial of motion to suppress identification testimony—proper**

The uncontested findings of a trial judge concerning identification of defendant were amply supported by the evidence and the findings in turn supported the trial court's conclusion that the pretrial procedures were not impermissibly suggestive where the trial judge found that a witness had been shown approximately 100 photographs to see if she could identify the person seen by her shortly after the murders were committed, and where approximately a year after the murders, the witness was shown 6 color photographs, each bear-

ing a picture of a white male approximately of the same age, each wearing a beard, each showing full face, and where the witness examined the photographs, discarded 3; of the remaining 3, she discarded one; of the remaining 2, she discarded one and selected the photograph of the defendant as being a photograph of the person she had seen in the parking lot shortly after the robbery and murders.

11. Criminal Law § 86.5— cross-examination concerning alleged participation in unrelated murder—proper

In a prosecution for first-degree murder, the trial court properly allowed the prosecutor to cross-examine defendant concerning his alleged participation in an unrelated murder where defendant took the stand to testify in his own behalf, and where there was no evidence or even suggestion of lack of good faith on the part of the prosecutor.

12. Criminal Law § 102— closing argument of prosecutor—no impropriety requiring trial judge to act ex mero motu

There was nothing so grossly improper about a prosecutor's closing argument in the guilt phase of a prosecution for first-degree murder so as to have required corrective action by the trial judge *ex mero motu.*

13. Criminal Law § 42.4— evidence that defendant seen with sawed-off shotgun relevant

In a prosecution for first-degree murder, evidence that defendant possessed a weapon similar to that used in the murders shortly after the murders occurred was relevant evidence.

14. Criminal Law § 135.8— aggravating factor that murder committed for pecuniary gain properly submitted

In a prosecution for first-degree murder, there was no error in the submission of the aggravating factor that the murder was committed for pecuniary gain. The 1983 legislative amendment to the Fair Sentencing Act's pecuniary gain provision, G.S. 15A-1340.4(a)(1)c, does not dictate redefinition of the pecuniary gain aggravating factor found in the death penalty statutes, G.S. 15A-2000(e)(6).

15. Criminal Law § 135.9— no error in failing to find age as mitigating factor

The trial court properly failed to give a peremptory instruction that defendant's age must be considered as a mitigating circumstance where defendant was 24 years old at the time of the commission of the murders for which he was charged and where the trial judge submitted to the jury the age of defendant as a possible mitigating circumstance for their consideration which the jury failed to find.

16. Criminal Law § 135.10— *death sentence—proportionality review*

In comparing a first-degree murder case to similar cases in which the death penalty was imposed, the Court could not find that the sentence of death in this case was disproportionate or excessive, considering both the crime and the defendant where the killings in this case were part of a violent course of conduct, were coldblooded, calculated, and senseless. G.S. 15A-2000(d)(2).

APPEAL by defendant from *Fountain, Judge*, at the 19 September 1983 Session of FORSYTH Superior Court.

Defendant was charged in indictments, proper in form, with the first-degree murder of Richard Augustus Adams and the first-degree murder of Delphina Kim Miller. Each indictment alleged felony murder as the basis for the first-degree murder charge. Defendant entered a plea of not guilty to each offense.

At trial, the State offered evidence tending to show that on 22 December 1982, Richard Adams and Kim Miller were employed by the Steak and Ale Restaurant on Stratford Road in Winston-Salem, North Carolina. Richard, a 21-year-old, had been a management trainee with the company for four months. Kim, who was 23 years old, worked as a bartender at the restaurant.

On the evening of 22 December, Patricia Coyle, the Assistant Manager of the Stratford Road Steak and Ale, left the restaurant at about 10:00 p.m. She returned to the restaurant later that night to check on Richard, who was still training under her supervision.

That evening, Richard was responsible for closing the restaurant, adding the cash and balancing the receipts. The standard procedure was for the closing manager to add the money and place it on the side of the desk in the restaurant office until all charges were balanced. Only then was the money to be placed in the safe.

Ms. Coyle testified that shortly after 12:00 a.m. she again left the restaurant. When she left, Kim was in the bar and Richard was sitting in the office talking with one of the waitresses, Audrey Little.

Ms. Little recalled that when she left the restaurant at 12:20 a.m., Kim was polishing the bar. Richard walked Audrey through the kitchen and watched her cross the parking lot to make sure she got to her car safely. After Audrey's departure, Kim and Richard were the only employees remaining at the Steak and Ale.

At approximately 9:00 a.m. the next morning, Patricia Coyle arrived to open the restaurant. She noticed that the sign was still on and Richard's car was still parked where it had been the night before. She opened the door to let in several employees who were

waiting outside and saw that the lights in the dining room were dim and the music was still on. She then walked through the restaurant to the office in the back and there discovered the bodies of Richard Adams and Kim Miller. Richard had been shot in the face with a shotgun and was slumped back in a chair against the wall. Kim had been shot in the back of the neck and was lying on the floor at Richard's feet. The money from the day's earnings was missing and the manager, by using the figures from the adding machine tapes Richard was working on when he was killed, determined that $2,696.55 in cash had been taken.

The State also presented the testimony of Linda Cain. She was a cashier at the Kyoto Steak House which was located next door to the Steak and Ale. Ms. Cain stated that sometime between 12:15 a.m. and 12:30 a.m. on 23 December, she was walking to her car after work when she heard what sounded like a loud bang coming from the direction of the Steak and Ale. She continued walking toward her car when she suddenly heard footsteps behind her. She looked over her shoulder and saw a man, later identified as defendant, running to an automobile parked in back of the Steak and Ale. She testified that she stared at the man for a few moments before he jumped into the passenger side of the vehicle. The driver of the bluish-grey or beige older model vehicle then backed hurriedly out of the parking lot.

On 24 March 1983, the witness Cain was presented with a photographic array from which she selected defendant's photograph and identified him as the man she saw in the Steak and Ale parking lot during the early morning of 23 December. Prior to 24 March, Ms. Cain had been shown approximately 100 photographs from which she was asked to identify the man she had earlier seen. She did not select any of these photos but was able to positively identify defendant's picture when the officers exhibited it to her.

The State offered additional evidence tending to implicate defendant in the commission of the crimes charged. On 17 March 1983, Jeffrey Scott Royal, a prisoner in the Forsyth County jail, approached Detective Robert Lloyd, indicating that he had information relating to the Steak and Ale homicides. Royal told Detective Lloyd that one evening in January, 1983, defendant was at Royal's residence when a Crimestopper broadcast about the

murders committed at the Steak and Ale came on the television. Royal stated that defendant said the police "sure would like to know what he knew about the crimes." Defendant then told Royal that he would "like to get another lick (robbery) like the one at the Steak and Ale" and that he "got over two thousand dollars out of Steak and Ale." Finally, Royal informed Detective Lloyd that defendant had a .20 gauge sawed-off shotgun with him at the Royal residence that day.

At the time Royal gave this information to police, defendant was being held prisoner in the Forsyth County jail on an unrelated armed robbery charge. On 23 March, Detective Lloyd brought defendant from the jail to the Winston-Salem Police Department for questioning. After signing a written waiver of his constitutional rights, defendant confessed to his involvement in the Steak and Ale murders. In this statement, defendant admitted that he was at the scene of the crime, but stated that he merely drove the getaway car for a friend. He maintained that he had no knowledge of the killings until his friend climbed back into the car following the robbery. The detectives then drove defendant to the Steak and Ale and asked him to describe more fully his role in the crimes committed on 23 December.

When they returned to the police department, defendant was placed in an office to await further questioning and was left alone for a few minutes. Detective Mike Branscome testified that as he walked by, defendant motioned him to come into the office. Defendant asked Branscome what he thought about defendant's situation and Branscome replied: "I believe you're the one that killed those people." Defendant then said he wished to make another statement and consented to have it tape-recorded.

In this second statement, defendant confessed that he had in fact entered the Steak and Ale Restaurant. He stated that he gained entry to the establishment by ringing the back door and forcing it open when Kim Miller answered the bell. He recalled that he forced Kim into the office and told her to hand over the cash. Defendant said that he then noticed Richard begin to get out of his chair. He thought Richard had something in his hand, perhaps a weapon, so defendant fired his gun at him. Defendant then shot Kim, picked up the shells which he had ejected from his sawed-off shotgun and ran out to his vehicle where an accomplice

was waiting. Defendant stated that he and his friend split the money. Finally, defendant told the police that he and his companion had been injecting "crystal meth" into their arms earlier that evening.

Defendant presented evidence in the nature of an alibi. Greg Teel, who in December 1982 was living with defendant and his girl friend, Cathy Lynn Giordano, testified that defendant was with him throughout the evening of 22 December. He stated that at about 6:00 p.m. that evening, he rode with defendant to take Cathy to work. He remembered that he and defendant then went back home and remained there until 9:00 or 10:00 o'clock, when they left to go to Greg's former girl friend's house. They visited with her for about 45 minutes, and then went to Bill's Truck Stop in Lexington, North Carolina, to get something to eat and to play the video games. At 12:00 or 12:30 a.m., defendant and Greg went to pick Cathy up at work. They then returned to Bill's Truck Stop to get something for Cathy to eat and then went home.

Cathy Giordano's testimony was corroborative of this sequence of events. She testified that when they went home after eating at Bill's Truck Stop, defendant immediately went to bed and remained at the apartment throughout the night.

Defendant testified in his own behalf. He stated that he was with Greg and Cathy on 22 and 23 December 1982. He denied any involvement in the Steak and Ale murders and stated that the officers had used threats and promises to obtain his confessions.

The jury convicted defendant of the first-degree murder of Richard Adams and the first-degree murder of Kim Miller.

A sentencing hearing was held pursuant to G.S. 15A-2000 *et seq.*, following the first-degree murder convictions.

The State presented no evidence during the sentencing phase of the trial, electing to rely on its evidence presented during the guilt determination phase.

Defendant presented the testimony of Dr. Mary Rood, a psychiatrist at Dorothea Dix Hospital. She testified that she examined defendant on 16 May 1983. Her diagnosis was that defendant suffered from anti-social behavior and a personality disorder manifested by drug abuse. She specifically stated, however, that,

in her opinion, defendant's capacity to conform his behavior to the requirements of the law was not impaired. She further offered her opinion that defendant was capable of distinguishing right from wrong.

At the conclusion of the sentencing hearing, the trial court submitted two aggravating circumstances with respect to each conviction:

1. Was the capital felony committed for pecuniary gain?

2. Was the murder for which the defendant stands convicted part of a course of conduct in which the defendant engaged and which included the commission by the defendant of another crime of violence against another person?

The trial court submitted the following mitigating circumstances relating to each murder conviction:

1. The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired.

2. The age of the defendant at the time of the crime.

3. Other circumstances arising from the evidence which the jury deems to have mitigating value.

a. The defendant's prior family history that would reasonably be expected to contribute to the defendant's criminal conduct.

b. The defendant's apparent drug addiction or abuse and alcoholism or alcohol abuse that would reasonably be expected to contribute to the defendant's criminal conduct.

With respect to each offense, the jury found beyond a reasonable doubt that both aggravating circumstances existed.

The jury also found the existence of two mitigating circumstances, those relating to defendant's prior family history and his drug and alcohol abuse. The jury specifically rejected the mitigating circumstance that defendant's capacity to appreciate the criminality of his conduct was impaired. They also found that defendant's age at the time of the crimes was not of mitigating value.

Finally, the jury found beyond a reasonable doubt that the aggravating circumstances were sufficiently substantial to call for the imposition of the death penalty when considered with the mitigating circumstances, and recommended that defendant be sentenced to death.

The trial court sentenced defendant to die for the first-degree murder of Richard Augustus Adams and for the first-degree murder of Delphina Kim Miller. Defendant appealed his death sentences directly to this Court pursuant to G.S. 7A-27(a).

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

Bruce C. Fraser for defendant-appellant.

BRANCH, Chief Justice.

[1] Defendant first assigns as error the denial of his pretrial motion for change of venue. He asserts that extensive media coverage of the "Steak and Ale" murders was highly prejudicial and precluded his receiving a fair trial in Forsyth County.

On a motion for change of venue pursuant to G.S. 15A-957, the burden is on the defendant to prove prejudice so great that he cannot obtain a fair and impartial trial. *State v. Jerrett*, 309 N.C. 239, 307 S.E. 2d 339 (1983); *State v. Dobbins*, 306 N.C. 342, 293 S.E. 2d 162 (1982). He must show 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. at 255, 307 S.E. 2d at 347. The determination of whether the defendant has met this burden of proof rests in the sound discretion of the trial judge and his ruling will not be overturned on appeal absent a showing of gross abuse of discretion. *State v. Oliver*, 302 N.C. 28, 274 S.E. 2d 183 (1981).

Our review of the record reveals that defendant has shown no abuse of discretion in the trial court's denial of the motion for change of venue.

While the media coverage of the crimes committed in the instant case was, as defendant alleges, pervasive, the articles ap-

pearing in local newspapers and the broadcasts on local radio and television stations were factual and non-inflammatory news accounts of the murders. This Court has consistently held that factual news accounts regarding the commission of a crime and the pretrial proceedings do not of themselves warrant a change of venue. *See, e.g., State v. Watson*, 310 N.C. 384, 312 S.E. 2d 448 (1984); *State v. Dobbins*, 306 N.C. 342, 293 S.E. 2d 162 (1982).

Furthermore, we have held that when a defendant 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. Watson*, 310 N.C. at 393, 312 S.E. 2d at 455. Here, defendant exercised only half of his available peremptory challenges.

Finally, the transcript of the jury selection process reveals that while numerous jurors had heard about the case through television or newspaper accounts of the killings, only one juror had tentatively formed an opinion about defendant's guilt. This juror was immediately excused by defense counsel with the consent of the prosecutor. Each juror selected to hear defendant's case stated unequivocally that he or she would determine defendant's guilt or innocence solely on the basis of evidence introduced at trial.

We hold that the motion for change of venue was properly denied.

[2] Defendant next contends the trial court erred by denying his motion for funds to hire a private investigator to assist in the preparation of his case. He bases his entitlement to such help upon G.S. 7A-450(b), which sets forth the responsibility of the State to provide an indigent defendant "with counsel and the other necessary expenses of representation," and G.S. 7A-454, which provides that the trial court may discretionarily "approve a fee for the service of an expert witness who testifies for an indigent person, ..."

It is well established that the issue of whether a private investigator should be appointed at State expense to assist an indigent defendant rests within the sound discretion of the trial judge. *State v. Tatum*, 291 N.C. 73, 229 S.E. 2d 562 (1976). Experts for trial preparation should be provided only when there is a

reasonable likelihood that the expert will materially aid the defendant in the preparation or presentation of the defense or that without such help it is probable the defendant will not receive a fair trial. *State v. Williams*, 304 N.C. 394, 284 S.E. 2d 437 (1981), *cert. denied*, 456 U.S. 932 (1982). We have held that the appointment of private investigators should be made "with caution and only upon a clear showing that specific evidence is reasonably available and necessary for a proper defense," since "[t]here is no criminal case in which defense counsel would not welcome an investigator to comb the countryside for favorable evidence." *State v. Tatum*, 291 N.C. at 82, 229 S.E. 2d at 568.

Applying these legal principles to the facts of this case, it is clear Judge Washington did not abuse his discretion by failing to appoint a private investigator for defendant.

A review of the transcript of the motion hearing reveals that defense counsel requested the appointment of a private investigator essentially because, as a sole practitioner, he did not have the time to interview and coordinate defendant's alibi witnesses. Counsel stated, however, that he had already talked to the witnesses. The gist of his argument was that a private investigator would be helpful as a witness coordinator and would be useful in determining which witnesses should be called to establish defendant's alibi defense.

Such an assertion by defense counsel does not rise to the level of showing a reasonable likelihood that the efforts of an investigator would discover additional evidence helpful to defendant. "[T]he State is not required by law to finance a fishing expedition for defendant in the vain hope that 'something' will turn up." *State v. Alford*, 298 N.C. 465, 469, 259 S.E. 2d 242, 245 (1979).

We find no abuse of discretion in the denial of defendant's motion for the appointment of a private investigator.

[3] These same considerations apply to defendant's contention of error in the trial court's denial of his motion for funds to hire a private psychiatrist.

By order of Judge David R. Tanis dated 19 April 1983, defendant was transferred to Central Prison in Raleigh in order that he might be observed by the medical staff of Dorothea Dix

Hospital to determine his capacity to proceed to trial. The psychiatrist's report, which was made available to defense counsel, indicated that defendant was capable of proceeding to trial and that he was legally sane. In the examining psychiatrist's opinion, defendant suffered from an anti-social personality disorder which was aggravated by drug and alcohol abuse.

On 2 August 1983, defendant moved that funds be made available to hire a private psychiatrist for a more thorough investigation of defendant's state of mind at the time he allegedly committed the crimes charged. Following a hearing, the trial court denied defendant's motion.

Under the circumstances here presented, we hold that the court's refusal to require the State to pay for an additional psychiatric evaluation was not error.

There was no serious contention that defendant lacked the capacity to stand trial or was insane at the time he allegedly committed the offenses. Defense counsel's admitted basis for attempting to secure an additional psychiatric evaluation at State expense was that he "was looking down the road to some extent . . . insofar as if the jury reaches the second issue in this matter and that's the thrust of my request in that regard."

Defendant clearly did not meet his burden of showing a reasonable likelihood that the expert would materially aid in the preparation of the case. The trial judge correctly denied defendant's motion for funds to pay for additional psychiatric testing and this assignment of error is therefore overruled.

[4] Defendant contends the trial court improperly excused six jurors for cause in violation of the principles established in *Witherspoon v. Illinois*, 391 U.S. 510, *reh'g denied*, 393 U.S. 898 (1968). *Witherspoon* permits the exclusion for cause of a juror if it is established that the juror "would *automatically* vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case. . . ." 391 U.S. at 522, n. 21 (emphasis in original). The North Carolina statute which sets forth the grounds for challenging a juror for cause, G.S. 15A-1212, adopts the *Witherspoon* test as the basis for excluding jurors who "[a]s a matter of conscience, regardless of the facts and circumstances," would be unable to return a verdict imposing the death penalty.

We conclude from our examination of the record that all jurors excluded for cause were properly excluded under the requirements of *Witherspoon* and G.S. 15A-1212(8). Each one of them emphatically stated that under no circumstances would he or she return a verdict of death. Their answers to the prosecutor's questions reveal an unwavering opposition to the death penalty and an unwillingness to set aside their beliefs to even *consider* death as a possible punishment.

Defendant next argues that the systematic exclusion of those jurors unalterably opposed to the death penalty prior to the guilt-innocence phase of the trial violated his right to due process and to trial by a jury drawn from a representative cross-section of the community. This argument has been consistently rejected by this Court. *See, e.g., State v. Bondurant*, 309 N.C. 674, 309 S.E. 2d 170 (1983); *State v. Oliver*, 309 N.C. 326, 307 S.E. 2d 304 (1983); *State v. Kirkley*, 308 N.C. 196, 302 S.E. 2d 144 (1983). Since defendant advances no reason for us to abandon the reasoning of our prior decisions on this issue, these cases operate to preclude relief for defendant here.

[5] Defendant's third argument relating to the jury selection process is that the trial court impermissibly restricted the *voir dire* of prospective jurors by defense counsel. His specific contention is that the trial court erred by refusing to permit defense counsel to require prospective jurors to name the three persons, living or dead, that person most admired.

This contention is without merit. The regulation of the manner and extent of the inquiry on jury *voir dire* rests largely in the trial judge's discretion. *State v. Bracey*, 303 N.C. 112, 277 S.E. 2d 390 (1981). The question posed here by defense counsel could not reasonably be expected to result in an answer bearing upon the fitness of the juror to serve impartially. No abuse of the trial judge's discretion has been shown and this assignment of error is dismissed.

Defendant next contends that the trial court erred in failing to grant his motion to suppress. Defendant challenges the admission of his confession on two grounds: (1) the confession was obtained as a result of an illegal detention in violation of *Dunaway v. New York*, 442 U.S. 200 (1979); and (2) the confession was ob-

tained by threats and promises and was without a knowing and voluntary waiver of defendant's *Miranda* rights.

Upon defendant's renewal of his motion to suppress made during the course of the trial, the trial court conducted a voir dire hearing and made the following findings of fact and conclusion of law:

> From the evidence offered, the Court finds that the defendant was arrested on or about the ninth or tenth of February, nineteen hundred eighty-three, on a charge of armed robbery which had no connection with the charge—for which he is now being tried; that the officers had reason to believe that the defendant was a likely participant in the crime charged in this case. When asked about it, he denied any knowledge of the case.
>
> About February 15th—strike that—about.
>
> In February, 1983, after the defendant was arrested on the robbery charge and later on March twenty-third, 1983, Officer Lloyd had a conversation with Patricia Royal at which time she informed him that after the first of the year, the defendant was in her home and saw a television ad concerning a reward for those responsible—strike that—for information about those responsible for the murders now under investigation.
>
> She informed Officer Lloyd that the defendant told her that if they only knew that he did it, that he would like to have another one like it; that based upon the information furnished by Patricia Royal, the officers had probable cause to interrogate the defendant.
>
> On the morning of March twenty-third, 1983, at about nine-thirty-five AM, the defendant was advised of his *Miranda* rights and knowingly waived his right to counsel and to remain silent. When he was asked about this particular case, he said that he knew about a man named Johnny who had hit the Steak and Ale; that he was a big man, about six feet, six inches tall, weighing two hundred fifty pounds; that he drove a Datsun hatchback and had tatoos on his arm.
>
> After further interrogation, he agreed to take a polygraph test before eleven o'clock that morning; that he took

the test at eleven and it was completed at twelve-thirty. Thereafter he was given lunch and returned to jail.

At four-thirty that afternoon, he was again interviewed and informed by Mr. Lynch, the polygraph operator, that he had failed to pass the polygraph test at which time he agreed to write out a statement which he did in his own handwriting. And based upon that, agreed to go to the Steak and Ale to show the officers how he entered the building. He informed them how to get there, which driveway to enter, showed where he had parked and the door he had entered.

When he returned, he was given his supper and was sitting alone when he saw Officer Branscome. That Officer Branscome told him he did not believe the statement that the defendant had theretofore written. The defendant thereupon agreed to make a further statement and agreed that Mr. Bullard could record the statement. At that time, which was early in the evening, the defendant made the statement which has been transcribed and offered into evidence by the State; that the statement was made about eight-twenty-seven PM on March twenty-third.

The Court finds further that Officer Lloyd—that Officer Lloyd told the defendant on March twenty-third he did not believe the defendant was telling the truth, but when asked if he was going to arrest the defendant's girlfriend named Cathy, Officer Lloyd informed the defendant that had he intended to arrest her, he would have done so in Albemarle when the defendant was apprehended with her on a robbery charge in that city. At the defendant's request, Officer Lloyd informed the defendant that he would be present at his court trial and at every court trial and that he has done so and testified.

Further, Officer Lloyd informed the defendant that if he gave a statement, that he would advise the District Attorney that he cooperated, but could not promise what would happen to him.

The Court further finds that the defendant has been arrested numerous times in the past; that he has heard the *Miranda* rights concerning numerous charges which have

heretofore been placed against him; that he was fully aware that he did not have to make a statement and that if he did make a statement, he could terminate that statement when he chose; that even though he informed the officers on the twenty-third that he was willing to answer part of their questions, he did not at any time request that they stop asking questions or that he—or suggest that he was unwilling to answer any particular question.

The evidence of the defendant concerning any other promise allegedly made to him are not accepted by the Court as true.

Upon the foregoing findings, the Court concludes that the defendant freely, voluntarily, without any coercion or promise made the statements—what are those exhibit numbers?

MR. FRASER: Three and five.

THE COURT: As shown on exhibits three and five.

The Court further finds and concludes that the exclusion of the evidence is not required by the Constitution of the United States or North Carolina; that the statements have not been obtained as a result of any substantial violation or any violation of the provisions of chapter 15A-974 of the General Statutes.

In making such determination, the Court finds that no particular interest of the defendant has been violated, there has been no deviation from lawful conduct on the part of the officers, and there has been no willful violation of any right of the defendant, and under all the circumstances, the court concludes that the evidence is competent and the motion to suppress is therefore denied.

The findings of fact by the trial court are binding upon this Court if supported by competent evidence in the record. *State v. Johnson*, 304 N.C. 680, 285 S.E. 2d 792 (1982). In this case, the court's findings are amply supported by the evidence presented on voir dire, and we are therefore bound by them. We are not, however, bound by the trial court's conclusions of law, and we may review them fully to ascertain whether they are supported by the findings of fact.

[6] Defendant first contends that his confession was obtained in violation of *Dunaway v. New York*, 442 U.S. 200, which held that an incriminating statement, made by a defendant who is seized without probable cause for his arrest, must be suppressed as "the fruit of the poisonous tree" unless some intervening event attenuates the effect of the unlawful seizure. *Id.*; *State v. Freeman*, 307 N.C. 357, 298 S.E. 2d 331 (1983). Defendant here argues that there was no probable cause to seize defendant, and also that there were no attenuating events occurring between defendant's unlawful arrest and his incriminating statement. We find that there was no unlawful arrest of defendant in this case and thus do not reach the issue of attenuating events. First, the defendant was already in custody and hence there was no seizure within the meaning of the fourth amendment. Second, the trial court specifically concluded, upon ample supporting evidence, that the officers had "probable cause to interrogate the defendant." Based upon our full review of the record and of the court's findings and conclusions, we are unable to find any error.

[7] Defendant also maintains that the court erred in concluding that his statement was made freely, voluntarily and after knowingly waiving his *Miranda* rights. Defendant argues that his statement was induced by promises and threats made by the officers to him. Again we disagree with defendant's contention. First, the trial court specifically found that Officer Lloyd only promised defendant to be present at defendant's trial and that defendant's cooperation would be communicated to the district attorney. The trial court explicitly rejected the "evidence of the defendant concerning any other promise allegedly made to him." There is ample evidence in the record to support the trial court's findings that the officers made no threats or promises which induced defendant to confess. The findings of fact in turn fully support the judge's conclusion that "the defendant freely, voluntarily, without any coercion or promise made the statements." We furthermore agree that, upon the evidence presented and the facts as found by the trial court, there was no *Miranda* violation in this case. The defendant's contentions regarding the admissibility of his confession are without merit.

[8] Defendant next assigns as error the failure of the trial court to exclude certain statements made by defendant on 24 March 1983. Defendant contends that, on 18 July 1983, he moved for

voluntary discovery pursuant to G.S. 15A-903(a), and that, on 25 July 1983, he requested production of all written and oral statements made by him which were in the possession of the prosecution. Both motions were granted. Nevertheless, defendant contends that the State failed to disclose statements made by him in which he described how the crime was committed, and that defendant was thereby prejudiced by the State's failure to comply. Defendant's brief on this point is far from clear, and while several different exceptions are noted, referring to several different statements by defendant, the brief details only the statements "allegedly made by defendant to [Detective Lloyd]" on 24 March 1983. The record discloses that defendant's original confession of having committed the killings occurred on 23 March 1983, at which time the statement was tape-recorded. On 24 March 1983, a transcription of the recording was read and signed by defendant. At trial, the prosecutor inquired of Detective Lloyd as to what occurred next:

> Q. Did you have occasion to ask him any questions at that time or did he have an occasion to make a statement to you?
>
> MR. FRASER: Objection, Your Honor.
>
> THE COURT: Overruled.
>
> MR. FRASER: May would he approach the bench?
>
> THE COURT: Well, yeah, if you wish to.
>
> (Conference at the bench.)
>
> THE COURT: All right. Overruled. Go ahead.
>
> Q. What, if anything, did he tell you at that time?
>
> MR. FRASER: Objection.
>
> THE COURT: Overruled.
>
> A. We told him there were a couple of questions we would like to ask him to clarify the statement. He said okay, he would answer them.
>
> He was asked again how he got into the Steak and Ale restaurant. He was then asked if he could describe the lady that came to the door. He stated she was about twenty-five

years old, attractive, brown hair, slender build, and she was wearing a white blouse.

He was asked what room he was in when he entered the building. He stated he knew it was not the dining room area for sure. He stated it might have been the kitchen area, but he could not be positive. He further stated it seemed like there were some boxes or something near the doorway when he entered.

MR. FRASER: Your Honor, object to that on the same grounds that I previously told the Court.

THE COURT: Overruled.

A. He stated that he could not draw a diagram of the interior because it was the first time he had been in the building. The writer then asked Gardner to describe the office. He advised he only remembered it as being sort of small. He stated he remembered the manager, the white male sitting at the desk doing paper work, and the desk was at the other end of the room.

Gardner described the white male as about the same age as the girl. He stated that he had short brown hair, no glasses, no beard, and wearing a light colored shirt.

Gardner was then asked if he remembered where he shot the two victims. He stated he shot the manager in the face and eye.

MR. FRASER: Your Honor, object and move to strike.

THE COURT: Overruled.

A. Gardner then added that he shot the girl in the back side of the neck. The writer then asked Gardner if he remembered what position the two victims were in when he left. Stated the manager was sort of slumped up on the wall, and the girl was lying on her side in the floor. Gardner gave no further information.

Q. Were warrants served on him subsequent to that time?

A. Yes, sir. We talked to District Attorney Tisdale and advised him of the above information and warrants were issued at that time.

Q. And he was returned to the county jail?

A. Yes, sir.

MR. TISDALE: You may examine.

We find no merit in defendant's argument. First, it is not at all evident from the record or from defendant's brief that there was indeed a violation of the discovery provisions. Second, assuming that the statement was not provided as required by G.S. 15A-903(a), it is simply inconceivable that it could have been sufficiently prejudicial as to warrant awarding defendant a new trial. The tape-recorded confession was played for the jury at trial and in it defendant recounted in great detail the events leading up to and surrounding the robbery and the murders. In our view, the statement made on 24 March 1982 was merely an elaboration and clarification, and defendant has not met his burden of demonstrating prejudice. Third, and again assuming there was a violation of discovery provisions, the sanctions, if any, which the trial judge may impose pursuant to G.S. 15A-910 are entirely discretionary and will not be reversed absent a showing of abuse. *State v. Alston*, 307 N.C. 321, 298 S.E. 2d 631 (1983). In this case, the trial court elected to impose no sanction, and defendant has failed to show any abuse of discretion. *Id.* This assignment is overruled.

[9] Defendant next argues that the trial court improperly expressed an opinion in its charge to the jury. In his instructions during the guilt-innocence phase of the trial, the trial judge, in an attempt to incorporate evidence of defendant's first written statement that "Johnny" was the perpetrator, charged as follows:

> Now in that connection, members of the jury, the defendant contends that you should not believe either statement that's been offered in evidence as having been made by him, that is the alleged written statement or the taped statement. He contends you should not believe that either of those statements are true, but that if you do accept either of them, you should accept the first one and reject the last one because he contends that if he did anything, that the most you could find that he did was to drive someone else there to commit a robbery and wait in the car for him and drive him away, and in case you should accept that theory, though he contends that you should acquit him. But if you should accept that, then the

> question arises as to whether the defendant is guilty of murder in the first degree by reason of aiding and abetting some other person in committing the alleged murders.

The court went on to instruct on the theory of aiding and abetting. We have reviewed the charge carefully and thoroughly, including the challenged portion quoted above. We are of the opinion that Judge Fountain's charge was supported by the evidence and was accurate and fair in every respect. This assignment is overruled.

[10] Defendant contends that the trial court erred in denying his motion to suppress the identification of him by the witness Linda Cain. Defendant argues that the identification by the eyewitness was inherently unreliable, that the pretrial photographic line-up was impermissibly suggestive, and that the witness's identification at trial was a result of the improper photographic line-up and therefore also inadmissible. We disagree.

> The test under the due process clause as to pretrial identification procedures is whether the totality of the circumstances reveals pretrial procedures so unnecessarily suggestive and conducive to irreparable mistaken identification as to offend fundamental standards of decency, fairness and justice.

State v. Henderson, 285 N.C. 1, 9, 203 S.E. 2d 10, 16 (1974), *death penalty vacated*, 428 U.S. 902 (1976).

Upon defendant's objection at trial, the trial court conducted a voir dire hearing to determine the admissibility of the identification testimony. After hearing the evidence, he made the following findings of fact:

> THE COURT: All right. Let the record show, please, that upon the defendant's objection, testimony relating to a photographic line-up, the defendant conducted—the Court conducted a voir dire examination in the absence of the jury —excuse me, did you want to offer any evidence on this question, Mr. Fraser?
>
> MR. FRASER: No, Your Honor.
>
> THE COURT: From the evidence offered—strike that—from the uncontradicted evidence offered, the Court finds

that the witness had, prior to August—prior to March 24th, 1983, been shown approximately one hundred photographs to see if she could identify the person seen by her on the early morning hours of December twenty-third, 1982. She did not select any such person whose photographs was shown her.

On December 24th in the afternoon, Officer Bullard showed the witness six color photographs, each bearing a picture of a white male apparently of the approximate—approximately of the same age, each wearing a beard, each showing a full face. The officer made no suggestion to the witness as to whether the photograph of a suspect or that of the defendant or any other particular person was among the six photographs shown her; that upon examining the photographs, she discarded three; of the remaining three, she discarded one; of the remaining two, she discarded one and selected the photograph of the defendant as being a photograph of the person she had seen in the parking lot of Steak and Ale Restaurant on the—in the early morning of December twenty-third, 1982.

* * * *

Let me add this: That no impermissible suggestion was made by anyone to the witness as to which photographs if any she should select.

Defendant made no objections to any of the foregoing findings. Each of the findings is amply supported by the evidence and the findings in turn support the trial court's conclusion that the pretrial procedures were not impermissibly suggestive. *See State v. Chatman*, 308 N.C. 169, 301 S.E. 2d 71 (1983). Furthermore, the judge specifically concluded that the witness's in-court identification was "based upon her observation at the time and independent of any photographs that were shown her on March 24th." *See id.* This assignment of error is overruled.

Defendant argues next that the trial court committed error in denying his motion to dismiss the charge of first-degree murder and his motions to set aside the verdict and for a new trial. Defendant points to no evidence or lack of evidence in this record to support his contention. We do not deem it necessary to review here the facts of this case. Suffice it to say that, applying the familiar test of the sufficiency of the evidence, and taking the

evidence in the light most favorable to the State, as we must, we find that there is substantial evidence of each essential element of the offense charged and of the defendant's being the perpetrator of the crime. See *State v. Earnhardt*, 307 N.C. 62, 296 S.E. 2d 649 (1982). We, therefore, hold that the trial court properly denied defendant's motions in this case.

[11] By his next assignment, defendant contends that the trial court erred in allowing the prosecutor to cross-examine him concerning his alleged participation in an unrelated murder. Defendant here took the stand to testify in his own behalf, and, in so doing, he became, as any other witness, subject to cross-examination and to impeachment, including inquiry into previous convictions or specific instances of misconduct. *State v. Clark*, 300 N.C. 116, 265 S.E. 2d 204 (1980); *State v. Herbin*, 298 N.C. 441, 259 S.E. 2d 263 (1979). During cross-examination of defendant in this case, the district attorney questioned him concerning his involvement in various robberies. Defendant admitted participating in robberies with Ronald Bruscia, Jeff Royal, Randy Taylor, and Richard Small. The following exchange then took place:

> Q. I'll ask you if you did not go to Rowan County on the 17th day of December and did kill and murder one Mr. Shaver in his home.
>
> MR. FRASER: Objection.
>
> THE COURT: Overruled.
>
> Exception No. 65
>
> A. No, Sir, I didn't.
>
> Q. But you were involved in that, is that correct?
>
> A. No, Sir.
>
> Q. You were not present?
>
> A. No, Sir.

The question to which defendant objected was entirely proper as an inquiry into a specific instance of misconduct, *State v. Clark*, 300 N.C. 116, 265 S.E. 2d 204, and there is no evidence or even suggestion of lack of good faith on the part of the prosecutor. *See State v. Ruof*, 296 N.C. 623, 252 S.E. 2d 720 (1979).

The further questioning amounted to "sifting" the witness, the limited practice of which has been approved by this Court. See *State v. Lampkins*, 283 N.C. 520, 196 S.E. 2d 697 (1973). This assignment is without merit.

[12] Defendant next alleges error in the prosecutor's closing argument during the guilt phase of the trial. Defendant made no objection to the portions he now challenges; even so, he contends the remarks were so prejudicial and improper as to require the trial court to act on its own motion. As we said in *State v. Johnson*, 298 N.C. 355, 259 S.E. 2d 752 (1979),

> the impropriety of the argument must be gross indeed in order for this Court to hold that a trial judge abused his discretion in not recognizing and correcting *ex mero motu* an argument which defense counsel apparently did not believe was prejudicial when he heard it.

Id. at 369, 259 S.E. 2d at 761. We have reviewed the prosecutor's argument in this case, including the portions now challenged by defendant, and we find nothing so grossly improper as to require corrective action by the trial judge *ex mero motu*.

[13] By his next assignment, defendant argues that evidence that he was seen possessing a sawed-off shotgun in January and February of 1983 was irrelevant and therefore inadmissible. This contention is wholly without merit. The killings which form the core of this case occurred in late December 1982. Evidence that defendant possessed shortly thereafter a weapon similar to that used in the murder is relevant evidence. We therefore overrule this assignment of error.

Defendant next contends that the trial court erred in sustaining the State's objection to the following question asked during cross-examination of Detective Bullard by defense counsel:

> Q. And all the investigation—in all the investigation that was done, there was no scientific evidence whatsoever recovered that incriminated John Gardner, was it?
>
> MR. TISDALE: Objection, Your Honor.
>
> THE COURT: Sustained.

Bearing in mind the familiar rule that a general objection, which is sustained, is sufficient "if there is any purpose for which

the evidence would be inadmissible," 1 Brandis on North Carolina Evidence § 27 (1982), we hold that, even assuming error in the judge's ruling, defendant has not demonstrated that such error was prejudicial. This assignment is overruled.

[14] Defendant next argues error in the submission of the aggravating factor that the murder was committed for pecuniary gain. Defendant, relying upon the 1983 legislative amendment to the Fair Sentencing Act's pecuniary gain provision, G.S. 15A-1340.4(a)(1)c, submits that the "pecuniary gain" aggravating factor found in the death penalty statutes, G.S. 15A-2000(e)(6), should be redefined to mean that the "defendant was hired or paid to commit the offense." G.S. 15A-1340.4(a)(1)c, as amended in Ch. 70, 1983 Sess. Laws. We disagree.

In *State v. Oliver*, 302 N.C. 28, 274 S.E. 2d 183 (1981), we interpreted G.S. 15A-2000(e)(6) to permit submission of the pecuniary gain factor when the killing was for the purpose of getting money or something of value. On the other hand, in construing G.S. 15A-1340.4(a)(1)c, we held that the Legislature intended "pecuniary gain" there only to mean the defendant was "hired or paid to commit the offense." In so holding we relied specifically upon the legislative act passed in the 1983 Session Laws entitled "An Act to Clarify the Aggravating Factor Regarding Pecuniary Gain." The Act only applied to the Fair Sentencing Act; no such clarification or explanation was made regarding G.S. 15A-2000(e)(6). We therefore perceive no reason to depart from our ruling in *Oliver*. *State v. Jackson*, 309 N.C. 26, 305 S.E. 2d 703 (1983). The aggravating factor that the murder was committed for pecuniary gain was properly submitted to the jury.

[15] Defendant's next assignment is the trial court's failure to give a peremptory instruction that his age must be considered as a mitigating circumstance. There is no merit to this contention. Defendant was 24 years old at the time of the commission of these crimes. The trial judge submitted to the jury the age of defendant as a possible mitigating circumstance for their consideration. The jury failed to find defendant's age as a mitigating factor. As we stated in *State v. Oliver (II)*, 309 N.C. 326, 307 S.E. 2d 304 (1983),

> Any hard and fast rule as to age would tend to defeat the ends of justice, so the term youth must be considered as relative and this factor weighed in the light of varying conditions and circumstances. It is well known that two young persons

> may vary greatly in mental and physical development, experience and criminal tendencies [citation omitted]. One of these factors may have greater significance than others in some cases, depending on the circumstances.

Id. at 372, 307 S.E. 2d at 333 (quoting *Giles v. State*, 261 Ark. 413, 421, 549 S.W. 2d 479, 483 (1977)). The trial court committed no error in failing to peremptorily instruct the jury as to this mitigating factor.

With the exception of his proportionality argument, all of the defendant's remaining assignments have heretofore been addressed and decided by the Court adversely to defendant. He has failed to persuade this Court that any of those prior rulings are in error and thus we are not inclined to disturb them.

[16] As we are required to do in every death case, we turn now to defendant's proportionality argument. Pursuant to G.S. 15A-2000(d)(2), we must review the record in this case and determine

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

State v. Bondurant, 309 N.C. 674, 692, 309 S.E. 2d 170, 181 (1983). We have reviewed carefully the record and find that the evidence fully supports the two aggravating circumstances found by the jury. Furthermore, we are unable to conclude that the jury imposed the death penalty "under the influence of passion, prejudice, or any other arbitrary factor." *State v. Jackson*, 309 N.C. 26, 305 S.E. 2d 703 (1983).

Finally, in comparing this case to similar cases in which the death penalty was imposed, we cannot say that the sentence of death in this case is disproportionate or excessive, considering both the crime and the defendant. The killings in this case were part of a violent course of conduct, and were coldblooded, calculated, and senseless. *See State v. Lawson*, 310 N.C. 632, 314 S.E. 2d 493 (1984); *State v. Craig & Anthony*, 308 N.C. 446, 302 S.E. 2d 740, *cert. denied*, 104 S.Ct. 263 (1983); *State v. Smith*, 305 N.C. 691, 292 S.E. 2d 264, *cert. denied*, 103 S.Ct. 474 (1982). We,

therefore, decline to set aside the death penalty imposed. In all phases of the trial below, we find

No error.

STATE OF NORTH CAROLINA v. ELMER LEROY PEOPLES, SR.

No. 106PA83

(Filed 28 August 1984)

1. **Criminal Law § 87; Witnesses § 7— incompetency of hypnotically refreshed testimony**

Hypnotically refreshed testimony is too unreliable to be used as evidence in judicial proceedings. The contrary decision of *State v. McQueen*, 295 N.C. 96, is overruled.

2. **Criminal Law § 87; Witnesses § 7— hypnotized witness—testimony as to facts related before hypnosis**

A person who has been hypnotized may testify as to facts which he related before the hypnotic session, and when a party attempts to offer testimony by a person who has been hypnotized, that party will bear the burden of proving that the proper testimony was related prior to hypnosis. Furthermore, a party proffering the testimony of a previously hypnotized subject is under a duty to disclose the fact of this hypnosis to the court and counsel outside the presence of the jury and before the testimony of the witness.

3. **Criminal Law § 87; Witnesses § 7— incompetency of hypnotically refreshed testimony—retroactivity**

The holding in this case that hypnotically refreshed testimony is inadmissible will apply only to cases which have not been finally determined on direct appeal as of the certification date of this decision. It may not be used as the basis for collaterally attacking any case which has been finally determined on direct appeal or in which no appeal was taken from the trial judgment.

4. **Criminal Law § 87; Witnesses § 7— incompetency of hypnotically refreshed testimony—retroactivity—harmless error rule**

In applying the rule on the inadmissibility of hypnotically refreshed testimony retroactively to all cases which have not been finally determined on direct appeal as of the date on which this opinion is certified, the appellate court will examine each appeal on a case-by-case basis to determine if the error was reversible, *i.e.*, whether a reasonable possibility exists that a different result would have been reached at the trial had the evidence not been erroneously admitted.

5. Criminal Law § 87; Witnesses § 7— incompetency of hypnotically refreshed testimony and video tape—prejudicial error

In this armed robbery prosecution, the admission of a witness's hypnotically refreshed testimony and a video tape recording of the hypnotic session constituted prejudicial error since a reasonable possibility exists that a different result would have been reached had this evidence not been admitted at defendant's trial.

ON defendant's petition for discretionary review of a decision by the Court of Appeals, 60 N.C. App. 484, 299 S.E. 2d 311 (1983), affirming defendant's convictions and judgments for armed robbery and conspiracy to commit armed robbery entered by *Judge Robert L. Farmer* at the 7 December 1981 Criminal Session of CUMBERLAND County Superior Court.

Rufus L. Edmisten, Attorney General, by Fred R. Gamin, Assistant Attorney General, for the state.

James R. Parish, Assistant Public Defender, for defendant appellant.

EXUM, Justice.

The crux of the present case concerns the admissibility of testimony by a witness who undergoes hypnosis prior to testifying. Defendant challenges the trial court's admission of a witness's hypnotically refreshed testimony and of a video tape recording of the hypnotic session. We find error in both rulings and reverse the decision of the Court of Appeals.

I.

In the early morning hours of 26 May 1980, Bruce Crockett Miller participated in the armed robbery of the Borden Chemical Plant in Fayetteville, North Carolina. He, along with two other men, took several buckets of almost pure silver, used by the plant in its manufacture of formaldehyde, valued at over $90,000. Defendant was arrested on 29 April 1981 in connection with the robbery. An eyewitness to the robbery, a shift supervisor at the company whom the perpetrators forced to open the building containing the silver, identified defendant as one of the robbers.

Pursuant to a plea agreement in an unrelated case, Miller testified against defendant who was tried with Robert Peele, the third man involved in the Borden Chemical robbery. Miller out-

lined, in considerable detail, the planning and robbery of Borden Chemical in which he, Peele, and defendant participated. Specifically, he related that defendant, whom Miller had known since high school and had seen occasionally during the ensuing twenty years, called him in April or May 1980; inquired of his interest in making "some easy money"; and arranged a meeting with a third man, Peele. The three men met a number of times to discuss and plan the robbery.

According to Miller, defendant called him at his Raleigh home on 24 May 1980 and told him to come back to Fayetteville. Miller went to defendant's home, and the two men completed plans for the robbery. Defendant told Miller that a large amount of silver was at the plant; that the number of people at the plant was reduced after the shift changed on Sunday evenings; that company policy prohibited guns on the premises; that the shift supervisor's name was Steve; and that, once the alarm sounded, the police could arrive at the plant after no less than five to seven minutes.

On Sunday evening, Miller, defendant, and Peele went to the plant. After the shift changed, Miller, armed with a gun, went to the supervisor's office. He instructed the supervisor to take him to the white building where the silver was kept. They went there and were joined by defendant and Peele. After prying open a second door and triggering an alarm, the men loaded a number of black buckets containing silver into the car. They left the premises.[1] Later they sold some of the silver and divided the remainder and the money among themselves.

Miller was arrested on 27 March 1981 in connection with an armed robbery unrelated to the instant case. On 15 April 1981, he gave police officers a statement concerning the robbery of the Borden Chemical Plant, in which he implicated defendant and Robert Peele. That statement was neither introduced at defendant's trial nor included in the record on appeal.

On 8 October 1981, Detective S. C. Sessoms, Jr., of the Fayetteville Police Department, conducted a hypnotic session with Miller. Sessoms had previously attended a two-week training

1. Miller's version of the events at the plant track the testimony of the shift supervisor.

course in hypnosis at the North Carolina Justice Academy. He stated that the course

> consisted of the history and current status of hypnosis, myths and misconceptions of hypnosis, illegal aspects of hypnosis, self-hypnosis training, brain psycho-dynamics, development and training in different techniques of hypnotic induction, deepening techniques, supervising subjects while they were in a hypnotic state, taking statements from subjects in hypnotic conditions, taking composite drawings from people in hypnotic conditions, consisting of written testimony, practical exercises and demonstrations also.

During the course, Sessoms hypnotized between eight and ten people. Prior to hypnotizing Miller, Sessoms read none of Miller's statements concerning the case. The attempted hypnosis was to seek additional recall of the robbery which Miller did not have in a normal state. Sessoms explained the process to Miller and proceeded to induce him into a hypnotic state. In Sessoms' opinion, he successfully hypnotized Miller. The process lasted for about an hour. During the hypnotic session, Miller related facts which corresponded with his subsequent testimony. Miller also testified that he did not believe he had been hypnotized by Sessoms.

Defendant was tried and convicted for the armed robbery and conspiracy to commit armed robbery of the Borden Chemical Plant. Judge Robert L. Farmer consolidated the cases for judgment and sentenced defendant to a minimum term of seven years and a maximum term of ten years. The Court of Appeals affirmed. We allowed defendant's petition for discretionary review on 5 April 1983. N.C. Gen. Stat. § 7A-31.

II.

The issue before us is whether hypnotically refreshed testimony is admissible. We do not write, however, on a clean slate. Numerous state and federal courts which have considered this issue can be categorized as follows: (1) cases holding that the effect of prior hypnosis goes only to the weight and credibility, not the admissibility of a witness's testimony; (2) cases holding that hypnotically refreshed testimony is admissible only if the hypnosis followed certain guidelines; and (3) cases holding that

testimony based on hypnotically refreshed memory is inadmissible.[2]

We have, until today, adhered to the first position. *State v. McQueen*, 295 N.C. 96, 119, 244 S.E. 2d 414, 427 (1978). In *McQueen* we observed that

> [t]he circumstance that this witness was hypnotized prior to trial would bear upon the credibility of her testimony concerning the occurrences at the Norris house at the time the two women were killed, but would not render her testimony incompetent. [T]he jury was fully advised that the witness had been so hypnotized. Her credibility, as a result of this circumstance, and of other matters bearing thereon, was for the jury.

Id. At the time of our decision in *McQueen*, however, we were not apprised of the problems inherent in hypnosis. Much of the literature and judicial analysis regarding hypnosis has emerged since *McQueen* was decided. Because of recent developments in the understanding of hypnosis as a tool to refresh or restore memory and the judicial trend away from acceptance of hypnotically refreshed testimony, we now reexamine our position in *McQueen* in light of the facts before us.

We are also cognizant of the vast array of scholarly literature on hypnosis contained in both legal and scientific journals. These sources provided great insight into the process of hypnosis, and we defer to them for this purpose. Our goal is to analyze the legal question of evidentiary admissibility so as to secure a just result. Unfortunately, we cannot achieve this without some treatment of the hypnotic process itself. We will, however, follow a simple approach. First, we explain briefly the process of hypnosis, emphasizing its potential relationship to the judicial process. Second, we examine and evaluate the three categories of judicial decisions regarding the admissibility of hypnotically refreshed testimony. Third, we announce the rule to be applied in the courts of this state.

2. Representative cases in each category are cited and discussed in Part IV, infra.

III.

The basis for the use of hypnotically refreshed testimony hinges on the notion that memory involves the storage of information received by the body's senses in the brain and, therefore, an inability to remember is merely an inability to retrieve previously stored information. Orne, "The Use and Misuse of Hypnosis in Court," 27 Int. J. Clinical and Experimental Hypnosis, 311, 321 (1979). Under this theory, hypnosis operates in a fashion which allows the subject to overcome the difficulties in retrieving this stored information. *United States v. Valdez*, 722 F. 2d 1196, 1200 (5th Cir. 1984) (quoting Putnam, "Hypnosis and Distortions in Eyewitness Memory," 27 Int. J. Clinical and Experimental Hypnosis, 437, 439-40 (1979)). An explanation for this position, simply stated, draws an analogy between the memory process and a multi-channel video tape recorder. All sensory impressions are supposedly recorded and stored in their pristine form inside a person's head to be played back at the time of recall. Theoretically hypnosis activates the video tape recorder. Orne, *supra*, at 321.

Hypnosis, however, involves more than the mere retrieval of stored or suppressed information. What often seems to be recall is in reality a process through which information received after an event is transformed by the subject's mind into a memory of that event. *See id.* Essentially the apparent recollection of a hypnotized subject may actually be a view which he has created subconsciously. This composite may evolve from a number of sources, including information gathered from other events, original recall, suggestions occurring during hypnosis from a variety of sources, and the unconscious adding of missing details. Martin T. Orne, one of the leading recognized experts on hypnosis, flatly rejects the video tape recorder theory of memory and casts serious doubts on the inherent reliability of hypnotically refreshed testimony.

Given this basic description of the theory underlying hypnosis, it is illuminating to examine the specific aspects of hypnotic recall relevant to its use in a judicial proceeding. Such aspects center on the reliability, or potential for accuracy, of recall stimulated by hypnosis.

Scientists generally agree that a number of flaws exist in the hypnotic process which can contribute to inaccurate recollections. These include the subject's eager suggestibility to the hypnotist's

words or actions, his desire to accommodate the hypnotist, and his inability to distinguish between actual memory and pseudo memory arising from the hypnosis. Barnard L. Diamond, another recognized expert in the area, explains that hypnosis is

> a state of increased suggestibility. . . .
>
> [S]uch suggestions cannot be avoided. The suggestive instructions and cues provided to the subject need not be, and often are not, verbal. . . . Especially powerful as an agent of suggestion is the context and purpose of the hypnotic session. Most hypnotic subjects aim to please. . . .
>
> It is very difficult for human beings to recognize that some of their own thoughts might have been implanted and might not be the product of their own volition. . . . Normally, mental processes are rationalized and experienced as the product of free will, even when it should be obvious that they are not.

Diamond, "Inherent Problems in the Use of Pretrial Hypnosis on a Prospective Witness," 68 Cal. L. Rev. 313, 333-34 (1980). These considerations operate in tandem with the accepted notion that hypnotized subjects confabulate, *i.e.* invent details to supply unremembered events in order to make their account complete and logical, as well as acceptable to the hypnotist. *Id.* at 342.

Although scientists do not understand the exact nature of hypnosis, they do recognize that it is a trance-like state induced by the hypnotist. Beyond this superficial explanation, the following characteristics have been observed:

> 1. *Subsidence of the planning function.* The hypnotized subject loses initiative and lacks the desire to make and carry out plans of his own. . . .
>
> 2. *Redistribution of attention.* . . . [U]nder hypnosis selective attention and selective inattention go beyond the usual range. . . .
>
> 3. *Availability of visual memories from the past, and heightened ability for fantasy-production.* . . . The memories are not all veridical, and the hypnotist can in fact suggest the reality of memories for events that did not happen.

> 4. *Reduction in reality testing and a tolerance for persistent reality distortion.* . . . Reality distortions of all kinds, including acceptance of falsified memories . . . and all manner of other unrealistic distortions can be accepted without criticism within the hypnotic state.
>
> 5. *Increased suggestibility.* The suggestibility theory of hypnosis is so widely accepted that hypnosis and suggestibility come to be equated by some writers on hypnosis.
>
> 6. *Role behavior.* The suggestions that a subject in hypnosis will accept are not limited to specific acts or perceptions; he will, indeed, adopt a suggested role and carry on complex activities corresponding to that role.
>
> 7. *Amnesia for what transpired within the hypnotic state.* . . . [Amnesia] is not an essential aspect of hypnosis. . . . Yet it is a very common phenomenon, and it can be furthered through suggestion.

E. Hilgard, The Experience of Hypnosis 6-10 (1968), *quoted in* Diamond, *supra* at 316. These characteristics demonstrate the need for extreme caution in using hypnotically refreshed testimony in a judicial proceeding.

The possibility that a person's testimony might be the result of suggestion from another person presents a firm indictment of the reliability of such testimony. The potential for suggestion is exacerbated by the fact that the hypnotic process is directed by a particular individual and the attention of the subject is wholly focused upon that person. Furthermore, suggestions can be entirely unintended and even unperceived by the hypnotist as well as the subject. Orne, *supra* at 322-27. Likewise, the subject experiences an overwhelming desire to please the hypnotist and, hence, becomes even more susceptible to suggestion. The subject may unwittingly produce responses which he perceives to be expected. Since a subject under hypnosis undergoes an impaired critical judgment, he may give undue credence to vague and fragmentary memories upon which he would not have relied outside the hypnotic state. *Id.* at 316-20. A combination of a susceptibility to suggestion and a compelling desire to please the hypnotist causes the subject to experience an unwillingness to admit that he cannot recall certain events. Thus he becomes susceptible to creating the event.

If we accept as true the notions of suggestibility and a tendency to confabulate, the dangers surrounding hypnotically refreshed testimony become even more pronounced when we realize that it is virtually impossible for the subject or even the trained, professional hypnotist to distinguish between true memory and pseudo memory. *Id.* at 17; Diamond, *supra* at 333-34. Both the subject and the hypnotist would tend to accept the accuracy of the post-hypnotic recall. Certainly if neither the subject nor the hypnotist can distinguish between true memory and confabulation, a lay observer, be it judge or juror, could hardly make the distinction. Absent objective, independent means to verify this recall, its accuracy must remain both unknown and unknowable.

In addition to resulting in this inability to distinguish between actual and created memory, the process of hypnosis tends to enhance the subject's confidence in his memory, whether genuine or invented. Orne, *supra* at 332. After a subject experiences what he believes to be a recall of events under hypnosis, he may develop an unshakable subjective conviction and confidence in his refreshed recollection. One court noted that this problem

> is enhanced by two techniques commonly used by lay hypnotists: Before being hypnotized the subject is told (or believes) that hypnosis will help him to 'remember very clearly everything that happened' in the prior event, and/or during the trance he is given the suggestion that after he awakes he will 'be able to remember' that event equally clearly and comprehensively.

People v. Shirley, 31 Cal. 3d 18, 65, 641 P. 2d 775, 803-04, 181 Cal. Rptr. 243, 272, *cert. denied*, 459 U.S. 860 (1982). This difficulty is enhanced after the subject leaves the hypnotic session because he "remembers the content of his new 'memory' but forgets its source, *i.e.*, forgets that he acquired it during the hypnotic session. . . ." *Id.*

In short, hypnosis not only irrevocably masks whether a subject's recall induced by it is true, it also creates a barrier to the ascertainment of its truthfulness through cross-examination—that method normally relied on in the courtroom to test the truthfulness of testimony. With this background regarding the scientific understanding of hypnosis, we turn to an examination and criti-

cism of the various ways in which courts have dealt with the admissibility of hypnotically refreshed testimony.

IV.

As we have explained, judicial decisions respecting the admissibility of hypnotically refreshed testimony fall into three basic groups: decisions holding that hypnosis affects only the credibility of the witness; decisions holding that hypnotically refreshed testimony is admissible if the hypnotic process followed certain procedural safeguards; and decisions holding that hypnosis renders a witness's subsequent testimony inadmissible. We will discuss each approach *seriatim*, noting the rationale underlying it and evaluating it in light of the nature of hypnosis.

A. *The Credibility Approach.*

The first major decision to consider the use of hypnosis to enhance a witness's memory was *Harding v. State*, 5 Md. App. 230, 246 A. 2d 302 (1968), *overruled, Collins v. State*, 52 Md. App. 186, 447 A. 2d 1272 (1982), *aff'd*, 296 Md. 670, 464 A. 2d 1028 (1983). In *Harding* the victim of a rape and assault testified after she had been hypnotized in order to recall the event. She explained that she was testifying from her own recollection. That testimony was supported by the hypnotist who testified, as an expert, that hypnosis was generally reliable and not unduly suggestive. He stated that "I seriously doubt suggestibility in the way we think of, in that you have an influence and the person subjects himself to your influence." *Id.* at 240, 246 A. 2d at 308. The Maryland court concluded that the fact of hypnosis went to the witness's credibility and not to the admissibility of the evidence. This approach viewed the challenged testimony as a present recollection of past events merely refreshed by the hypnosis, much as it might have been refreshed by any stimulus. Accordingly, the fact that a witness had been hypnotized went only to his credibility as a witness.

The obvious advantage of this approach hinges on its permitting the jury to hear all testimony which might be important in a given case. Furthermore, it affords the jury an opportunity to hear certain testimony which may prove critical, especially where the witness who has been hypnotized is the bulwark of the prosecution's case. Under this approach, traditional legal devices in-

cluding cross-examination of the witness; disclosure to the jury of the hypnotism; expert testimony on hypnosis, its risks, and limitations; and appropriate instructions from the court, purportedly enable the jury to evaluate properly the credibility of a witness who has been hypnotized. *See* Ruffa, *Hypnotically Induced Testimony: Should it be Admitted?* 19 Crim. L. Bull. 293, 298 (1983). Since the *Harding* decision in 1968, a number of jurisdictions, including our own, have followed its lead in holding that a witness's testimony having been refreshed by hypnosis goes only to credibility and not admissibility. *Creamer v. State*, 232 Ga. 136, 205 S.E. 2d 240 (1974); *People v. Smrekar*, 68 Ill. App. 3rd 379, 24 Ill. Decisions 707, 385 N.E. 2d 848 (1979); *Pearson v. State*, 441 N.E. 2d 468 (Ind. 1982); *State v. Wren*, 425 So. 2d 756 (La. 1983); *State v. Greer*, 609 S.W. 2d 423 (Mo. Ct. App. 1980), *vacated on other grounds*, 450 U.S. 1027 (1981); *State v. McQueen*, 295 N.C. 96, 244 S.E. 2d 414 (1978); *State v. Brown*, 337 N.W. 2d 138 (N.Dak. 1983); *State v. Brom*, 8 Or. App. 598, 494 P. 2d 434 (1972); *State v. Glebock*, 616 S.W. 2d 897 (Tenn. Cr. App. 1981); *Chapman v. State*, 638 P. 2d 1280 (Wyo. 1982).

Despite the claim that this approach allows the jury to consider all relevant evidence, it is not without its limitations. As we have noted, scientific research indicates the unreliability of hypnotically refreshed testimony.[3] We were not aware of the significant pitfalls in this process when we decided *McQueen* and apparently the *Harding* Court was similarly unapprised. As one expert on hypnosis explained,

> Perhaps if the *Harding* trial and appellate courts had been presented a more accurate description of the nature of hypnosis and the extreme vulnerability of the subject to suggestion, they might have been less disposed to admit the evidence, and the subsequent trend of the law might have been different.

Diamond, *supra*, at 323. The overwhelming scientific evidence is that a subject under hypnosis is extremely susceptible to suggestion, has an often overwhelming desire to please the hypnotist, and is left, after hypnosis, with an inability to distinguish be-

3. For an excellent summary of the different types of scientific research and their findings, see Orne, *supra* at 315-25.

tween pre-hypnotic memory and post-hypnotic recall, which may be the product of either suggestion, confabulation or both. Thus, the very foundation of the *Harding* approach is questionable, since hypnotically refreshed testimony may well be completely unreliable. More important, this unreliability may be impossible for even an expert to ascertain since neither the hypnotist nor the subject can accurately determine whether a hypnotized person's recall under or after hypnosis is actual memory or confabulation.

Perhaps the most serious flaw in the credibility approach is the misconception that cross-examination of the previously hypnotized witness will allow the opponent not only to illustrate the risk of the procedure, but also to contest the witness's testimony. Scientific research indicates that once a subject experiences hypnotic recall, his confidence in the accuracy of his recall is greatly strengthened. This enhanced confidence may give the witness an unshakable conviction that his testimony is accurate. Diamond, *supra*, at 339 (noting that one "remarkable feature of hypnosis is its apparent ability to resolve doubts and uncertainties . . ."). This false confidence may actually nullify the safeguard of cross-examination.

In a criminal proceeding a defendant has a constitutional right to confront the witnesses against him. U.S. Const. amend. VI. Since a previously hypnotized witness has no recollection of the procedure itself, the defendant is unable to question him about the hypnotic process and his right of confrontation on this point is completely frustrated. Effective cross-examination is, furthermore, nearly impossible when a witness's confidence in his recall has been artificially enhanced by hypnosis.

In the final analysis, overwhelming scientific evidence suggests that hypnotically refreshed testimony is not inherently reliable and that cross-examination is not an adequate safeguard against the dangers inherent in hypnosis. Yet there is a "scientific" aura which is associated with hypnosis that may be so well-entrenched in the minds of potential jurors that they assign undue credibility to hypnotically refreshed testimony. Jurors may "accord uncritical and absolute reliability to a scientific device without consideration of its flaws in ascertaining veracity." *Commonwealth v. Nazarovitch*, 496 Pa. 97, 102, 436 A. 2d 170, 173

(1981) (quoting Spector & Foster, *Admissibility of Hypnotic Statements: Is the Law of Evidence Susceptible?* 38 Ohio L. J. 567, 583 (1977)). Jurors are, quite simply, not able to be arbiters of the credibility of hypnotized witnesses. Ruffa, *supra*, at 314.

We conclude, therefore, that the credibility approach to hypnotically refreshed testimony is unsound and should be rejected. In overruling *Harding*, the Maryland court reached the same conclusion. *Collins*, 52 Md. App. 186, 447 A. 2d 1272 (1982), *aff'd*, 296 Md. 670, 464 A. 2d 1028 (1983).

B. *The Safeguards Approach.*

The second group of cases which adopt a middle ground is exemplified by *State v. Hurd*, 86 N.J. 525, 432 A. 2d 86 (1981). As the New Jersey Court explained, "Hypnotically-induced testimony may be admissible if the proponent can demonstrate that the use of hypnosis in the particular case was a reasonably reliable means of restoring memory comparable to normal recall in its accuracy." *Id.* at 538, 432 A. 2d at 92. These decisions recognize the general problems associated with hypnosis, including extreme suggestibility, loss of critical judgment, tendency to confabulate, and increased confidence in one's recall. In an effort to reconcile these scientifically established problems associated with hypnosis with the recognition that rendering hypnotically refreshed testimony inadmissible may result in the potential loss of important evidence, these cases carve out a middle ground between admissibility and inadmissibility. To facilitate this approach, the *Hurd* Court adopted the following set of guidelines:

> First, a psychiatrist or psychologist experienced in the use of hypnosis must conduct the session. . . .
>
> Second, the professional conducting the hypnotic session should be independent of and not regularly employed by the prosecutor, investigator or defense.
>
> Third, any information given to the hypnotist by law enforcement personnel or the defense prior to the hypnotic session must be recorded, either in writing or in other suitable form. . . .
>
> Fourth, *before* inducting hypnosis the hypnotist should obtain from the subject a detailed description of the facts as the subject remembers them. . . .

> Fifth, all contacts between the hypnotist and the subject must be recorded. This will establish a record of the pre-induction interview, the hypnotic session, and the post-hypnotic period, enabling a court to determine what information or suggestions the witness may have received. . . .
>
> Sixth, only the hypnotist and the subject should be present during any phase of the hypnotic session, including the pre-hypnotic testing and the post-hypnotic interview. . . .

Id. at 544-46, 432 A. 2d at 96-97. These procedural safeguards were first suggested by Orne. *See* Orne, *supra*, at 335-36. A number of courts have followed New Jersey's lead in taking this middle ground, adopting guidelines similar to those above. *See Brown v. State*, 426 So. 2d 76 (Fla. Dist. Ct. App. 1983); *State v. Beachum*, 97 N.Mex. 682, 643 P. 2d 246 (Ct. App. 1981); *State v. Martin*, 33 Wash. App. 486, 656 P. 2d 526 (1982). Oregon has codified this approach in its statutes. Or. Rev. Stat. § 136.675 (1981).

Theoretically, adherence to these procedural requirements is supposed to increase the reliability of hypnotically refreshed testimony and decrease the dangers inherent in the hypnotic process, especially that of suggestion. Armed with a proper and complete record of the entire hypnotic process, a court may exclude hypnotically refreshed testimony if it deems it too unreliable after considering the procedures employed in performing the hypnosis. Since the jury hears this evidence only after the court makes an initial judgment of reliability, this approach at least eliminates the problems associated with the jury's having to make its own determination of reliability.

A number of problems still remain. The most important is that ascertaining the reliability of hynotically refreshed testimony may yet remain practically impossible even for well trained observers including the trial judge. If, as many experts on hypnosis believe, the hypnotized subject tends to confabulate or fill in gaps in his memory so that neither he nor the trained hypnotist can distinguish between what the subject truly recollects and what he has confabulated, then ascertaining the reliability of his hypnotically refreshed testimony becomes practically impossible. Only if this testimony is independently corroborated would its accuracy be reasonably ascertainable. In that case, however, the

need for the hypnotically refreshed testimony is diminished since the corroborating evidence could often be used in its place.

This approach also contemplates a case-by-case analysis of admissibility of specific hypnotically refreshed testimony. It consumes judicial time and leads to conflicting results in the trial courts. Further, it could have the adverse effect of giving hypnotically refreshed testimony, in the eyes of the jury, "an aura of reliability which, in actuality, it does not possess. . . ." *People v. Gonzalez*, 108 Mich. App. 145, 160, 310 N.W. 2d 306, 313 (1981), *aff'd*, 415 Mich. 615, 329 N.W. 2d 743 (1982), *modified on other grounds*, 417 Mich. 968, 336 N.W. 2d 751 (1983).

The courts which admit hypnotically refreshed testimony if it follows certain safeguards equate the potential inaccuracies of hypnotically refreshed testimony with "often historically inaccurate" ordinary eyewitness testimony. *Hurd*, 86 N.J. at 542-43, 432 A. 2d at 92. Certainly all eyewitness testimony is subject to inaccuracies because human beings are fallible. The problem with hypnotically refreshed testimony lies not so much with the fallibility of the human witness but with the defects in the hypnotic process itself which cannot be compensated for by the ordinary trial process. Hypnotically refreshed testimony is, quite simply, *not* like normal eyewitness testimony. The fatal flaw with the safeguards approach, as acknowledged by Orne who originally proposed it, is that the safeguards cannot prevent the subject from confusing that which he has confabulated under hypnosis with actual memory. Orne, Affidavit for Amicus Curiae Brief in Opposition to Petition for Rehearing before California Supreme Court at 6-7, *People v. Shirley*, 31 Cal. 3rd 18, 641 P. 2d 775, 181 Cal. Rptr. 243 (1982), *quoted in* Ruffa, *supra* at 294 n. 8. Thus, this approach affords no acceptable way to test the reliability of hypnotically refreshed testimony.

C. *The Inadmissibility Approach.*

A growing number of state courts have adopted a general rule that hypnotically refreshed testimony is inadmissible, a position first taken in *State v. Mack*, 292 N.W. 2d 764 (Minn. 1980). *See State v. Mena*, 128 Ariz. 226, 624 P. 2d 1274 (1981); *People v. Shirley*, 31 Cal. 3rd 18, 641 P. 2d 775, 181 Cal. Rptr. 243, *cert. denied*, 459 U.S. 860 (1982); *Strong v. State*, --- Ind. ---, 435 N.E. 2d 969 (1982); *Collins v. State*, 52 Md. App. 186, 447 A. 2d 1272

(1982); *People v. Gonzalez*, 415 Mich. 615, 329 N.W. 2d 743 (1982), *modified on other grounds*, 417 Mich. 968, 336 N.W. 2d 751 (1983); *State v. Palmer*, 210 Neb. 206, 313 N.W. 2d 648 (1981); *People v. Hughes*, 88 A.D. 2d 17, 452 N.Y. Supp. 2d 929 (1982); *Commonwealth v. Nazarovitch*, 496 Pa. 97, 436 A. 2d 170 (1981). At least one federal court also follows this rule. *See United States v. Valdez*, 722 F. 2d 1196 (5th Cir. 1984). This approach appears to be gaining in judicial favor. *See* Note, *Pretrial Hypnosis and its Effect on Witness Competency in Criminal Trials*, 62 Neb. L. Rev. 336, 346 (1983).

These decisions reflect a common concern with the present state of the art of hypnosis. They elect to preclude the admission of hypnotically refreshed testimony because the indices of unreliability inherent in normal memory reappear in more extreme forms when the witness is hypnotized. The "safeguards" theory, first enunciated by *Hurd*, is deemed inadequate and impractical in alleviating this unreliability. *Shirley*, 31 Cal. 3rd at 63 n. 44, 641 P. 2d at 802 n. 44, 181 Cal. Rptr. at 270 n. 44. In reaching the judgment that hypnosis, as a scientific method for improving a witness's recollection, is unreliable, many courts have determined that the scientific community has not recognized hypnosis as a generally reliable method of enhancing a witness's recollection to the extent that it should be used in judicial proceedings. *See Mena*, 128 Ariz. at 231, 624 P. 2d at 1279; *Nazarovitch*, 496 Pa. at 110, 436 A. 2d at 177. These cases rely upon the standard established in *Frye v. United States*, 293 Fed. 1013 (D.C. Cir. 1923). This widely recognized and cited case formulated the general rule that expert testimony on a new scientific technique can only be admitted when that technique has "gained general acceptance in the particular field in which it belongs." *Id.* at 1014. Courts relying upon *Frye* scrutinize the scientific testimony and literature to determine whether hypnosis has "gained such standing and scientific recognition among [the] authorities as would justify the courts in admitting" hypnotically refreshed testimony. *Id.* As the *Mack* court stated, "Under the *Frye* rule, the results of mechanical or scientific testing are not admissible unless the testing has developed or improved to the point where experts in the field widely share the view that the results are scientifically reliable as accurate." 292 N.W. 2d at 768 (Minn. 1980).

Courts which adopt the view that hypnotically refreshed testimony is inadmissible reject both the notion that a witness's having been hypnotized goes only to his credibility and the belief that the unreliability inherent in hypnosis can be eliminated or sufficiently curbed by following certain procedural safeguards. *Valdez*, 722 F. 2d at 1202. By holding hypnotically refreshed testimony inadmissible, these courts risk excluding evidence which may be both relevant and probative on certain issues. *Id.* at 1201. Despite this potential loss of evidence, the unreliability of the hypnotic process and its unacceptability within the scientific community have led these courts to conclude that the fairest practice is to keep hypnotically refreshed testimony out of judicial proceedings.

Several courts, while adopting a general rule of inadmissibility, have refrained from making the rule absolute. The Fifth Circuit noted that in a given case, "the evidence favoring admissibility might make the probative value of the testimony outweigh its prejudicial effect. If adequate procedural safeguards have been followed, corroborative post-hypnotic testimony might be admissible." *Valdez*, 722 F. 2d at 1203. The California Supreme Court exempted testimony of a criminal defendant himself from its rule of inadmissibility. The Court created this "necessary exception to avoid impairing the fundamental right of an accused to testify in his own behalf." *Shirley*, 31 Cal. 3d at 67, 641 P. 2d at 805, 181 Cal. Rptr. at 273. Furthermore, courts which have ruled hypnotically refreshed testimony inadmissible have not precluded the testimony of a previously hypnotized witness concerning matters related prior to the hypnotic session, so long as the testimony does not relate the fact that the witness has been hypnotized. *State ex rel. Collins v. Superior Court of Arizona*, 132 Ariz. 180, 209-10, 644 P. 2d 1266, 1295 (1982); *Shirley*, 31 Cal. 3d at 67, 641 P. 2d at 805, 181 Cal. Rptr. at 273; *Mack*, 292 N.W. 2d at 771; *Commonwealth v. Taylor*, 294 Pa. Super. 171, 439 A. 2d 805 (1982). The general approach is to find hypnotically refreshed testimony inadmissible subject to these limited exceptions.

V.

[1] Our review of the state of the art of hypnosis and the judicial decisions which have considered the admissibility of hypnotically refreshed testimony lead us to conclude that our deci-

sion in *McQueen* should be overruled insofar as it permits the admission of hypnotically refreshed testimony. Given the problems inherent in the hypnotic process, such as the enhanced suggestibility of the subject, his tendency to confabulate when there are gaps in his recollection, his increased confidence in the truthfulness and accuracy of his post-hypnotic recall which may preclude effective cross-examination, and the inability of either experts or the subject to distinguish between memory and confabulation, hypnotically refreshed testimony is simply too unreliable to be used as evidence in a judicial setting.

A salient factor influencing our decision to review and overrule *McQueen* is Maryland's decision to overrule *Harding*. *Collins*, 52 Md. App. 186, 447 A. 2d 1272 (overruling *Harding v. State*, 5 Md. App. 230, 246 A. 2d 302 (1978)), *aff'd*, 296 Md. 670, 464 A. 2d 1028. We followed *Harding* in *McQueen* and the recent overruling of *Harding* by the Maryland Court of Appeals erases the cornerstone of the credibility approach to hypnotically refreshed testimony and, hence, the basic premise of *McQueen*. As one commentator noted, "*Collins* destroys the very foundation of those cases that have viewed hypnosis as only affecting the credibility of witnesses." Note, "Pretrial Hypnosis," *supra* at 344. We find the change adopted by the Maryland courts extremely persuasive in our analysis of the admissibility of hypnotically refreshed testimony.

A number of the courts which have applied the *Frye* test and concluded that hypnotically refreshed testimony is inadmissible have used that test in other contexts. *See State v. Wakefield*, 263 N.W. 2d 76 (Minn. 1978) (considering the admissibility of polygraph results); *State ex rel. Trimble v. Hedman*, 291 Minn. 442, 192 N.W. 2d 432 (1971) (considering the admissibility of voice prints). Although we have not specifically adopted the *Frye* test in this jurisdiction, we have used the theory underlying that decision. In holding that the results of polygraph examinations should not be admitted, we stressed that the polygraph had "not yet attained scientific acceptance as a reliable and accurate means of ascertaining truth or deception." *State v. Foye*, 254 N.C. 704, 708, 120 S.E. 2d 169, 172 (1961). *Accord, State v. Brunson*, 287 N.C. 436, 445, 215 S.E. 2d 94, 100 (1975). Furthermore, in our recent decision which changed our exception to this rule and held that the results of polygraph examinations could not be admitted even

by stipulation, we stressed the "lack of general scientific recognition" as a major factor in our decision. *State v. Grier*, 307 N.C. 628, 638, 300 S.E. 2d 351, 356 (1983).

In addition to holding that hypnosis has not reached a level of scientific acceptance which justifies its use for courtroom purposes, we further conclude that no set of procedural safeguards can adequately remedy this unreliability. Dr. Orne, who designed the safeguards generally followed by courts which have adopted them, has admitted that they are ineffective in eliminating the dangers associated with hypnosis. We are persuaded that the inability of either an expert or the hypnotized witness to distinguish between the witness's confabulation and true memory is sufficient for us to conclude that adopting a series of procedural safeguards would not be effective in combating the dangers we see in hypnotically refreshed testimony. We hold, therefore, that hypnotically refreshed testimony is inadmissible in judicial proceedings. Our cases to the contrary are overruled.

This holding is consistent with our recent determination that the results of polygraph tests are inadmissible even upon the stipulation of the parties. *Id.* In making that determination, we noted the futility of giving the trial judge discretion to determine case-by-case whether particular polygraph testing was reliable, the consumption of judicial time and resources in making such determinations, and the undue influence which such results might have upon the jury. *Id.* at 642-43, 300 S.E. 2d at 359-60. These same considerations militate against adopting procedural safeguards like those articulated in *Hurd.*

[2] Our rule of inadmissibility does not, however, render all testimony of a previously hypnotized witness inadmissible. A person who has been hypnotized may testify as to facts which he related before the hypnotic session. The hypnotized witness may not testify to any fact not related by the witness before the hypnotic session. Investigators, attorneys, and other parties who might have occasion to induce potential witnesses to be hypnotized are cautioned to make every effort to preserve, in writing or otherwise, this pre-hypnotic information. When a party attempts to offer testimony by a person who has been hypnotized, that party will bear the burden of proving that the proffered testimony was related prior to hypnosis. A party proffering the

testimony of a previously hypnotized subject is under a duty to disclose the fact of this hypnosis to the court and counsel, outside the presence of the jury and before the testimony of the witness.

We wish to make clear that this rule does not affect the use of hypnosis in criminal investigations. We caution, however, those who use hypnosis; it is a procedure to be executed with care. We suggest that the procedural safeguards formulated by Dr. Orne and adopted by *Hurd*, which have been quoted earlier in this opinion, be followed in the use of hypnosis for criminal investigative purposes. *See Valdez*, 722 F. 2d at 1204; *Collins*, 132 Ariz. at 187, 644 P. 2d at 1273.

VI.

[3] We must also consider the application of the rule announced herein to other cases involving hypnotically refreshed testimony. In assessing the potential retroactive application of this rule, both the purpose which it seeks to achieve and the effect of retroactive application on the administration of justice are important. *See Brown v. Louisiana*, 447 U.S. 323, 328 (1980); *Hankerson v. North Carolina*, 432 U.S. 233, 248 (1977); *Stovall v. Denno*, 388 U.S. 293, 297 (1967). The purpose of the rule making hypnotically refreshed testimony inadmissible is to prevent the admission of inherently unreliable evidence. As we have explained, the dangers associated with this type of testimony are too great to allow it to infect the fact-finding process. The admission of hypnotically refreshed testimony directly affects the truth-seeking function of the courts. Our new rule should be given broadest application consistent with the due administration of justice. Therefore, our holding in this case will apply only to cases which have not been finally determined on direct appeal as of the certification date of this decision. It may not be used as the basis for collaterally attacking any case which has been finally determined on direct appeal or in which no appeal was taken from the trial judgment. We think this fairly balances those considerations calling for the adoption of the new rule against any adverse impact upon the administration of justice caused by its adoption.

[4] In applying our new rule retroactively to all cases which have not been finally determined on direct appeal as of the date on which this opinion is certified, we will examine each appeal on a case-by-case basis to determine if the error was reversible, *i.e.*,

whether a reasonable possibility exists that a different result would have been reached at the trial had the evidence not been erroneously admitted. The use of this harmless-error analysis will allow us to correct errors in which the truth-seeking process was tainted by the hypnotically refreshed testimony while imposing minimal adverse impact on the administration of justice.

VII.

[5] In this case, the testimony by Detective Sessoms regarding the hypnotic session and the admission and playing before the jury of the video tape of the witness Miller during the hypnotic session were inadmissible under the rules we today announce. Yet they constituted a major portion of the state's case. Miller was, by his own admission, an accomplice of defendant. His testimony, after undergoing hypnosis for the purpose of refreshing his recollection, was in large part responsible for defendant's conviction. Since Miller's statement made before the hypnotic session was not proffered at trial nor is it contained in the record on appeal, none of his testimony was admissible under the rules we today announce. The video tape of the hypnotic session strengthened the credibility of his testimony in the eyes of the jury. It gave an unwarranted aura of reliability to his testimony. These erroneous admissions taken together constitute reversible error because a reasonable possibility exists that a different result would have been reached had this evidence not been admitted at defendant's trial. N.C. Gen. Stat. § 15A-1443(a). We therefore reverse the decision of the Court of Appeals and remand the case to that court for further remand to the superior court where defendant will be given a new trial to be conducted under the rules we today announce.

Reversed and remanded.

SHIRLEY T. HARRIS v. W. F. MAREADY, WILLIAM H. PETREE, C. ROGER HARRIS, AND PETREE, STOCKTON, ROBINSON, VAUGHN, GLAZE & MAREADY

No. 518A83

(Filed 28 August 1984)

1. **Appeal and Error § 2— Court of Appeals decision—agreement that case should have been dismissed—no dissent—no right of appeal**

Where all three judges of the Court of Appeals agreed that the complaint and summonses should have been dismissed but differed as to why dismissal was proper, there was no dissent from the decision of the Court of Appeals so as to give plaintiff a right of appeal to the Supreme Court pursuant to G.S. 7A-30(2) although two concurring opinions were so labeled.

2. **Process §§ 1.2, 7; Rules of Civil Procedure § 4— summons directed to another person—sufficiency of service on defendant**

Defendant was sufficiently served with process to bring him within the jurisdiction of the court when defendant was inadvertently delivered a copy of a summons directed to a codefendant in the action where the caption of the summons listed defendant's name first among the various individual defendants being sued and listed defendant's name as a member of a law firm being sued, since there was no substantial possibility of confusion in the case about the identity of defendant as a party being sued. G.S. 1A-1, Rule 4(j)(1).

3. **Process §§ 5.1, 7— summons directed to law firm as "P.A."—law firm actually a partnership—amendment of summons**

Where a summons was issued and a complaint was filed against a law firm as a "P.A." when in fact the law firm was a partnership, and service of the summons was completed by personal delivery to a partner in the law firm, the process was sufficient to bring the law firm within the court's jurisdiction, and the trial court had the discretion to allow an amendment of the complaint and summons to eliminate references to a "P.A.," since the substitution of the partnership for the "P.A." is a correction in the description of a party actually served rather than a substitution of new parties. G.S. 1A-1, Rules 4(j)(7) and 4(i).

4. **Attorneys at Law § 5.1; Rules of Civil Procedure § 8.1— professional malpractice action—demand for monetary relief in complaint—dismissal not required**

Although a professional malpractice action may be dismissed under Rule 41(b) for a plaintiff's violation of the Rule 8(a)(2) prohibition against stating in the complaint the demand for monetary relief in an action in which the amount in controversy exceeds $10,000, this extreme sanction is to be applied only when the trial court determines that less drastic sanctions will not suffice. In this case, the trial court did not err in refusing to dismiss an attorney malpractice action because the complaint contained allegations that plaintiff had been damaged in an amount exceeding five million dollars and that plaintiff was entitled to an award of the same amount for punitive damages.

Justice MARTIN dissenting in part.

Chief Justice BRANCH joins in this dissenting opinion.

ON certiorari, to review the decision of the Court of Appeals, 64 N.C. App. 1, 306 S.E. 2d 799 (1983), which affirmed in part and reversed in part the order of *Albright, Judge,* entered on June 21, 1982 in Superior Court, FORSYTH County. The Court of Appeals affirmed the trial court's dismissal of a complaint and summonses against the defendants for lack of jurisdiction and insufficiency of process and service of process. The Court of Appeals reversed the trial court's denial of the defendants' motion to dismiss the complaint and summonses for violation of Rule 8(a)(2) of the North Carolina Rules of Civil Procedure. The plaintiff filed a notice of appeal of right under G.S. 7A-30(2) from the decision of the Court of Appeals. The plaintiff also petitioned the Supreme Court for writ of certiorari on December 7, 1983. Heard in the Supreme Court February 13, 1984.

James, McElroy & Diehl, P.A., by William K. Diehl, Jr. and Katherine S. Holliday, for the plaintiff appellant.

Brooks, Pierce, McLendon, Humphrey and Leonard, by Hubert Humphrey, for the defendant appellees.

MITCHELL, Justice.

In several assignments presented to this Court for review, the plaintiff contends that the Court of Appeals erred in affirming the trial court's dismissal of the plaintiff's complaint and summonses against an individual defendant and the defendant law firm. The plaintiff also assigns as error the holding by the Court of Appeals that the trial court should have dismissed the action because of the plaintiff's violation of Rule 8(a)(2) of the North Carolina Rules of Civil Procedure. G.S. 1A-1, Rule 8(a)(2). For reasons stated below, we reverse the decision of the Court of Appeals.

[1] At the outset we note that the defendants have filed a motion to dismiss the plaintiff's appeal. G.S. 7A-30(2) creates an appeal of right from any decision of the Court of Appeals "in which there is a dissent." The defendants argue there was no dissent in the Court of Appeals although two concurring opinions were so

labeled. All three judges agreed that the plaintiff's actions against both the law firm and the individual defendant should have been dismissed but differed as to why dismissal was proper. The defendants argue that since all three judges agreed that the case should have been dismissed, the decision was not one "in which there is a dissent." G.S. 7A-30(2).

The defendants are correct in their assertion that the plaintiff has no right of appeal pursuant to G.S. 7A-30(2). Because all three judges agreed that the complaint and summonses should be dismissed, although for different reasons, there was no dissent from the decision of the Court of Appeals. *See Nantz v. Employment Security Commission*, 290 N.C. 473, 226 S.E. 2d 340 (1976). The plaintiff's appeal is dismissed. Nevertheless, in our discretion we allow the plaintiff's petition for writ of certiorari to review the holdings of the Court of Appeals, pursuant to Rule 21 of the Rules of Appellate Procedure.

The plaintiff, Shirley Harris, brought this action for malpractice against the law firm of Petree, Stockton, Robinson, Vaughn, Glaze and Maready, and against two partners in the law firm, W. F. Maready and William H. Petree. The plaintiff employed the defendant Maready, a partner in the defendant law firm, in July 1976 to represent her in domestic matters involving her husband at that time, C. Roger Harris. Roger Harris was also named a defendant in this action but has taken no part in this appeal.

At the time of Maready's representation of the plaintiff Shirley Harris, the defendant Roger Harris was allegedly engaged in business transactions with the defendant Petree, a senior partner in the defendant law firm. In her complaint against the law firm and two of its partners, the plaintiff claims that because of Petree's relationship with her former husband, her attorney Maready was forced to withdraw from representing her. She contends that as a result she has been forced to hire other lawyers, to lose significant litigation advantages and to lose a long term professional relationship. She also claims that prior to his withdrawal from the case, Maready was unwilling to pursue her interests vigorously because of his partner Petree's business involvement with her husband. She claims she received no property settlement and a lesser alimony award than she was entitled to receive in her divorce action because Maready did not actively pursue her claim.

On January 18, 1979 Maready informed the plaintiff that he would be unable to continue representing her because of a memorandum circulated by Petree which instructed members of the law firm to decline from representing clients who had interests adversarial to those of Roger Harris. Almost three years later on January 11, 1982, an order granting the plaintiff an extension of time for filing a complaint was issued along with summonses directed to the defendants in this action. Summonses were served on the law firm on January 14, 1982 by leaving copies with "William H. Petree, (General Partner)" and service on Petree individually on the same day. Summonses were served on Maready on January 27 and on Roger Harris on January 25, 1982. On January 25 the plaintiff filed a verified complaint, and it was served on all defendants by certified mail.

On March 1, 1982 Maready, Petree, and the law firm moved in a special appearance to dismiss the summonses and the complaint and to sever the action against them from that against Roger Harris. The defendants gave several reasons in support of their motion for dismissal.

The summons to the law firm and the original complaint each were directed to "Petree, Stockton, Robinson, Vaughn, Glaze & Maready, P.A." Contending that no such entity exists since the law firm has never been a professional association, the defendants cited lack of jurisdiction, insufficiency of process and service of process and failure to state a claim upon which relief can be granted in support of motions to dismiss under Rule 12 of the North Carolina Rules of Civil Procedure. G.S. 1A-1, Rule 12.

The defendants further claimed insufficiency of process and insufficiency of service of process on W. F. Maready and sought to dismiss the summons and complaint against him. The motion stated that no valid summons or other process was served on Maready. In an affidavit later submitted by Maready, he stated that the only civil summons delivered to him was addressed to Roger Harris.

The defendants also claimed that the plaintiff in her complaint violated Rule 8(a)(2) of the North Carolina Rules of Civil Procedure in that the complaint stated that the plaintiff had been damaged in an amount in excess of five million dollars. The prayer for relief in the complaint requested five million dollars

from the law firm in compensatory damages, five million dollars jointly and severally from Petree and Maready in compensatory damages, and five million dollars jointly and severally from all defendants in punitive damages.

On March 4, 1982 the plaintiff amended her complaint by deleting the designation "P.A." from the caption and from other references to the firm, by deleting any description of the law firm as a professional association and by alleging the firm to be a general partnership of attorneys. The plaintiff amended the prayer for relief in the complaint by deleting the paragraphs requesting five million dollars and substituting paragraphs asking for relief in an amount in excess of $10,000.

On June 10 and June 11, 1982 the trial court considered the defendants' motions and affidavits. The plaintiff orally moved to amend the summons which had been served on Maready to delete the name of C. Roger Harris, and to insert in its stead the name of Maready. She also moved to delete the letters "P.A." from the summons addressed to the law firm. The trial court denied the plaintiff's motions. In an order filed June 21, 1982, the trial court allowed the defendants' motions to dismiss the summons and complaint against the law firm for lack of jurisdiction over the person, insufficiency of process and insufficiency of service of process. The trial court also allowed the motion to dismiss the summons and complaint against Maready on grounds of insufficiency of process and insufficiency of service of process. The trial court denied the motion to dismiss the summonses and complaint against all defendants because the complaint stated a demand for a specific amount of monetary relief of more than ten thousand dollars in a malpractice action—a violation of Rule 8(a)(2) of the North Carolina Rules of Civil Procedure.

The plaintiff appealed to the Court of Appeals, and the defendant cross-assigned as error the trial court's refusal to dismiss for violation of Rule 8(a)(2). The Court of Appeals, in an opinion by Judge Braswell, affirmed the dismissal of the complaint and summonses against the law firm and Maready. The Court of Appeals reversed the trial court as to the defendants' cross assignment of error, and held that the trial court should have dismissed the summonses and complaint because of the violation of Rule 8(a)(2). Judge Arnold concurred in the portion of the opinion which held

that the action should have been dismissed for violation of Rule 8(a)(2) but stated that he did not think the case should have been dismissed for lack of jurisdiction. Judge Webb concurred in all portions of the opinion except on the issue of dismissal for violation of Rule 8(a)(2).

We note that the first two questions before us involve the summonses and not the complaint, since it was the issuance of the summonses and order extending time to file the complaint which commenced the lawsuit. *See* G.S. 1A-1, Rule 3. The complaint was filed and served by certified mail more than a week after the summonses were issued. Since the statute of limitations for this action expired between the issuance of the summonses and the filing of the complaint, the questions involving adequacy of the summonses are crucial.

I.

[2] We first consider whether the defendant Maready was sufficiently served with process. The plaintiff contends the Court of Appeals erred in affirming the trial court's dismissal of the summons and complaint as to Maready for insufficient service of process. It is undisputed by the parties that on January 27, 1982 a deputy sheriff personally delivered to Maready a copy of a summons issued January 11, 1982 which was directed to C. Roger Harris, Bermuda Run, Advance, North Carolina. The Court of Appeals held that the plaintiff failed to comply with the statutory rules for service of process and that the service of the summons was insufficient to confer jurisdiction over the defendant Maready. We disagree.

The purpose of a service of summons is to give notice to the party against whom a proceeding is commenced to appear at a certain place and time and to answer a complaint against him. *Farr v. City of Rocky Mount*, 10 N.C. App. 128, 177 S.E. 2d 763 (1970), *cert. denied*, 277 N.C. 725, 178 S.E. 2d 831 (1971). This Court has stated that Rule 4 of the North Carolina Rules of Civil Procedure, the State law which governs process and service of process, is similar to Rule 4 of the Federal Rules of Civil Procedure. The purpose of the rule is to provide notice of the commencement of an action and "to provide a ritual that marks the court's assertion of jurisdiction over the lawsuit." *Wiles v. Welparnel Construction Co.*, 295 N.C. 81, 84, 243 S.E. 2d 756, 758

(1978) (quoting Wright & Miller, Federal Practice and Procedure: Civil § 1063 p. 204 (1969)). Unless notice is given to the defendant of proceedings against him and he is thereby given the opportunity to appear and be heard or he appears voluntarily, the court has no jurisdiction to proceed to judgment even though it may have subject matter jurisdiction. *Beaufort County v. Mayo*, 207 N.C. 211, 176 S.E. 753 (1934).

Where there is a defect in the process itself, the process is generally held to be either voidable or void. Where the process is voidable, the defect generally may be remedied by an amendment because the process is sufficient to give jurisdiction. Where the process is void, however, it generally cannot be amended because it confers no jurisdiction. 62 Am. Jur. 2d *Process* § 21 (1972). Likewise, if the service is insufficient and unauthorized by law the court does not acquire jurisdiction. *Id.* at § 30.

Rule 4(b) states that a summons "shall be directed to the defendant or defendants." G.S. 1A-1, Rule 4(b). The statutory method for service of process on a natural person in this State is set forth in Rule 4(j)(1). In pertinent part the rule states that to effect service, a summons or complaint must be delivered to the person sought to be served. G.S. 1A-1, Rule 4(j)(1).

In this case a Deputy Sheriff of Forsyth County delivered a copy of a summons to Maready personally in the reception area of the law firm of Petree, Stockton, Robinson, Vaughn, Glaze and Maready. However, the copy was a copy of a summons directed to another defendant, C. Roger Harris. The pertinent portions of that copy appear as follows in the record:

STATE OF NORTH CAROLINA
County of Forsyth

SHIRLEY T. HARRIS	)	
	)	
against	)	CIVIL SUMMONS
	)	
W. F. MAREADY, WILLIAM H. PETREE, C. ROGER HARRIS, and PETREE, STOCKTON, ROBINSON, VAUGHN, GLAZE and MAREADY, P.A.	)	To Be Served With Order Extending Time

STATE OF NORTH CAROLINA

To each of the defendants named below—GREETING:

Defendant	Address
C. ROGER HARRIS (Home Bermuda Run, Advance, N. C.)	Chairman of the Board United Citizens Bank P. O. Box 5039 Winston-Salem, NC 27103

YOU ARE HEREBY SUMMONED AND NOTIFIED to appear and answer to the above entitled civil action as follows: a written Answer to the Complaint must be served upon the plaintiff's attorney within THIRTY DAYS after the service of the Complaint, as authorized in the Order on the reverse side hereof, ...

The "Order on the reverse side hereof" referred to in the copy of the summons is an order extending the time for the plaintiff to file a complaint. The order states with some specificity that the plaintiff will seek to recover damages for malpractice from Maready and the other defendants based on negligence, breach of contract, improper conduct due to conflict of interest and fraudulent misrepresentation.

The record further reveals that the case file in the Office of the Clerk of Superior Court of Forsyth County, also contains a summons identical in all respects to the copy of the summons delivered to Maready, except that it is directed to "W. F. Maready" at the law firm's address in Winston-Salem. The "Sheriff's Return" on the face of the summons directed to Maready specifically recites that it was served on him by a deputy sheriff on January 27, 1982 by "delivering a copy to him personally" at the law firm's address. The "Sheriff's Return" on the summons directed to Harris, a copy of which was delivered to Maready, states that it was served by the Sheriff of Davie County by personally delivering a copy to Harris there. Obviously, the deputy sheriff in Forsyth County simply delivered Maready a copy of the summons directed to Harris. It is also obvious that no amount of diligence by the plaintiff or her counsel would have revealed this mistake by the deputy sheriff.

Although the copy of the summons actually handed to the defendant Maready was a copy of the wrong summons, we are per-

suaded that as in *Wiles v. Welparnel Construction Co.*, 295 N.C. 81, 243 S.E. 2d 756 (1978) the mandates of Rule 4 have been met. In *Wiles* the summons was addressed to the agent of a corporation instead of the defendant corporation. Acknowledging that the dictates of Rule 4(b) require that a summons be directed to the defendant instead of to its agent, we held there that when the name of the defendant is sufficiently stated in the caption of the summons and in the complaint, such that it is clear that the corporation and not its agent is being sued, the summons is adequate to bring the defendant within the jurisdiction of the court.

This Court held in *Wiles* that any ambiguity in the directory paragraph of the summons was eliminated by the complaint and the caption of the summons and that "the possibility of any substantial misunderstanding concerning the identity of the party being sued in this situation is simply unrealistic." *Id.* at 85, 243 S.E. 2d at 758. Similarly, we are persuaded that there was no substantial possibility of confusion in this case about the identity of Maready as a party being sued. Maready was personally served with a summons, the caption of which listed his name first among the defendants being sued. In fact, his name appeared twice in the caption as he was named both individually and as a part of the law firm. Any person served in this manner would make further inquiry personally or through counsel if he had any doubt that he was being sued and would be required to answer the complaint when it was filed. Such further inquiry would have revealed the existence of a summons directed to him and purporting on its face to have been served upon him and would have established his duty to appear and answer.

Although we have held that actual notice given in a manner other than that prescribed by statute cannot supply constitutional validity, *Philpott v. Kerns*, 285 N.C. 225, 203 S.E. 2d 778 (1974), we have also found guidance from Judge John J. Parker who stated that:

> A suit at law is not a children's game, but a serious effort on the part of adult human beings to administer justice; and the purpose of process is to bring parties into court. If it names them in such terms that every intelligent person understands who is meant, . . . it has fulfilled its purpose; and courts should not put themselves in the position of failing to recognize what is apparent to everyone else.

Wiles v. Welparnel Construction Co., 295 at 84-85, 243 S.E. 2d at 758 (quoting *United States v. A. H. Fischer Lumber Co.*, 162 F. 2d 872, 873 (4th Cir. 1947)). Therefore, we hold on the facts of this case that the requirements for service of process prescribed in Rule 4 have been met. This is so despite the fact that Maready was inadvertently handed a copy of a summons directed to another defendant in the action.

II.

[3] We next address the plaintiff's contention that the Court of Appeals erred in affirming the trial court's dismissal of the complaint and summons against the defendant law firm. The trial court dismissed the complaint and summons against the firm on grounds of lack of personal jurisdiction, insufficiency of process and insufficiency of service of process. In upholding the trial court, the Court of Appeals reasoned that the summons and original complaint were each directed to a nonexistent corporation "Petree, Stockton, Robinson, Vaughn, Glaze and Maready, P.A." instead of to the existing partnership "Petree, Stockton, Robinson, Vaughn, Glaze and Maready." The Court of Appeals held that the trial court did not abuse its discretion when it refused to allow amendment of the summons.

Although the plaintiff amended the complaint to delete "P.A." and references to a professional association, the Court of Appeals held that such an amendment constituted a substitution of party defendants and named a party who had never been served and against whom the statute of limitations had run. We disagree.

It is undisputed that the law firm of Petree, Stockton, Robinson, Vaughn, Glaze and Maready is now and always has been a partnership and that a summons was issued and the complaint filed against a firm bearing the same names but designated "P.A." Service of the summons was completed by personal delivery to William Petree, a partner in the law firm. Although the plaintiff purported to amend the complaint to eliminate references to a "P.A.", her motions to amend the summons were denied.

Rule 4(i) of the Rules of Civil Procedure permits trial courts to allow in their discretion the amendment of any process or

proof of service thereof "unless it clearly appears that material prejudice would result to substantial rights of the party against whom the process issued." G.S. 1A-1, Rule 4(i). This Court has stated that the discretionary powers of amendment permit the courts to allow amendment to correct a misnomer or mistake in the name of a party. *Bailey v. McPherson*, 233 N.C. 231, 63 S.E. 2d 559 (1951). If the amendment amounts to a substitution or entire change of parties, however, the amendment will not be allowed. *Hogsed v. Pearlman*, 213 N.C. 240, 195 S.E. 789 (1938).

In *Bailey* the plaintiff instituted an action against M. H. Winkler Manufacturing Co., Inc. The Commissioner of Motor Vehicles, the defendant's agent for process, was served with process. The sheriff's return indicated ultimate receipt of process by a person named M. H. Winkler in Baton Rouge, Louisiana. Winkler made a special appearance in this State moving that the summons be quashed on grounds that no such corporation existed. The evidence showed that Winkler was the sole proprietor of a business which operated under the name of M. H. Winkler Manufacturing Company. This Court held that the trial court correctly permitted the plaintiff to amend to substitute the individual's name for that of the corporation. *See also, Propst v. Hughes Trucking Co.*, 223 N.C. 490, 27 S.E. 2d 152 (1943) (upholding an amendment of "Hughes Trucking Company" to "Hughes Transportation, Inc."); *Clevenger v. Grover*, 212 N.C. 13, 193 S.E. 12 (1937) (affirming the allowance of an amendment from "Knott Hotel Co." to "Knott Management Corporation"). This Court stated in *Bailey* that "if the misnomer or misdescription does not leave in doubt the identity of the party intended to be sued, or even where there is room for doubt as to identity, if service of process is made on the party intended to be sued, the misnomer or misdescription may be corrected by amendment at any stage of the suit." 233 N.C. at 235, 63 S.E. 2d at 562.

In general, courts are more reluctant to permit amendment of process or pleadings to change a description of a party as an individual or partnership to that of a corporation than they are to permit amendment to change the description of a party as a corporation to that of an individual or partnership, because of the prescribed statutory method of serving a corporation. *Blue Ridge Electric Membership Corporation v. Grannis Brothers, Inc.*, 231 N.C. 716, 58 S.E. 2d 748 (1950). In *Grannis* we stated the rule to

be that where individuals are doing business as a partnership under a firm name, such firm is described in an action as a corporation, and process is served on a member of the partnership, members of the partnership may be substituted by amending the process and allowing the pleading to be amended. *Id.* at 719, 58 S.E. 2d at 750. We stated further that substitution in the case of a misnomer is not considered a substitution of new parties but merely "a correction in the description of the party or parties actually served." *Id.* at 720, 58 S.E. 2d at 751. These rules control the present case.

The substitution of "Petree, Stockton, Robinson, Vaughn, Glaze and Maready" for "Petree, Stockton, Robinson, Vaughn, Glaze and Maready, *P.A.*" is a correction in the description of a party actually served instead of a substitution of new parties. Certainly the misdescription of the law firm as a "P.A." did not "leave in doubt the identity of the party intended to be sued." *Bailey v. McPherson*, 233 N.C. at 235, 63 S.E. 2d at 562.

Furthermore, service of process was made on "William Petree, (General Partner)" at the law offices of the firm. Rule 4(j)(7) of the North Carolina Rules of Civil Procedure provides *inter alia* that service may be made on a partnership by delivering a copy of the summons to any general partner or by leaving a copy in the office of such general partner who is in charge of the office. G.S. 1A-1, Rule 4(j)(7). Thus, even if the identity of the party intended to be served was in doubt, the plaintiff sought through amendment to correct "the description of a party actually served." *Blue Ridge Electric Membership Corp. v. Grannis Brothers, Inc.*, 231 N.C. at 720, 58 S.E. 2d at 751.

The Court of Appeals has pointed to a number of our cases in support of its holding below, but we find those cases distinguishable. The Court of Appeals cites *Grannis*, where the attempted substitution was from a nonexistent corporation, Grannis Brothers, Inc., to E. W. Grannis Company, a partnership. We note that in *Grannis*, the plaintiff never moved to amend the summons to correct the description of the party. Additionally, the difference between "Grannis Brothers, Inc." and "E. W. Grannis Company" is much greater than the difference between "Petree, Stockton, Robinson, Vaughn, Glaze and Maready, P.A." and the identical names, absent the "P.A."

The Court of Appeals also cites *McLean v. Matheny*, 240 N.C. 785, 84 S.E. 2d 190 (1954), *Jones v. Vanstory*, 200 N.C. 582, 157 S.E. 867 (1931) and *Hogsed v. Pearlman*, 213 N.C. 240, 195 S.E. 789 (1938) for the proposition that to allow the plaintiff's amendment in this case would make and not merely amend process. We do not agree.

In *McLean* the plaintiff sued "W. B. Matheny, trading as Matheny Motor Company." The plaintiff tried to amend to sue "Matheny Motor Company, Inc.," a corporation, as an additional defendant. This Court held that the plaintiff could not amend the process to add the corporation as an additional party defendant because the amendment would add a party not already served. We stated that the plaintiff's motion was not one to cure a misnomer "by substituting the correct name of a proper party who was before the court *in lieu of* the purported partnership. On the contrary, the motion was to make the defendant corporation an additional party and to file an amendment to the complaint." 240 N.C. at 787, 84 S.E. 2d 191 (emphasis added). In the case before us the motion was to amend to correct a designation of a party served.

In *Jones* the plaintiff sought to amend a summons directed to the "trustees" of the Masonic and Eastern Star Home to make a corporation, "Masonic and Eastern Star Home, Inc.," a defendant. In *Hogsed* the plaintiff made a motion to amend the summons and complaint from "H. Pearlman, trading as Pearlman's Railroad Salvage Company" to "Pearlman's Salvage Company, Inc." This Court affirmed the denial of motions to amend in both cases because the corporations had never been served with process. We are not persuaded that these cases are controlling. Unlike the situation in the present case, the attempted amendments in *Jones* and *Hogsed* would have substituted corporations for individuals. As we noted above, our courts are more reluctant to allow such amendments because of the more exacting statutory method for serving process on corporations. *Blue Ridge Electric Membership Corp. v. Grannis Brothers, Inc.*, 231 N.C. 716, 58 S.E. 2d 748 (1950).

We hold that the process afforded the defendant law firm under the facts of the case before us was sufficient to comply with Rule 4 and bring the law firm within the court's jurisdiction

within the statute of limitations. It is apparent that the trial court in this case refused to allow the amendment of the summons under the belief that the law firm had not been brought within its jurisdiction rather than in an exercise of its discretion under Rule 4(i) of the North Carolina Rules of Civil Procedure. We reverse and remand, therefore, to the Court of Appeals with instructions that it further remand to the trial court for an exercise of the trial court's discretion on this question in accordance with this opinion. *See Henry v. Deen*, 310 N.C. 75, 310 S.E. 2d 326 (1984); *Byrd v. Mortenson*, 308 N.C. 536, 302 S.E. 2d 809 (1983).

III.

[4] We next consider the Court of Appeals' holding that the trial court abused its discretion in failing to allow the defendants' motion to dismiss for a violation of Rule 8(a)(2) of the North Carolina Rules of Civil Procedure. The Court of Appeals held that the case should have been dismissed in its entirety against Maready, Petree, and the defendant law firm, because of the violation.

Rule 8(a)(2) states in pertinent part that in all professional malpractice actions,

> wherein the matter in controversy exceeds the sum or value of ten thousand dollars ($10,000), the pleading shall not state the demand for monetary relief, but shall state that the relief demanded is for damages incurred or to be incurred in excess of ten thousand dollars ($10,000).

G.S. 1A-1, Rule 8(a)(2).

The plaintiff's original complaint contained, in a section titled "DAMAGES," allegations that the defendants had injured her in an amount "which may exceed five million dollars," and that the acts of the defendants entitled her to an award of the same amount for punitive damages. In the section of the complaint entitled "PRAYER FOR RELIEF" the plaintiff prayed that she receive five million dollars from the law firm and five million dollars from Maready and Petree, jointly and severally, in compensatory damages. She sought to recover five million dollars jointly and severally from all defendants in punitive damages. In an amendment as a matter of right, the plaintiff deleted all reference to five million dollars in the section entitled "PRAYER FOR RELIEF" and substituted language asking that she recover an amount in

excess of $10,000 for compensatory and for punitive damages. The plaintiff did not amend the reference to five million dollars in the section entitled "DAMAGES."

The trial court determined that the complaint violated Rule 8(a)(2) "clearly and unequivocally." Nevertheless, the trial court acting in its discretion denied the defendant's motion to dismiss for this violation.

In reversing the trial court, the Court of Appeals reasoned that *Jones v. Boyce*, 60 N.C. App. 585, 299 S.E. 2d 298 (1983) is dispositive of the issue and that the trial court abused its discretion in denying the defendants' motion to dismiss. We do not agree.

The General Assembly enacted G.S. 1A-1, Rule 8(a)(2) in response to what has been called a national medical malpractice crisis brought on by increasing numbers of malpractice suits and resultant sharply rising malpractice insurance rates. *See* Report of the North Carolina Professional Liability Insurance Study Commission, at 4, March 12, 1976. A number of state legislatures have enacted a variety of provisions in an attempt to deal with frivolous malpractice suits and high damage awards. *See* 61 Am. Jur. 2d, *Physicians, Surgeons and Other Healers* § 372 (1981). At least two states have taken the approach of North Carolina in attempting to prevent the statement of a specific amount of damages sought in the complaint. *See, e.g.* Wash. Rev. Code Ann. § 4.28.360 (providing that a complaint shall not state damages sought but shall contain a prayer for damages "as shall be determined"); N.Y. Civ. Prac. Law § 3017(c) (providing that a complaint shall not state an amount of damages sought except to state that the jurisdictional amount is exceeded).

Although this Court has never decided what sanctions are appropriate for parties who violate Rule 8(a)(2), we note that decisions in other jurisdictions favor penalties less harsh than dismissal. In *Pizzingrilli v. Von Kessel*, 100 Misc. 2d 1062, 420 N.Y.S. 2d 540 (1979) a New York court held that Section 3017(c) which, like our Rule 8(a)(2), prohibits the statement of an amount of money demanded, does not authorize "[s]o drastic a remedy as dismissal." That court ordered the violating clause stricken from the pleading.

The commentary that accompanies New York's Section 3017(c) suggests that, although striking the offending portion of the complaint is effective in keeping the amount of damages sought away from the jury's consideration, other available remedies for failure to obey the rule would be more effective in preventing harm to professional reputations caused by publicity surrounding a high demand for relief in a pleading. Among those alternative remedies suggested by the commentator were the imposition of monetary penalties similar to those awarded for failure to make discovery. N.Y. Civ. Prac. Law § 3017(c) comment 3017:11 (McKinney's Supp. 1983).

In *McNeal v. Allen*, 95 Wash. 2d 265, 621 P. 2d 1285 (1980), the Supreme Court of Washington rejected the notion that a doctor could sue in defamation for a violation of Washington's rule against stating the amount of damages sought in a malpractice action. Acknowledging that one purpose of the rule was the prevention of sensational publicity, the court stated that other remedies were more appropriate. The court addressed the concern that other disciplinary actions—such as a reprimand, striking the offensive portions, or a fine—did not provide sufficient remedy for a defendant since after a complaint is filed, the damage is done. The court also addressed the concern that the sanctions were not severe enough to deter lawyers from violating the rule in drafting pleadings. The court stated that "[i]t is to be presumed that officers of the court will endeavor to abide by the rules governing procedure," and added that if deliberate violations occur, the court could make the punishment more severe "to discourage emulation." 95 Wash. 2d at 269, 621 P. 2d at 1287.

After a review of sanctions available in other states, we cannot agree with the statement of the Court of Appeals in *Jones v. Boyce*, 60 N.C. App. 585, 299 S.E. 2d 298 (1983) that absent the strong sanction of dismissal for violation of Rule 8(a)(2) litigants may ignore the rule's proscriptions with impunity. We agree with the view expressed in other jurisdictions that dismissal for a violation of Rule 8(a)(2) is not always the best sanction available to the trial court and is certainly not the only sanction available. Although an action may be dismissed under Rule 41(b) for a plaintiff's failure to comply with Rule 8(a)(2), this extreme sanction is to be applied only when the trial court determines that less drastic sanctions will not suffice.

The trial court in this case refused to dismiss this action on Rule 8(a)(2) grounds. We hold under the facts of this case that the trial court did not err in denying the motion and reverse the holding of the Court of Appeals to the contrary.

In summary, we reverse the holding of the Court of Appeals that the summonses and the complaint against the defendant Maready and the defendant law firm were properly dismissed. We also reverse the holding of the Court of Appeals that the trial court erred in denying the defendants' motion to dismiss for violation of Rule 8(a)(2). We remand this action to the Court of Appeals with instructions for further remand to the trial court for an exercise of its discretion on the issue of whether to allow an amendment of the misnomer in the summons directed to the law firm.

Reversed and remanded.

Justice MARTIN dissenting in part.

I concur in parts II and III of the majority opinion. For the reasons herein stated, I am compelled to dissent from part I of the opinion.

The majority leaves the well-defined path of determining the validity of service of process as set forth in *Philpott v. Kerns*, 285 N.C. 225, 203 S.E. 2d 778 (1974), and other cases, and embarks upon the uncertain and uncharted waters of whether there is a "substantial possibility of confusion in this case about the identity of Maready as a party being sued" as the test for sufficiency of service. In making this departure, the majority relies principally upon *Wiles v. Construction Co.*, 295 N.C. 81, 243 S.E. 2d 756 (1978). In *Wiles*, the summons was directed to the defendant corporation's registered agent rather than to the corporation. This Court felt "that the time has come to re-evaluate the considerations on which this narrow interpretation of sufficiency of process on corporate defendants is grounded." *Id.* at 84, 243 S.E. 2d at 757. Further, the Court stated:

> [W]e feel that the better rule in cases such as this is that when the name of the defendant is sufficiently stated in the caption of the summons and in the complaint, such that it is clear that the corporation, rather than the officer or agent receiving service, is the entity being sued, the summons,

> when properly served upon an officer, director or agent specified in N.C.R. Civ. P. 4(j)(6), is adequate to bring the *corporate defendant* within the trial court's jurisdiction.

Id. at 85, 243 S.E. 2d at 758 (emphasis added).

It is readily apparent that the Court strictly limited *Wiles* to the facts of that case, where service is attempted on a corporate defendant. The majority seeks to extend the holding of *Wiles* to individuals. It so happens that the defendant in the present case is a lawyer, but the opinion is not limited to lawyers. Rather, the opinion would grant jurisdiction over the person of anyone if there is no substantial possibility of confusion about the identity of the person being sued, even though the attempted service was not in accord with the statute. This abrogates an essential requirement for valid service as contained in Rule 4(b) of the North Carolina Rules of Civil Procedure and leaves counsel and the courts with no fixed rule for determining the validity of service. Rule 4(b) requires that the summons be directed to the *defendant* and that he be notified to appear and answer within thirty days after service. Rule 4(j)(1)(a) requires that to obtain service upon a natural person a copy of *the* summons must be delivered to the defendant. (Emphasis added.) There are substantial reasons that the copy of the summons be directed to defendant. By so doing, he knows that *he* is required to appear and answer. A summons directed to another party or person would not place the defendant on notice that *he* is required to take action. As the summons is not directed to him, a defendant could assume that only the person to whom the summons is directed is required to appear and answer. By not delivering to Maready a copy of the summons directed to him, plaintiff has failed to comply with the statute.

It is the rule of this Court that unless individual natural persons are served with summons in strict accord with the statute, the service is constitutionally invalid. Such service does not give the court jurisdiction. *Philpott v. Kerns, supra*, 285 N.C. 225, 203 S.E. 2d 778; *Distributors v. McAndrews*, 270 N.C. 91, 153 S.E. 2d 770 (1967). " 'Actual notice, given in any manner other than that prescribed by statute cannot supply constitutional validity to the statute or to service under it.' " *McAndrews*, 270 N.C. at 94, 153 S.E. 2d at 772. Neither *Philpott* nor *McAndrews* was overruled, either expressly or impliedly, by *Wiles*.

Moreover, *Wiles* has been on the books since 1978 and the legislature has not amended N.C.R. Civ. P. 4 to adapt to *Wiles*. While it is true that the conduct of a lawsuit is not a game between counsel, the party seeking jurisdiction over a defendant has the burden of providing sufficient process for that purpose. Here, the plaintiff, represented by counsel, failed to so do with respect to the defendant Maready.

The facts in *Stone v. Hicks*, 45 N.C. App. 66, 262 S.E. 2d 318 (1980), are indistinguishable from those in the Maready case. In *Stone*, the copy of the summons delivered to the defendant Hicks directed the defendant Fowler to appear and answer; the copy delivered to defendant Fowler directed the defendant Hicks to appear. The Court of Appeals held that the service was fatally defective and that no jurisdiction over the defendants was obtained.

In *Neal-Millard Company v. Owens*, 115 Ga. 959, 42 S.E. 266 (1902), the Supreme Court of Georgia held that service on a defendant with process commanding someone else to appear is no process at all as to the defendant and he would have the right to utterly disregard it.

It is conceded that the service on Maready was not as prescribed by the statute. The summons served upon Maready was not directed to him as required by N.C.R. Civ. P. 4(b). Without statutory process, the court acquires no jurisdiction over defendant. *Beaufort County v. Mayo*, 207 N.C. 211, 176 S.E. 753 (1934). "Law is not a 'feather on the water' and it should not be 'quicksand' to trap the unwary." *Id.* at 214, 176 S.E. at 755. Not only was the attempted service unauthorized by law, it was contrary to law, N.C.R. Civ. P. 4(b), and the court did not acquire jurisdiction. 62 Am. Jur. 2d *Process* § 30 (1972). Moreover, the service is constitutionally invalid, preventing the court from obtaining jurisdiction over Maready. *Philpott, supra; McAndrews, supra; Stone, supra.*

This is a hard case, and hard cases tend to make bad law. The law has established one rule for all persons. I cannot concur in the new general rule for service of process which the majority seeks to adopt.

I vote to affirm the Court of Appeals in affirming the dismissal of the claim against defendant Maready for insufficiency of service.

Chief Justice BRANCH joins in this dissenting opinion.

STATE OF NORTH CAROLINA v. JOHN VINCENT BEAL

No. 564A82

(Filed 28 August 1984)

Criminal Law § 135.8— first-degree murder—sentencing phase—considering defendant's prior adjudication as youthful offender an aggravating circumstance—error

The trial court committed prejudicial error by allowing the jury to consider defendant's prior adjudication as a youthful offender under the Alabama Youthful Offender Act as a prior "felony conviction" which could be considered as an aggravating circumstance under the North Carolina capital punishment statute. G.S. 15A-2000(e)(3).

Justice MEYER dissenting.

Justice COPELAND joins in this dissenting opinion.

APPEAL of right by the defendant from the judgment and sentence entered by the *Honorable Robert M. Burroughs, Judge Presiding,* at the 13 September 1982 Session of the Superior Court, LINCOLN County, following his conviction of murder in the first degree. Heard in the Supreme Court 12 March 1984.

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

Richard E. Jonas and Richard L. Kennedy, for defendant-appellant.

FRYE, Justice.

Defendant brings forward numerous assignments of error relating to the guilt-innocence phase of his trial and one assignment of error relating to the sentencing phase of his trial. After carefully reviewing all the defendant's assignments of error, we find no prejudicial error in the guilt-innocence phase of his trial.

However, during the sentencing phase, the trial court committed prejudicial error when it allowed the jury to consider defendant's prior adjudication as a youthful offender under the Alabama Youthful Offender Act as a prior felony conviction which could be considered as an aggravating circumstance under the North Carolina capital punishment statute. Since this was the only aggravating circumstance which was presented to the jury, and since the record does not support the jury's finding of the aggravating circumstance upon which the sentencing court based its sentence of death, defendant's sentence of death must be overturned and a sentence of life imprisonment imposed in lieu thereof. G.S. 15A-2000(d)(2).

I.

The State's evidence disclosed that on Friday, 14 May 1982, the victim, Jodie Abernathy, age seventeen, and Sarah Lineberger, age eighteen, were riding around the general area of Lincolnton, North Carolina, in Ms. Abernathy's 1979 brown Sunbird Pontiac. After stopping at a local drugstore and a game room, the young women went to Gilbert's Trailer Park located off Highway 27 at approximately 9:00 p.m., so that Ms. Abernathy could give her boyfriend some prom pictures.

Upon arrival at Gilbert's Trailer Park, the young women discovered that a party was taking place at the trailer where Ms. Abernathy thought her boyfriend would be. This trailer was located beside the trailer of Pete Beal, the defendant's brother. The defendant also was at the trailer park visiting his brother.

While Ms. Abernathy and Ms. Lineberger were waiting for the arrival of Ms. Abernathy's boyfriend, Ms. Lineberger, who knew the defendant, began to talk to him while standing between the trailers. During the course of the conversation, defendant asked if anyone could take him home. Ms. Lineberger told defendant that she did not have a car; however, Ms. Abernathy said that she would take him home if he would buy her some gas. Between 9:30 and 10:00 p.m., Ms. Abernathy and defendant left the trailer park in Ms. Abernathy's car. Ms. Abernathy was driving the car and the defendant was sitting on the passenger side.

Defendant lived approximately nine miles from Gilbert's Trailer Park in a trailer located at the end of a graveled drive ap-

proximately four-tenths of a mile off Rural Public Road (hereinafter RPR) #1312 in the Iron Station Community. Jim Price, for whom defendant worked, also lived on RPR #1312 on the same graveled drive as the defendant. No other residences are located along this drive.

At approximately 10:45 p.m., Mr. Price observed a dark car, maybe bronze or brown, with the lights out, going down the gravel drive by his home toward the defendant's trailer. Although Mr. Price could not identify the occupants of the car, he stated that the person on the passenger side waved at him. At about 11:15 p.m., Mr. Price observed a car, which looked like the one he had seen earlier, coming from the direction of defendant's trailer with only its parking lights on.

On that same night, at approximately 11:00 p.m., Wilma Hoffman, who lived on RPR #1312 about one-fourth of a mile from the Price residence and defendant's trailer, heard her dog and other dogs in the neighborhood barking. The dogs were still barking at 12:00 midnight. At that time, Ms. Hoffman went out on her porch. After listening for a few minutes, Ms. Hoffman heard "an awful moaning sound" three or four times which almost "frightened [her] to death." The moaning sounded human to her. The moaning sounds were coming from the general direction of the defendant's trailer.

During the early morning hours of 15 May 1982, Ms. Abernathy's car was found parked on the side of Philadelphia Church Road, a rural paved road in Gaston County, located approximately 3.3 miles from defendant's trailer. The keys were in the ignition and one of the windows was rolled down.

During the afternoon of 15 May 1982, Sergeant Robert Stacy of the Gaston County Police Department went to see the defendant at his trailer. He observed "smoke billowing from the trash can barrel at the end of the trailer." The barrel had a grate on top of it and a rock on top of the grate. Defendant went with Sergeant Stacy to the Gaston County Police Department where several photographs were taken of him. Several scratches and abrasions were observed on the defendant's arms.

On Sunday, 16 May 1982, Lincoln County Sheriff Harven Crouse and several deputies went to defendant's trailer. Sheriff

Crouse looked inside the barrel at the end of defendant's trailer and removed a large bone from it. Several small bones were also observed in the barrel. He also saw a pair of gloves lying on the ground near the barrel and a plastic jug which was about one-third full of kerosene.

On Wednesday, 19 May 1982, the burned remains of a body, later identified as that of Jodie Abernathy, were discovered by searchers approximately 147 feet from defendant's trailer. The remains, which were sealed in plastic, were found in a washout covered with leaves, pine needles and plastic.

Paul Midgett, an acquaintance of the defendant, testified that sometime between 12:00 midnight and 3:00 a.m. on a Friday in May defendant telephoned him. Defendant said that a girl had given him a ride home and he had gotten her to go into the trailer. "[H]e wanted to get him a little bit and she wouldn't go for it." She slapped defendant. Defendant just "went off," "[w]ent crazy." Defendant knocked her down the hallway and out the door. When he knocked her out the door, she hit her head on a rock or a block. Defendant was scared, grabbed her by her hair and hit her on it [the rock or block] again. Defendant told him he was really scared and didn't know what to do. He put her in the trash barrel and poured kerosene on her and lit the kerosene. She would not burn up completely and later he pulled her remains out of the barrel and had "her stashed down at the trailer." Midgett also relayed the above facts to his parents through a letter written while he was in prison, and he later gave a statement to the police.

Dr. Page Hudson, the Chief Medical Examiner for the State of North Carolina and an expert in the field of forensic pathology, identified the remains which were found as being those of Ms. Abernathy. As a result of his examination of the remains, Dr. Hudson testified that he observed various skull injuries. He also observed a fracture of the front forehead area, and a fracture of the deep bone of the face in the sinus area. Additionally, he observed damage to the teeth and the chin area, as well as a fracture on the left and right side of the lower jaw.

Dr. Hudson testified that death was caused by "blunt force injury. Blunt force trauma to the head. A beating." In his opinion, more than one blow was inflicted upon the victim. Dr. Hudson

was unable to identify the instrument used to kill the victim. He could only state that it was something "very blunt and very heavy." Additionally, Dr. Hudson did not believe that a single fall would have caused the injuries suffered by the victim.

The defendant testified in his own behalf. Defendant stated that he and the victim were talking outside Ms. Abernathy's car, approximately seven or eight feet from his trailer. After asking her about whether Ms. Lineberger was still dating someone, defendant stated that he asked her, "What about you." In response to this question, Ms. Abernathy told him that if he tried anything, she would tell on him, and then she slapped him. Defendant stated that he hit her, and she spun around and fell against the steps of the trailer. She did not move again after she fell. According to defendant, Ms. Abernathy was dead.

Defendant then used Ms. Abernathy's car to drive around in an attempt to get aid for her. Eventually, he abandoned the car and walked back home, arriving at about midnight. He checked the victim again to see if she was alive. Defendant concluded that she was dead. Shortly thereafter, defendant placed Ms. Abernathy in the barrel and burned her body. He removed the remains that would not burn and hid them in the woods near his trailer.

Based upon the above evidence, the jury found defendant guilty of murder in the first degree.

At the sentencing hearing, one aggravating circumstance and several mitigating circumstances were submitted to the jury. The sole aggravating circumstance that was submitted to the jury was, "[t]he defendant had been previously convicted of a felony involving the use or threat of violence to the person." The predicate offense proffered by the State to support a finding of the above aggravating circumstance was defendant's previous adjudication as a youthful offender under the Alabama Youthful Offender Act. The jury found the existence of the above-quoted aggravating circumstance, and did not find any mitigating circumstances. Subsequently, the jury recommended that defendant be sentenced to death, and the trial court sentenced him accordingly.

II.

The dispositive issue in this case relates to the sentencing phase of defendant's trial. That issue presents the following question for review by this Court: Did the trial court commit prejudicial error when it allowed the jury to consider defendant's prior adjudication as a youthful offender under the Alabama Youthful Offender Act as a prior felony conviction which could be considered as an aggravating circumstance under the North Carolina capital punishment statute? After carefully reviewing the North Carolina capital punishment statute, especially G.S. § 15A-2000(e)(3), the Alabama Youthful Offender Act and the cases which have construed the Act, we hold that the trial court committed prejudicial error by allowing the jury to consider defendant's prior adjudication as a youthful offender under the Alabama Youthful Offender Act as a prior "felony conviction."

In order to resolve this issue of first impression in this State, we have carefully studied and examined the Alabama Youthful Offender Act, Ala. Code §§ 15-19-1 through 15-19-7, and the cases which have construed this Act. The portions of the Alabama Youthful Offender Act which are pertinent to this case are Ala. Code §§ 15-19-1, 15-19-6 and 15-19-7. These statutes respectively provide as follows:

> § 15-19-1 Investigation and examination by court to determine how tried; consent of minor to trial without jury; arraignment as youthful offender.
>
> (a) A person charged with a crime which was committed in his minority but was not disposed of in juvenile court and which involves moral turpitude or is subject to a sentence of commitment for one year or more shall, and, if charged with a lesser crime may be investigated and examined by the court to determine whether he should be tried as a youthful offender, provided he consents to such examination and to trial without a jury where trial by jury would otherwise be available to him. If the defendant consents and the court so decides, no further action shall be taken on the indictment or information unless otherwise ordered by the court as provided in subsection (b) of this section.
>
> (b) After such investigation and examination, the court, in its discretion, may direct that the defendant be arraigned

as a youthful offender and no further action shall be taken on the indictment or information; or the court may decide that the defendant shall not be arraigned as a youthful offender, whereupon the indictment or information shall be deemed filed.

§ 15-19-6. Disposition upon adjudication.

(a) If a person is adjudged a youthful offender and the underlying charge is a felony, the court shall:

(1) Suspend the imposition or execution of sentence with or without probation;

(2) Place the defendant on probation for a period not to exceed three years;

(3) Impose a fine as provided by law for the offense with or without probation or commitment;

(4) Commit the defendant to the custody of the board of corrections for a term of three years or a lesser term.

(b) Where a sentence of fine is not otherwise authorized by law, then, in lieu of or in addition to any of the dispositions authorized in this section, the court may impose a fine of not more than $1,000.00. In imposing a fine the court may authorize its payment in installments.

(c) In placing a defendant on probation, the court shall direct that he be placed under the supervision of the appropriate probation agency.

(d) If the underlying charge is a misdemeanor, a person adjudged a youthful offender may be given correctional treatment as provided by law for such misdemeanor.

§ 15-19-7. Effect of determination; records not open to public inspection; exception.

(a) No determination made under the provisions of this chapter shall disqualify any youth for public office or public employment, operate as a forfeiture of any right or privilege or make him ineligible to receive any license granted by public authority, *and such determination shall not be deemed a*

conviction of crime; provided, however, that if he is subsequently convicted of crime, the prior adjudication as youthful offender shall be considered. (Emphasis added.)

(b) The fingerprints and photographs and other records of a person adjudged a youthful offender shall not be open to public inspection; provided, however, that the court may, in its discretion, permit the inspection of papers or records.

The above statutory provisions describe the procedures to be employed under the Alabama Youthful Offender Act, the possible dispositions upon adjudication as a youthful offender, and the effect of a determination that an individual is a youthful offender.

During the sentencing hearing which was held after the jury had found defendant guilty of murder in the first degree, the State attempted to establish the aggravating circumstance that "defendant had been previously convicted of a felony involving the use or threat of violence to the person." G.S. 15A-2000(e)(3). In its attempt to prove the above-quoted aggravating circumstance, the State relied upon defendant's prior adjudication as a youthful offender under the Alabama Youthful Offender Act. Over the objections of counsel for the defendant, the trial court allowed the State to introduce and read to the jury certified copies of the original indictment against defendant, his subsequent plea, and the resulting disposition of defendant's case based upon his adjudication as a youthful offender.[1] At the conclusion of the sentencing hearing, the sole aggravating circumstance submitted to and found by the jury was that "defendant had been previously convicted of a felony involving the use or threat of violence to the person." G.S. 15A-2000(e)(3).

Defendant contends that the trial court erred in allowing the jury to consider his prior adjudication as a youthful offender under the Alabama Youthful Offender Act as a prior felony conviction under G.S. 15A-2000(e)(3) of the North Carolina capital punishment statute. Defendant notes that the express language of

1. In view of the purposes and the reasons for which the Alabama Youthful Offender Act was enacted, we will not disclose the nature of the original charge which eventually led to defendant's adjudication as a youthful offender. To do otherwise would be contrary to the express language contained in Ala. Code § 15-19-7(b), which provides that the "record of a person adjudged a youthful offender shall not be open to public inspection."

Ala. Code § 15-19-7(a) provides that an adjudication as a youthful offender "shall not be deemed a conviction of crime."

The State contends that the trial court properly allowed the jury to consider defendant's prior adjudication as a youthful offender as a "felony conviction," relying upon that portion of Ala. Code § 15-19-7(a) which provides that "if he [the person adjudged a youthful offender] is subsequently convicted of crime, the prior adjudication as youthful offender shall be considered." The State also contends that "[w]hether such a determination is labeled an adjudication or conviction would seem to make no difference in respect to the nature of the crime committed and any subsequent consideration it should be given by a jury upon sentencing proceedings."

G.S. 15A-2000(e) of the North Carolina capital punishment statute provides, in pertinent part, as follows:

> Aggravating Circumstances.—Aggravating circumstances which may be considered shall be limited to the following:
>
> . . . .
>
> (3) The defendant had been previously convicted of a felony involving the use or threat of violence to the person.

This Court has interpreted G.S. 15A-2000(e)(3) as requiring proof that the defendant had been previously *convicted* of a felony involving the use or threat of violence to the person. *State v. Goodman*, 298 N.C. 1, 257 S.E. 2d 569 (1979). A charge or an indictment is insufficient to support a finding of a conviction. *Id.* at 23, 257 S.E. 2d at 584; *see also State v. Ell*, 196 Neb. 800, 246 N.W. 2d 594 (1976).

The purpose of the Alabama Youthful Offender Act has been stated as follows:

> The Alabama Youthful Offender Act was conceived for the purpose of protecting those who fall within its ambit from the stigma and practical consequences for a conviction of a crime. Accordingly, the Act provides for confidentiality in the proceedings and in the availability of the offender's records with regard to the adjudication.

Raines v. State, 294 Ala. 360, 366, 317 So. 2d 559, 564, *reh'g denied*, 294 Ala. 767 (1975).

In the instant case, it was clearly established that defendant was adjudicated a youthful offender in the Circuit Court of Calhoun County in February 1984. Therefore, the questions to be determined by this Court are whether that prior *adjudication* amounts to a *conviction* of a felony and whether it was properly considered in this case. In deciding those questions, we are guided by the explicit language of Ala. Code § 15-19-7(a) which provides, in pertinent part, that an adjudication as a youthful offender "shall not be deemed a conviction of crime; provided, however, that if he is subsequently convicted of crime, the prior adjudication as youthful offender shall be considered."

The Alabama courts have consistently held that the determination that the accused is a youthful offender is not a conviction. *Raines v. State*, 294 Ala. 360, 317 So. 2d 559, *reh'g denied*, 294 Ala. 767 (1975); *Thomas v. State*, Ala. Crim. App., 445 So. 2d 992 (1984); *Daniels v. State*, Ala. Crim. App., 375 So. 2d 523 (1979). Additionally, the Supreme Court of Alabama in *Ex parte Thomas*, Ala., 435 So. 2d 1324 (1982), has provided some insightful guidance concerning the meaning of the statutory language of Ala. Code § 15-19-7(a), which provides that if the youthful offender is subsequently convicted of a crime, "the prior adjudication as youthful offender shall be considered."

In *Ex parte Thomas*, the defendant had been convicted of third degree burglary. Prior to sentencing, the state gave notice that it wanted to have defendant sentenced as an habitual offender under the Habitual Offender Act. Thereafter, the trial court allowed the state to introduce evidence of a previous felony conviction of second degree burglary and a previous youthful offender adjudication. The defendant was subsequently sentenced to a term of imprisonment of ten years.

On appeal, the question presented for review was whether the sentence imposed was erroneous because it was based upon the erroneous admission and consideration of defendant's prior youthful offender adjudication. The Alabama Supreme Court noted that the sentence imposed by the trial court was within the range of permissible sentences under the Habitual Offender Act, regardless of whether one or two felony convictions were used.

Additionally, the court noted that the sentence imposed was permissible for defendant's present conviction, without taking into consideration the prior felony conviction or the prior youthful offender adjudication. Nevertheless, the court remanded the case to the trial court for a specific finding of whether the trial court had invoked the Habitual Offender Act.

In addressing the state's contention that it was proper for the trial court to consider defendant's prior adjudication as a youthful offender in determining the appropriate sentence to be imposed, the court stated:

> The State calls our attention to further language found in § 15-19-7 which states that if a youthful offender "is subsequently convicted of crime, the prior adjudication as youthful offender shall be considered." We hold that a prior youthful offender adjudication is properly considered in determining the sentence to be imposed within the statutory range for a later crime for which the defendant has been convicted. *That same youthful offender determination, however, may not be considered a prior felony conviction, as contemplated by the Habitual Offender Act, so as to bring the defendant within the purview of the higher sentence categories of that Act.* (Emphasis added.)

Ex parte Thomas, Ala., 435 So. 2d at 1326.

We find the facts and circumstances of *Ex parte Thomas* to be very similar to the facts and circumstances of the instant case. Therefore, we believe that the reasoning which was applied there is equally applicable to the instant case. We are also mindful of the fact that *Ex parte Thomas* is a decision of the highest court of Alabama, whose duty it is to interpret the laws of that state. That being so, the *Ex parte Thomas* decision, and more specifically the interpretation given Ala. Code § 15-19-7(a) by that court, is very persuasive authority which should be given substantial weight by this Court. We find no reasonable basis for distinguishing between the use of a prior youthful offender adjudication to prove a prior felony conviction under an habitual offender statute and the use of a prior youthful offender adjudication to prove a prior felony conviction under the North Carolina capital punishment statute. Therefore, we hold that the trial court committed prejudicial error by allowing the jury to consider de-

fendant's prior youthful offender adjudication as a prior felony conviction. Such an adjudication does not amount to a prior felony conviction.

III.

In conclusion, we hold that the State's evidence was insufficient to support the submission to the jury of the aggravating circumstance that "defendant had previously been convicted of a felony involving the use or threat of violence to the person." G.S. 15A-2000(e)(3). Accordingly, we overturn defendant's sentence of death and impose a sentence of life imprisonment. *See* G.S. 15A-2000(d)(2). Therefore, the judgment below is vacated, and the defendant is sentenced to a term of imprisonment for the remainder of his natural life. Defendant is entitled to credit for any time previously spent in confinement as a result of these charges before the date of this judgment. An amended commitment shall be issued by the Superior Court, Lincoln County, in accordance with this judgment. *See State v. Jackson*, 309 N.C. 26, 305 S.E. 2d 703 (1983).

We have carefully reviewed all of the assignments of error raised by defendant relating to the guilt-innocence phase of his trial, and we find them to be without merit. Accordingly, we find that no error occurred during the guilt-innocence phase of defendant's trial.

Guilt-Innocence Phase—no error.

Sentencing Phase—death sentence vacated; sentence of life imprisonment imposed.

Justice MEYER dissenting.

I respectfully dissent from both the reasoning and result reached by the majority on the issue of whether defendant's prior adjudication under the Alabama Youthful Offender Act was properly considered in sentencing.

In 1974 the defendant, then twenty years old and serving in the United States Army, pled guilty in an Alabama court of law to a charge of rape, a crime involving the use or threat of violence to the person. The judgment of the Alabama court is as follows:

State v. Beal

YOUTHFUL OFFENDER ACTION, SENTENCE BY COURT. PROBATION DENIED

State of Alabama)
Y.O. #6684 vs.) Youthful Offender Action
John Vincent Beal) *Charge: Rape*
Youthful Offender) *Guilty Plea as charged*
Sentence and Denial of Probation.

This the 4th day of February, 1975:

This Youthful Offender Action having commenced trial by the Court without the intervention of a Jury and the Defendant having pled guilty, *and the Court having adjudged the Defendant a Youthful Offender and guilty of the underlying offense of Rape and the Defendant having applied for probation*:

Comes now the Defendant in open Court in his own proper person and with Attorney, Honorable H. Darden Williams, and being asked by the Court if he had anything to say why the sentence of the law should not now be pronounced upon him says "Nothing" and before passing sentence the Court determines by examination of said Defendant and other evidence that said Defendant was by trade or occupation "a soldier, army of the United States of America" and he is of the white race, male sex, is twenty (20) years of age (d/b; May 11, 1954) and his physical condition is "good, need dental work."

It is considered, ordered and adjudged by the Court that the Youthful offender be and *he is hereby sentenced to imprisonment in the custody of the Director of the Board of Corrections of the State of Alabama for a term of three years, as punishment fixed by the Court, and, the Court hereby denies Probation.*

(Judge Wm. C. Bibb)

(Emphasis added.)

Beal was sentenced to three years imprisonment and received the benefits of adjudication as a youthful offender, thereby entitling him to the protections afforded that status under Alabama law. In 1982 this same defendant was convicted, in a

North Carolina court of law, of first degree murder. It is my position that whatever protections he was earlier afforded as a youthful offender were lost as a result of his subsequent conviction for first degree murder.

In North Carolina we have no statutory provision that would preclude consideration of defendant's prior plea of guilty to the charge of rape, irrespective of his youthful offender status. Furthermore, I believe that the language of the Alabama Youthful Offender Act, the policy underlying that statute, and the case law interpreting it dictate a result contrary to that reached by the majority.

I. North Carolina Law.

There is no authority under North Carolina law for affording the defendant the protections which he contends are afforded him under the Alabama Youthful Offender Act. Even in the case of *misdemeanors* (with the exception of certain misdemeanor drug violations) and in adjudications of juvenile delinquency, North Carolina law allows the judge to consider the prior convictions and adjudications.

G.S. § 15-223 provides, in pertinent part, that

> Expunction of records for first offenders under the age of 18 at the time of conviction of misdemeanor.—(a) Whenever any person who has not yet attained the age of 18 years and has not previously been convicted of any felony, or misdemeanor other than a traffic violation, under the laws of the United States, the laws of this State or any other state, pleads guilty to or is guilty of a misdemeanor other than a traffic violation, he may file a petition in the court where he was convicted for expunction of the misdemeanor from his criminal record. The petition cannot be filed earlier than two years after the date of the conviction or any period of probation, whichever occurs later, ... (b) If the court, after hearing, finds that the petitioner had remained of good behavior and been free of conviction of any felony or misdemeanor, other than a traffic violation, for two years from the date of conviction of the misdemeanor in question, and petitioner was not 18 years old at the time of the conviction in question, it shall order that such person be restored, in the contempla-

> tion of the law, to the status he occupied before such arrest or indictment or information. No person as to whom such order has been entered shall be held thereafter under any provision of any laws to be guilty of perjury or otherwise giving a false statement by reason of his failure to recite or acknowledge such arrest, or indictment, information, or trial, or response to any inquiry made of him for any purpose.

The statute provides that the information in the file be disclosed to judges for the purpose of ascertaining whether the offender had previously been granted a discharge.

As the defendant in the present case was over the age of 18 when the offense was committed, and the offense with which he was charged was a felony—rape, he would not have been eligible to receive the benefits of G.S. § 15-223 in North Carolina.

When our legislature has deemed it appropriate, it has provided for the blanket protections which this defendant argues should be afforded him. G.S. § 90-96 provides for the expunction of records for first offense misdemeanor controlled substance violations. That section specifically provides that

> (a) . . . Upon fulfillment of the terms and conditions, the court shall discharge such person and dismiss the proceedings against him. Discharge and dismissal under this section shall be without court adjudication of guilt and shall not be deemed a conviction for purposes of this section or for purposes of disqualifications or disabilities imposed by law upon conviction of a crime including the additional penalties imposed for second or subsequent convictions of this Article.

I read nothing in G.S. § 90-96, however, to suggest that these protections afforded in limited cases of first offense misdemeanor drug violations should extend to a felony rape conviction.

Finally, G.S. § 7A-638 provides that:

> An adjudication that a juvenile is delinquent or commitment of a juvenile to the Division of Youth Services shall neither be considered conviction of any criminal offense nor cause the juvenile to forfeit any citizenship rights.

Significantly, this provision, unlike the Alabama Youthful Offender Act, makes no exception for consideration of the adjudica-

tion for subsequent sentencing purposes. Also of significance and consistent with its policy of protecting the youthful offender from the stigma of conviction, is that cases construing the Alabama Youthful Offender Act have held that one so adjudicated may not be impeached by the fact of his adjudication. North Carolina law is to the contrary. G.S. § 7A-676 provides for the expunction of records of juveniles adjudicated delinquent and undisciplined. G.S. § 7A-677, however, provides that

> (b) Notwithstanding subsection (a), in any criminal or delinquency case if the juvenile is the defendant and chooses to testify or if he is not the defendant and is called as a witness, the juvenile may be ordered to testify with respect to whether he was adjudicated delinquent.

Furthermore, similar to the provisions of G.S. § 15-223(d), G.S. § 7A-678 provides that "upon testifying in a criminal or delinquency proceeding [the juvenile] may be required by a judge to disclose that he was adjudicated a delinquent."

Whether viewed under North Carolina or Alabama law, the defendant in this case was clearly not a juvenile at the time he committed the offense. In fact, the Alabama Youthful Offender Act specifically excludes juveniles. Ala. Code § 15-19-1(a).

In summary, although our legislature has recognized, in limited cases, that juveniles, youthful offenders, and first offenders for drug violations may be entitled to and afforded protections through expunction of records, and that an adjudication of delinquency should not be considered a conviction, I find no authority in North Carolina to support the majority's conclusion that this defendant's plea of guilty to a charge of rape must be ignored in the sentencing phase of a capital case simply because he was afforded the status and protections of a youthful offender in Alabama.

II. Alabama Law.

The Alabama Youthful Offender Act, § 15-19-7(a), provides in pertinent part that determination as a youthful offender "shall not be deemed a conviction of crime; provided, however, *that if he is subsequently convicted of a crime, the prior adjudication as youthful offender shall be considered.*" The term "convicted of a crime" is not used in the narrow sense but is a broad phrase

which would include pleas of guilty and adjudications of delinquency where the offense was a felony. I read this language to mean that if a defendant is subsequently convicted of a crime, his prior adjudication as a youthful offender *must* then be considered in the sentencing for the subsequent crime.

The stated purpose of the Alabama Youthful Offender Act supports this interpretation. Ala. Code § 15-19-17(a) provides that "[n]o determination made under the provisions of this chapter shall disqualify any youth for public office or public employment, operate as a forfeiture of any right or privilege or make him ineligible to receive any license granted by public authority." In *Raines v. State*, 294 Ala. 360, 366, 317 So. 2d 559, 564, *reh'g denied*, 294 Ala. 767 (1975), the Alabama court noted that "[t]he Alabama Youthful Offender Act was conceived for the purpose of *protecting* those who fall within its ambit from *the stigma and practical consequences of a conviction for a crime*." (Emphasis supplied.) Clearly, the Act is intended solely to protect those who, following a transgression in their youth, become law abiding citizens. However, equally clear is the fact that once subsequently convicted of a crime, those same individuals no longer need, nor are they entitled to protection "from the stigma and practical consequences of a conviction for a crime."

In *Thomas v. State*, 445 So. 2d 992 (Ala. 1984), after noting that a prior adjudication as a youthful offender may not be used to enhance punishment under the Habitual Offender Act, *see Ex Parte Thomas*, 435 So. 2d 1324 (Ala. 1982), the Alabama court stated:

> The purpose of the Youthful Offender Act is to protect "those who fall within its ambit from the stigma and practical consequences of a conviction for a crime." *Raines v. State*, 294 Ala. 360, 366, 317 So. 2d 559 (1975). It is clear, however, that the Act is not intended to prevent the consideration of the adjudication for every conceivable purpose during the entire life-time of the youthful offender. Under Section 15-19-7(a), if a youthful offender "is subsequently convicted of crime, the prior adjudication as youthful offender *shall* be considered." (Emphasis added.) Similarly, adjudication as a juvenile is admissible in "a disposition hearing in a juvenile court or in sentencing proceedings after conviction of a crime

for the purposes of presentence study and report." Alabama Code Section 12-15-72(b) (1975).

Id. at 994.

The court then noted that under the circumstances of the case then at bar (involving impeachment of a youthful offender's credibility) the "State's policy interest in protecting the confidentiality of a youthful offender's record must yield to the public's right to the integrity of the judicial system." *Id.*

Ex parte Thomas, 435 So. 2d 1324 is not dispositive of the issue. That case merely held that adjudication as a youthful offender may not be considered as a prior felony conviction *under the Alabama Habitual Offender Act.* The case does not preclude consideration of the underlying crime for sentencing in general.

G.S. § 15A-2000, our capital punishment statute, provides that: (a)(3) "Evidence may be presented as to *any matter that the court deems relevant to sentence*, and *may include* matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (e) and (f). *Any evidence which the court deems to have probative value* may be received." (Emphasis added.) Following defendant's conviction for first degree murder in this case, he was no longer entitled to the protection afforded by the Alabama Youthful Offender Act. For purposes of sentencing, there was no longer a policy interest in protecting the confidentiality of defendant's youthful offender record. There remained only "the public's right to the integrity of the judicial system." I would therefore hold that evidence pertaining to defendant's plea of guilty to a charge of rape is relevant to sentencing and may now be considered by the courts of North Carolina.

Justice COPELAND joins in this dissent.

STATE OF NORTH CAROLINA v. GRADY MELVIN HOLLOWAY

No. 138A84

(Filed 28 August 1984)

1. **Criminal Law § 84; Searches and Seizures § 43— motion to suppress evidence—absence of affidavit—waiver of right to suppress**

Defendant waived his right to seek suppression of evidence seized pursuant to a search warrant on the ground that the deputy clerk who issued the warrant was not neutral where defendant failed to file an affidavit with the motion to suppress as required by G.S. 15A-977(a), and defendant also failed to specify his source of the information or the basis for his belief as required by that statute.

2. **Searches and Seizures § 43— waiver of right to suppress evidence—State's failure to object to form of motion to suppress**

The State's failure to object to the form of a motion to suppress did not affect either defendant's waiver of his right to seek suppression by failing to file an affidavit to support the motion or the trial court's statutory authority to deny summarily the motion to suppress when defendant failed to comply with the procedural requirements of G.S. Chapter 15A, Art. 53.

Justice EXUM dissenting.

Justices COPELAND and FRYE join in this dissenting opinion.

APPEAL of right by the State under N.C.G.S. 7A-30(2) from a decision of a divided panel of the Court of Appeals, 66 N.C. App. 491, 311 S.E. 2d 707 (1984), reversing a judgment entered September 21, 1982 in Superior Court, WILKES County, by *Judge F. Fetzer Mills.*

The defendant pled guilty to trafficking in methaqualone in violation of N.C.G.S. 90-95(h)(2)(b) and trafficking in marijuana in violation of N.C.G.S. 90-95(h)(1)(b). The charges were consolidated for judgment, and the defendant was sentenced to a term of fourteen years imprisonment and fined $50,000. The Court of Appeals reversed on the basis of the trial court's denial of the defendant's motion to suppress evidence obtained pursuant to a search warrant and remanded to Superior Court for a hearing on that issue. Judge Hedrick dissented from the Court of Appeals decision, and the State filed timely notice of appeal to the Supreme Court. The defendant petitioned for discretionary review of additional issues raised in the Court of Appeals. The petition was allowed April 30, 1984. Heard in the Supreme Court June 11, 1984.

Rufus L. Edmisten, Attorney General, by Angeline M. Maletto, Associate Attorney, for the State appellant-appellee.

Moore and Willardson, by Larry S. Moore, John S. Willardson, and William F. Lipscomb, for the defendant appellant-appellee.

MITCHELL, Justice.

The State appeals from a Court of Appeals decision reversing the trial court's denial of the defendant's motions to suppress evidence and remanding to the trial court for a hearing on the defendant's contention that a Deputy Clerk of Superior Court, Wilkes County did not perform her function of issuing warrants in a neutral and detached way. Because we find that the defendant waived his right to raise on appeal the question of the deputy clerk's neutrality, we hold that the trial court committed no error and reverse the decision of the Court of Appeals.

The defendant, Grady Melvin Holloway, was charged with trafficking in methaqualone and marijuana. He entered pleas of not guilty and filed a motion to suppress evidence seized pursuant to a search warrant which had been issued on March 18, 1982 by Janet Handy, a Deputy Clerk of Superior Court, Wilkes County. The motion to suppress alleged *inter alia* that the warrant was issued without probable cause and that it was improperly executed. The motion also included the following allegation:

> 4. The defendant is informed and believes and alleges on information and belief that the aforesaid Deputy Clerk of Superior Court of Wilkes County was not a "neutral and detached magistrate" as required to justify the issuance of the search warrant, *State v. Miller*, 16 N.C. App. 1; *State v. Campbell*, 282 N.C. 125 and/or that the application for a search warrant was inadequate.

Hearings on the motion to suppress were held in August and September of 1982. During the hearings the defendant presented evidence tending to show that Deputy Sheriff Sam Winters, S.B.I. Agent John Stubbs and S.B.I. Agent Jonathan Jones visited Magistrate Barry Woods on March 17, 1982. At that time the law enforcement officers related to Woods information they had obtained concerning the defendant's involvement in drug trafficking.

Woods told the officers he did not believe they had produced sufficient evidence of probable cause to justify the issuance of a search warrant. Woods testified that at that time he called District Attorney Michael Ashburn who agreed that there was insufficient probable cause. The following day, after acquiring more information, Deputy Sheriff Winters and S.B.I. Agent Jones went to Janet Handy, Deputy Clerk of Superior Court, to apply for a search warrant. After reading the officers' application and affidavit, Handy issued a search warrant pursuant to her authority under N.C.G.S. 15A-243(b)(2) and N.C.G.S. 7A-181(2).

After the hearing the trial court denied the defendant's motion to suppress. The defendant changed his plea from not guilty to guilty and reserved his right to appeal under N.C.G.S. 15A-979(b) from the denial of his motion. He also reserved the right to present additional evidence on the issue of the suppression motion.

In a subsequent hearing on the motion to suppress, Janet Handy was called as a witness by the defendant. The defendant's counsel questioned Handy about her relationship with officers who applied for the search warrant on March 18, 1982. The following transpired:

> Q. Now, did you have any type of social relationship with any of the officers?
>
> MR. ASHBURN: Objection.
>
> COURT: Sustained.
>
> EXCEPTION 42
>
> MR. WILLARDSON: I think at this point this could be important to our motion. We think this goes to the heart of the matter.
>
> COURT: It is going to be a sad thing if a person's personal life is going to be called into Court. If that happened to me, I would quit, if I worked in the Clerk's office—if I were called into Court and had to be questioned about my personal life. That objection is sustained.
>
> EXCEPTION 43

MR. WILLARDSON: I ask that it be answered for the record.

COURT: I sustained the objection.

EXCEPTION 44

MR. WILLARDSON: Can she whisper the answer for the record?

COURT: I sustained the objection.

EXCEPTION 45

The defendant appealed the denial of his motion to suppress to the Court of Appeals, contending that the Clerk did not perform her function in a neutral and detached way in violation of the protections of the Fourth Amendment of the Constitution of the United States. A majority of the three-judge panel disagreed with the trial court on the issue of the Clerk's neutrality and held that the trial court erred in denying "defendant an opportunity to develop, even for the purpose of the record on appeal, matters that could show that the person who issued the search warrant did not perform her function in a neutral and detached way." 66 N.C. App. at 499-500, 311 S.E. 2d at 712. The Court of Appeals reversed and remanded the case to the trial court, stating that the defendant "is entitled to a plenary hearing in an effort to support his contention." *Id.* at 500, 311 S.E. 2d at 712. Judge Hedrick dissented from the majority decision on that issue. He reasoned that since the defendant did not include an affidavit or state specific facts supporting his contention that Handy was not a neutral and detached magistrate, the trial court could have summarily denied the motion to suppress. Judge Hedrick also rejected the defendant's argument on substantive grounds. The State appealed to this Court.

[1] Because we find that the defendant waived his right to raise on appeal the issue of the neutrality of the deputy clerk, we reverse the decision of the Court of Appeals. We remand the case to that Court with instructions to reinstate the judgment entered by the trial court.

A defendant who seeks to suppress evidence upon a ground specified in N.C.G.S. 15A-974 must comply with the procedural requirements of Article 53, Chapter 15A of the General Statutes.

See State v. Satterfield, 300 N.C. 621, 268 S.E. 2d 510 (1980). Specifically, N.C.G.S. 15A-977(a) states that a motion to suppress evidence made before trial "*must* be accompanied by an affidavit containing facts supporting the motion. The affidavit may be based upon personal knowledge, or upon information and belief, *if the source of the information and the basis for the belief are stated.*" (Emphasis added.) A judge

> may summarily deny the motion to suppress evidence if:
>
> (1) The motion does not allege a legal basis for the motion; or
>
> (2) The affidavit does not as a matter of law support the ground alleged.

N.C.G.S. 15A-977(c). As noted by Judge Hedrick in his dissent, the Official Commentary which follows the statute states that it is structured "to produce in as many cases as possible a summary granting or denial of the motion to suppress. The defendant must file an affidavit as to the facts with his motion." N.C.G.S. 15A-977, Official Commentary.

The unverified motion in this case merely states that the defendant is informed and alleges that the deputy clerk was not a "neutral and detached magistrate." In violation of the requirements of N.C.G.S. 15A-977(a), the defendant filed no affidavit with his motion to suppress. Although he stated upon information and belief the deputy clerk was not neutral and detached, that statement appears in the body of the unverified motion to suppress instead of in an affidavit as required by N.C.G.S. 15A-977(a).

In further violation of N.C.G.S. 15A-977(a), the defendant failed to specify his source of the information or the basis for his belief. This Court has held that a defendant's failure to comply with the requirements of Article 53 is a waiver of his right to suppression of evidence obtained in violation of statutory or constitutional law. *State v. Satterfield*, 300 N.C. 621, 268 S.E. 2d 510 (1980). Furthermore, the defendant has the burden of showing that he has complied with the procedural requirements of Article 53. *Id.* at 624-25, 268 S.E. 2d at 513-14. Because the defendant failed to file an affidavit to support the general information and belief alleged in his motion, we hold that he waived his right to

seek suppression on constitutional grounds of the evidence seized pursuant to the search warrant.

[2] The defendant contends that because the State did not object to the sufficiency of the motion to suppress at trial, or to the evidentiary hearing held on the motion, the State cannot now raise the issue of the motion's deficiency for the first time before this Court. We find no merit in this contention. We have held that defendants by failing to comply with statutory requirements set forth in N.C.G.S. 15A-977 waive their rights to contest on appeal the admission of evidence on constitutional or statutory grounds. *State v. Maccia*, 311 N.C. 222, 316 S.E. 2d 241 (1984); *State v. Satterfield*, 300 N.C. 621, 268 S.E. 2d 510 (1980). The State's failure to object to the form of the motion affects neither that waiver nor the authority statutorily vested in the trial court to deny summarily the motion to suppress when the defendant fails to comply with the procedural requirements of Article 53. The trial court could properly have denied the defendant's motion to suppress based on the defendant's procedural failures alone, and we therefore reverse the decision of the Court of Appeals.

The defendant has argued that instead of remanding on the issue for further hearing, the Court of Appeals should simply have reversed the trial court's denial of the motion to suppress because of the deputy clerk's lack of neutrality. For the reasons stated herein, we have held that the trial court could properly deny the motion to suppress on this ground summarily and that the Court of Appeals erred in reversing and remanding the case for a new hearing as to the deputy clerk's neutrality *vel non*. *A fortiori* the Court of Appeals did not err in failing to reverse absolutely the trial court's denial of the defendant's motion to suppress on the ground of lack of neutrality.

We note that although the defendant petitioned this Court for discretionary review of other issues, he has briefed no issues other than the ones discussed in this opinion. Since the defendant has briefed no additional issues, they are deemed abandoned. *See* Rule 16, North Carolina Rules of Appellate Procedure.

For reasons discussed herein, the decision of the Court of Appeals is reversed and the case is remanded to that Court with instructions to reinstate the judgment of the trial court.

Reversed and remanded.

Justice EXUM dissenting.

I vote to affirm the decision of the Court of Appeals for the reasons stated in that court's majority opinion. I disagree with this Court's conclusion that defendant waived his right to challenge the neutrality of the magistrate because he did not attach an affidavit to his motion to suppress as required by N.C. Gen. Stat. § 15A-977(a).

Had the trial court summarily dismissed the motion for this procedural default, the ruling would have been correct. But defendant would then have been in a position to reassert his motion with an attached affidavit and to have it heard on the merits.

As the case stands, the trial court with the state's acquiescence heard the motion and ruled on its merits. No question was raised regarding the lack of a supporting affidavit by either the trial court or the state. Undoubtedly this was because an affidavit would probably have asserted no more, substantively, than the motion itself asserted. The lack of a supporting affidavit was raised for the first time by the state in this Court. Under these circumstances I would hold the state waived its right to have the motion summarily dismissed at trial by failing to raise defendant's procedural default at that stage of the proceeding.

Under the majority's holding defendant is forever precluded from having a court properly address the substance of his motion because of a procedural default which could have been cured in the trial court had either the trial court or the state then relied on it. Having not then relied on it, the state should not be permitted to avoid defendant's motion by asserting the procedural default for the first time in this Court. If the shoe were on the other foot, and defendant had failed to object at trial to a similar procedural default on the state's part, the Court, I am satisfied, would have no difficulty holding that defendant had waived his right to object on appeal.

I note, too, that whether a magistrate issuing a search warrant is neutral and detached is an issue more crucial than ever in light of *United States v. Leon*, --- U.S. ---, 52 U.S.L.W. 5155 (decided 5 July 1984). *Leon* holds that evidence seized pursuant to

a warrant issued by a "detached and neutral magistrate but ultimately found to be unsupported by probable cause" is admissible under the Fourth Amendment. Gone is the Fourth Amendment's probable cause requirement insofar as it protects a citizen from being convicted on the basis of evidence seized in its absence pursuant to a warrant. Now under the Fourth Amendment when a warrant is required all that stands between the state's ability to search for and seize evidence and use it in court and the "right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures" is a "detached and neutral magistrate."

Justices COPELAND and FRYE join in this dissenting opinion.

WILKES COUNTY, BY AND THROUGH ITS CHILD SUPPORT ENFORCEMENT AGENCY, *EX REL.*, SHIRLEY WHITAKER NATIONS AND BETTY WHITAKER, PLAINTIFFS v. JUNIOR GENTRY, DEFENDANT

No. 478PA83

(Filed 28 August 1984)

Bastards § 1 — failure to support illegitimate child — prior criminal action establishing paternity and ordering lump sum settlement

Defendant's 1974 plea of guilty to a criminal charge of nonsupport of an illegitimate child, pursuant to G.S. 49-2, did not bar an action by the Wilkes County Department of Social Services for child support pursuant to G.S. 110-128, *et seq.* Credible, uncontroverted evidence of defendant's *plea* of guilty to a criminal charge of nonsupport of the minor child was sufficient to establish paternity so as to bring defendant within the definition of "responsible parent" under G.S. 110-129. Plaintiff instituted this action well within the five-year limitation period and defendant, as a responsible parent, was liable for the amount of public assistance paid. Further, a payment of the lump sum amount ordered as a result of the 1974 conviction for nonsupport of an illegitimate child did not relieve defendant of responsibility for further support. G.S. 110-135, G.S. 110-137, G.S. 49-14, G.S. 49-2, G.S. 49-7, G.S. 50-13.7, and G.S. 50-13.4(b)(c).

DEFENDANT appeals from a decision of the Court of Appeals, 63 N.C. App. 432, 305 S.E. 2d 207 (1983), one judge dissenting, which reversed summary judgment entered for defendant by *Osborne, J.*, at the 22 February 1982 Session of District Court, WILKES County.

The action was instituted by the Wilkes County Department of Social Services to recover past public assistance paid for the support of an illegitimate minor child, and to secure an order for continuing child support from the defendant.

The sole issue on appeal is whether the defendant's 1974 plea of guilty to a criminal charge of nonsupport of an illegitimate child, pursuant to G.S. § 49-2, bars this action by Wilkes County DSS for child support pursuant to G.S. § 110-128, *et seq.* We hold that it does not. For the reasons set forth below we modify and affirm the decision of the Court of Appeals.

Franklin Smith, attorney for defendant-appellant.

Paul W. Freeman, Jr., attorney for plaintiff-appellee.

MEYER, Justice.

The minor child was born out of wedlock on 27 September 1973. Shortly thereafter the child's mother initiated a criminal action against the defendant for nonsupport of an illegitimate child. The record contains a certified copy of defendant's plea of guilty to this charge on 27 June 1974. The court ordered that prayer for judgment be continued on the condition that defendant pay a lump sum settlement of $2,500.00 to the mother, in addition to the medical expenses incident to the child's birth.

The record further discloses that Wilkes County DSS is currently paying $127.00 a month for the support of the minor child and had paid a total of $1,352.50 as of 26 February 1982.

In November 1981 Wilkes County DSS filed a complaint asking that the defendant be adjudicated the father of the minor child; that he be ordered to indemnify the State for all past public assistance paid on behalf of the minor child; and that he be ordered to provide such continuing support for the minor child as may be adequate and reasonable.

Defendant's answer denied paternity and pled the statute of limitations as a bar. On 11 March 1982 the trial judge granted defendant's motion for summary judgment.

Wilkes County DDS appealed to the Court of Appeals. That court reversed, holding that "summary judgment was improperly entered for the defendant and should have been entered for the

plaintiff." *Id.* at 438, 305 S.E. 2d at 212. The Court of Appeals remanded the case for a finding on the reasonable needs of the minor child and the ability of the defendant to pay.

Defendant argued to the Court of Appeals, as he does to this Court, that plaintiff is precluded from recovering in this civil action because following his 1974 plea of guilty, the payment of the lump sum amount essentially satisfied his obligation to support the minor child. Plaintiff argued that the criminal action established paternity and should estop further litigation on that issue and that defendant's lump sum payment in 1974 did not preclude a subsequent civil action for past (1974 to present) and continuing future support. The Court of Appeals gave collateral estoppel effect to the "implicit determination" of paternity in the criminal action and, based on this holding, concluded that defendant was liable to the plaintiff for past and future support rendered on behalf of the minor child.

While we agree with the result reached by the Court of Appeals, we find it unnecessary to determine whether defendant's 1974 plea of guilty to the criminal charge of nonsupport must be given collateral estoppel effect. *See State v. Lewis*, 311 N.C. 727, 319 S.E. 2d 145 (1984) which addresses that issue. At the hearing on the motion for summary judgment the plaintiff submitted the Transcript of Plea Negotiations and Order for Judgment in the prior criminal case as evidence of defendant's paternity. Defendant made no attempt to refute or explain this evidence and it was therefore uncontroverted. The plea of guilty may therefore be considered as an evidentiary admission by the defendant on the issue of paternity. *See* 2 Brandis on N.C. Evidence § 177 (1982); *Grant v. Shadrick*, 260 N.C. 674, 133 S.E. 2d 457 (1963); *Boone v. Fuller*, 30 N.C. App. 107, 226 S.E. 2d 191 (1976). We believe that in this case the credible, uncontroverted evidence of defendant's *plea* of guilty to a criminal charge of nonsupport of the minor child is sufficient to establish paternity so as to bring defendant within the definition of "responsible parent" under G.S. § 110-129. That definition includes "the father of an illegitimate child." Our holding is not dependent upon the determination of defendant's guilt in the 1974 criminal case.

G.S. § 110-135 provides the authority under which plaintiff is entitled to recover for past public assistance rendered on behalf of the minor child. That section provides in pertinent part that:

> Acceptance of public assistance by or on behalf of a dependent child creates a debt, in the amount of public assistance paid, due and owing the State by the responsible parent or parents of the child. . . . This liability shall attach only to public assistance granted subsequent to June 30, 1975, and only with respect to the period of time during which public assistance is granted, and only if the responsible parent or parents were financially able to furnish support during this period.
>
> The United States, the State of North Carolina, and any county within the State which has provided public assistance to or on behalf of a dependent child shall be entitled to share in any sum collected under this section, and their proportionate parts of such sum shall be determined in accordance with the matching formulas in use during the period for which assistance was paid.
>
> No action to collect such debt shall be commenced after the expiration of five years subsequent to the receipt of the last grant of public assistance. The county attorney or an attorney retained by the county and/or State shall represent the State in all proceedings brought under this section.

The record discloses that defendant's minor child, as of 26 February 1982, had received $1,352.50 in past public assistance paid.

G.S. § 110-137 provides that:

> By accepting public assistance for or on behalf of a dependent child or children, the recipient shall be deemed to have made an assignment to the State or to the county from which such assistance was received of the right to any child support owed for the child or children up to the amount of public assistance paid. The State or county shall be subrogated to the right of the child or children or the person having custody to initiate a support action under this Article and to recover any payments ordered by the court of this or any other state.

Plaintiff instituted this action well within the five year limitation period[1] and defendant, as a responsible parent, is liable for the amount of public assistance paid.

We do not accept defendant's contention that the payment of the lump sum amount ordered as a result of the 1974 conviction for nonsupport of an illegitimate child relieves defendant's responsibility for future support. The 1974 action was brought pursuant to G.S. § 49-2 and the lump sum payment was ordered pursuant to G.S. § 49-7. G.S. § 49-7 provides, in pertinent part, that:

> Compliance by the defendant with any or all of the further provisions of this Article or the order or orders of the court requiring additional acts to be performed by the defendant shall not be construed to relieve the defendant of his or her responsibility to pay the sum fixed *or any modification or increase thereof.* (Emphasis added.)

See State v. Dill, 224 N.C. 57, 29 S.E. 2d 145 (1944); *State v. Duncan*, 222 N.C. 11, 21 S.E. 2d 822 (1942). G.S. § 49-7, read together with G.S. § 50-13.7, which provides for the modification of an order for child support, clearly contemplates a continuing obligation on the part of the parents of an illegitimate child to provide support, including when necessary the modification or increase of payments ordered to satisfy this obligation. We therefore hold that, having been conclusively determined a "responsible parent," as that term is defined in G.S. § 110-129, defendant must

1. In its brief to this Court, defendant argues that plaintiff is barred by the limitation period in G.S. § 49-14. When this suit was instituted, G.S. § 49-14(c) provided that: "(a) The paternity of a child born out of wedlock may be established by civil action. Such establishment of paternity shall not have the effect of legitimation. . . (c) Such action shall be commenced within one of the following periods: (1) Three years next after the birth of the child; or (2) Three years next after the date of the last payment by the putative father for the support of the child, whether such last payment was made within three years of the birth of such child or thereafter. Provided, that no such action shall be commenced nor judgment entered after the death of the putative father." We note first that this statute has been amended to remove the 3-year limitation period. *See* N.C. Gen. Stat. § 49-14(c) (Cum. Supp. 1983). Furthermore, we have treated plaintiff's action as one instituted pursuant to G.S. § 110-128, *et seq.*, to recover past public assistance. It was not a civil action to establish paternity pursuant to G.S. § 49-14. Finally, defendant did not raise or argue this issue in the Court of Appeals and is therefore precluded from making the argument to this Court. N.C. Rules of App. Proc. 16(a).

necessarily remain liable for the future support of his minor child. *See* G.S. § 50-13.4(b) and (c) (providing that the father and the mother shall be primarily liable for the support of a minor child and authorizing the court to order the parties to provide support).

The case is remanded to the Court of Appeals for further remand to the trial court for findings on the reasonable needs of the minor child and the ability of the defendant to pay them.

Modified and affirmed.

In re Shue

IN THE MATTER OF: LORETTA DIANE SHUE

No. 366A83

(Filed 28 August 1984)

1. **Infants § 6— review hearing of temporary placement of child—return of child to parent**

G.S. 7A-657 contemplates that a child may be returned to the parent(s) from whose custody it was taken if the trial court finds sufficient facts to show that the child will receive proper care and supervision from the parent(s) and that such placement is deemed to be in the best interest of the child.

2. **Infants § 6— review hearing of temporary placement—erroneous use of change of circumstances standard**

In a review hearing of a temporary placement of a neglected child with her father after custody was removed from the mother, the trial court erred in using a "change of circumstances" standard and in requiring the mother to show that the child was being inappropriately cared for by the father before custody would be returned to her.

3. **Infants § 6— review hearing of temporary placement—failure to hear relevant testimony**

In a review hearing of a temporary placement of a neglected child with her father after custody was removed from the mother, the trial court erred in failing to hear and consider the testimony of various witnesses tendered by the mother which tended to disclose relevant facts concerning the mother's changed circumstances and the care or lack of care which the father and his wife were then providing for the child.

4. **Infants § 6— review hearing of temporary placement—no authority to award permanent custody or terminate jurisdiction**

In a review hearing of a temporary placement of a neglected child with her father after custody was removed from the mother, the trial court did not have authority to make an award of permanent custody where the father did not file a motion in the cause pursuant to G.S. 50-13.1 seeking custody of the child. Nor did the trial court have authority to terminate its jurisdiction over the case where the child had not reached her eighteenth birthday, no person or agency claiming the right of custody made a motion in the cause seeking custody pursuant to G.S. 50-13.1, and custody of the child was not restored to the parent from whom custody was taken. G.S. 7A-647, -657.

Justice MEYER concurring in result.

APPEAL of right, pursuant to G.S. 7A-30(2), by the Mecklenburg County Department of Social Services and the guardian *ad litem* from the decision of the majority panel of the Court of Appeals, 63 N.C. App. 76, 303 S.E. 2d 636 (1983), reversing the Order of *Judge William G. Jones*, entered on 8 September 1981, in Dis-

trict Court, MECKLENBURG County. Heard in the Supreme Court 6 October 1983.

Ruff, Bond, Cobb, Wade & McNair, by Moses Luski, for Mecklenburg County Department of Social Services, petitioner-appellant.

W. Thomas Ray, Guardian ad Litem, for Loretta Diane Shue, a minor.

Richard F. Harris, III, for Omega Lee James, respondent-appellee.

FRYE, Justice.

In this case the two dispositive issues on appeal relate to the review hearing which was conducted by the trial court on 8 June 1981. The dispositive issues are whether the trial court erred by imposing an erroneous burden of proof on the mother, Omega Lee James, in her effort to regain custody of her child, Loretta Shue, and whether the trial court erred in awarding custody of Loretta Shue to Roy Shue without hearing the testimony of various witnesses who were tendered to the trial court by Omega Lee James. The Court of Appeals concluded that the trial court had erred in both respects. After carefully reviewing the record and the applicable statutes, we find that the result reached by the majority panel of the Court of Appeals was correct; however, we modify that opinion in some respects.

On 20 September 1979, the Mecklenburg County Department of Social Services (hereinafter "DSS") filed a juvenile petition in the District Court, Mecklenburg County, alleging that Loretta Diane Shue, three years of age, was a "dependent child" as defined by G.S. 7A-278(3) (1969),[1] or in the alternative, that she was a "neglected child" as defined by G.S. 7A-278(4) (1969).[2] One of the facts relied upon by DSS to support the filing of the juvenile petition was that on or about June 1979, in response to a referral

1. G.S. 7A-278(3) (1969) was repealed by the 1979 N.C. Sess. Laws c. 815 § 1, and has been replaced by G.S. 7A-517(13) (1981). Throughout this opinion, we shall refer to the new statutory provisions of the North Carolina Juvenile Code.

2. G.S. 7A-278(4) (1969) was repealed by the 1979 N.C. Sess. Laws c. 815 § 1, and has been replaced by G.S. 7A-517(21) (1981).

from other sources, DSS discovered that Loretta Shue had "sustained serious and extensive bruises on the front of her abdomen, left side and buttocks." At that time, the mother, Omega Lee,[3] explained that the child had been dropped over a hamper by her boyfriend, Tommy Boatwright. Another fact relied upon by DSS was that on 15 September 1979, Loretta Shue was admitted to Presbyterian Hospital "in an unconscious state with a black eye and was diagnosed as having a concussion and a possible bruised kidney." On this occasion, the mother stated that the child was injured when she fell out of her bed. Based upon information and belief, DSS opined that the injuries sustained by the child "were the result of either a failure to supervise or actual physical abuse of the child."

After the presentation of evidence at an adjudicatory hearing conducted on 26 September 1979 and 8 October 1979, the trial court, Judge William G. Jones presiding, determined that the head injury suffered by Loretta Shue on 15 September 1979 was not the result of an accident. Instead, Judge Jones concluded that the injuries were the result of an assault on the child by either the mother or the mother's boyfriend. Thereafter, the trial court adjudged Loretta Shue a "neglected child," and DSS was awarded temporary custody of Loretta Shue. DSS also was requested to submit to the trial court a plan "and alternative plans" for "permanent placement of Loretta Diane Shue."

Subsequently, on 7 November 1979, Roger (hereinafter "Roy") Eugene Shue filed a motion with the trial court in which he stated that he was the natural father of Loretta Shue. Additionally, he stated that it was in the best interest of Loretta Shue that she be placed in his care, custody and control.

At a dispositional hearing conducted on 8 November 1979, DSS submitted to the trial court, Judge William G. Jones presiding, a plan outlining the specific areas which had to be addressed in order for Loretta Shue to be returned to her mother's custody. At this hearing, the trial court also determined the respective amounts of child support to be paid to DSS by Omega

3. At the time the initial petition was filed by DSS, the mother's name was Omega Lee. However, since that time the mother has married and her name is Omega Lee James. The usage of either name in this opinion shall refer exclusively to the mother of Loretta Shue.

Lee and Roy Shue. Additionally, psychological evaluations of Roy Shue, his wife, Marilyn Shue, and Omega Lee were ordered. If deemed appropriate by the psychiatrist, Loretta Shue was also to be examined.

On 28 December 1979 another dispositional hearing was held. At this hearing, the evidence disclosed that Roy and Marilyn Shue were married in February 1967. It was the second marriage for both. Mrs. Shue had three children from a previous marriage, one of whom is Omega Lee, the mother of Loretta Shue. In April or May 1975, Roy and Marilyn Shue separated. In June 1978, the Shues reconciled and re-established their marriage. They have lived together since that time. During the time that Roy and Marilyn Shue were separated, Omega Lee continued to live with Roy Shue. It was during this interval that Roy Shue fathered Omega's child, Loretta. After hearing the above evidence and other evidence, the trial court noted that the psychological evaluations of Mr. and Mrs. Roy Shue failed to answer several questions which it considered crucial in order to make a final disposition. Therefore, the trial court ordered that certain specific questions had to be answered by the psychiatrist before any disposition could be made. Custody of Loretta Shue was ordered to remain with DSS.

On 8 February 1980, at the conclusion of the dispositional hearing, the trial court, Judge William G. Jones presiding, entered a Dispositional Order directing that DSS retain legal custody of the child but further directing that Loretta Shue shall "be placed in trial placement with Mr. & Mrs. Roy Eugene Shue," for one year. Visitation rights were granted to the mother.

At the review hearing held on 8 June 1981, the trial court considered various psychiatric evaluation reports and home studies done by DSS of the putative father's household and the mother's new household, which was set up after her marriage. Both studies recommended that custody of Loretta Shue remain with her father since she had adjusted well and it was important that she have stability in her life. However, after considering the above evidence and listening to the testimony of Omega Lee James, Roy Shue, and Dr. Edward C. Holscher, the psychiatrist who examined Roy and Marilyn Shue and Loretta Shue, the trial court limited Mrs. Omega James to one hour to present additional evidence. Additionally, the trial court stated:

> I think that unless Mrs. James is able to prove that Omega [sic] is being inappropriately cared for by the Shues that it would be in Loretta's best interest to remain with them because that's where she's lived for the last year and a half, because she is with one of her natural parents, and because she was removed from Mrs. James's [sic] custody and placed there on account of Mrs. James's [sic] own action or inaction, as the case may be, under circumstances that threatened her child's life.

At that time, the attorney for Mrs. Omega James moved for a mistrial on the ground that the trial court had formed an opinion without hearing all the evidence. This motion was denied by the trial court. Thereafter, without hearing all of the evidence tendered by counsel for Mrs. James, the trial court entered an order granting "full legal and physical care, custody and control" of Loretta Shue to Roy Shue. Mrs. James was given visitation rights.

On appeal, the Court of Appeals held that the trial court erred by using, "in effect, a change of circumstance standard" in the instant case and by "requiring the mother to show that it was not in the child's best interest for the child to stay with the father." The Court of Appeals also held that the trial court erred by making its custody decision before hearing all of the evidence which was tendered by the mother.

Other facts necessary to determine the issues raised on appeal will be incorporated in this opinion.

At the review hearing, which is mandated by G.S. 7A-657 (1981), and which was conducted on 8 June 1981, Mrs. Omega James was attempting to present evidence to the trial court which would convince the trial court that it was in the best interest of Loretta Shue that custody be restored to her. After hearing the testimony of Mrs. Omega James and Dr. Edward Holscher, a psychiatrist, the trial court announced an hour recess and stated the following:

> COURT: This is a Review hearing, and I have read and considered the report prepared by Dr. Holscher and dated on May 28th or whatever it was and that, in addition to that, I've heard testimony from him and he has been examined and

cross-examined by all parties; and that I've heard Mrs. James's [sic] testimony; that I've read the report prepared by Ms. Patterson and dated February, and if I understand correctly that's still the Department's position, and the report attached to that report from the Department of Social Services in Cabarrus County, including the Affidavit by whatever her name was, regarding the marks on the child's buttocks and that I've read the report from the Cherokee County Department of Social Services regarding the James' residence; and that I am willing to have you, Mr. Harris, present whatever evidence you care to present, either through live testimony of witnesses or through your own statements summarizing what their testimony would be; and I'm willing to give an additional hour in which to do that; and, as far as I think the Statute requires me to base the decision I have to make on the best interest of the child, but I want to express the preliminary opinion that I think that unless Mrs. James is able to prove that Omega [sic] is being inappropriately cared for by the Shues that it would be in Loretta's best interest to remain with them because that's where she's lived for the last year and a half, because she is with one of her natural parents, and because she was removed from Mrs. James's [sic] custody and placed there on account of Mrs. James's [sic] own action or inaction, as the case may be, under circumstances that threatened her child's life. I think that I tried to carefully say what I feel about it, and I think that pretty well summarizes my point of view at this point. . . . (inaudible) . . [.] the child's being mistreated by the Shues, I think all the reports, including specifically the report from the Cabarrus County and from Dr. Holscher, indicate that she is receiving appropriate care there. And it's my philosophy that when children are being properly cared for they ought not to be switched or moved, and I guess that's the underlying basis for my opinion. I'm sympathetic to Omega's anger at me and her frustration with this process and yet I can't understand why she doesn't accept some responsibility herself for the situation she finds herself in. That child was in the hospital, and if the doctor's reports are to be believed, in very serious condition. And it happened while she was there, and if she didn't do it, the boyfriend with whom she continued to live through the last hearing did do it

> because the evidence, the factual evidence, is just inconsistent with the child falling out of bed. Every doctor and every psychiatrist who have examined that evidence have come to that conclusion that I'm aware of. I don't know, in light of that expression of opinion, Rich, whether you care to go on or not, but if you want to I'm willing for you to; if you don't want to I'm willing to enter an Order now on the basis of what I've heard.

After the trial court had made the above comments, Mr. Harris, counsel for the mother, objected to the trial court's limitation of one hour for additional testimony from the mother and also made a motion for a mistrial. This motion was denied. Thereafter, the trial court stated that it was inclined to leave Loretta Shue in the custody of her father "in the absence of any proof showing that she is not receiving the appropriate care." Then, without hearing the additional testimony of the witnesses which the mother had planned to present at trial, the trial court entered an Order granting custody of Loretta Shue to Roy Shue.

Although both of the dispositive issues in the instant case relate to the review hearing, we consider it appropriate to quote pertinent parts of the statutory provisions of the North Carolina Juvenile Code which are applicable to this case. Those statutes are G.S. §§ 7A-516, -640, -646, -647 and -657 (1981). Those statutes, in pertinent part, respectively provide as follows:

> § 7A-516. Purpose.
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> This Article shall be interpreted and construed so as to implement the following purposes and policies:
>
> . . . .
>
> (3) To develop a disposition in each juvenile case that reflects consideration of the facts, the needs and limitations of the child, the strengths and weaknesses of the family, and the protection of the public safety.
>
> § 7A-640. Dispositional hearing.
>
> The dispositional hearing may be informal, and the judge may consider written reports or other evidence concerning the needs of the juvenile. The juvenile and his parent, guardian, or custodian shall have an opportunity to present evi-

dence, and they may advise the judge concerning the disposition they believe to be in the best interest of the juvenile. The judge may exclude the public from the hearing unless the juvenile moves that the hearing be open, which motion shall be granted.

§ 7A-646. Purpose.

The purpose of dispositions in juvenile actions is to design an appropriate plan to meet the needs of the juvenile and to achieve the objectives of the State in exercising jurisdiction. If possible, the initial approach should involve working with the juvenile and his family in their own home so that the appropriate community resources may be involved in care, supervision, and treatment according to the needs of the juvenile. Thus, the judge should arrange for appropriate community-level services to be provided to the juvenile and his family in order to strengthen the home situation.

§ 7A-647. Dispositional alternatives for delinquent, undisciplined, abused, neglected, or dependent juvenile.

The following alternatives for disposition shall be available to any judge exercising jurisdiction, and the judge may combine any of the applicable alternatives when he finds such disposition to be in the best interest of the juvenile:

(1) The judge may dismiss the case, or continue the case in order to allow the juvenile, parent, or others to take appropriate action.

(2) In the case of any juvenile who needs more adequate care or supervision or who needs placement, the judge may:

a. Require that he be supervised in his own home by the Department of Social Services in his county, a court counselor or other personnel as may be available to the court, subject to conditions applicable to the parent or the juvenile as the judge may specify; or

b. Place him in the custody of a parent, relative, private agency offering placement services, or some other suitable person; or

c. Place him in the custody of the Department of Social Services in the county of his residence, or in the case

of a juvenile who has legal residence outside the State, in the physical custody of the Department of Social Services in the county where he is found so that agency may return the juvenile to the responsible authorities in his home state. Any department of social services in whose custody or physical custody a juvenile is placed shall have the authority to arrange for and provide medical care as needed for such juvenile.

§ 7A-657. Review of custody order.

In any case where the judge removes custody from a parent or person standing in loco parentis because of dependency, neglect or abuse, the juvenile shall not be returned to the parent or person standing in loco parentis unless the judge finds sufficient facts to show that the juvenile will receive proper care and supervision.

In any case where custody is removed from a parent, the judge shall conduct a review within six months of the date the order was entered, and shall conduct subsequent reviews at least every year thereafter. . . .

The court shall consider information from the Department of Social Services; the juvenile court counselor, the custodian, guardian, the parent or the person standing in loco parentis, the foster-parent, the guardian ad litem; and any public or private agency which will aid it in its review.

In each case the court shall consider the following criteria:

(1) Services which have been offered to reunite the family;

(2) Where the juvenile's return home is unlikely, the efforts which have been made to evaluate or plan for other methods of care;

(3) Goals of the foster care placement and the appropriateness of the foster care plan;

(4) A new foster care plan, if continuation of care is sought, that addresses the role the current foster parent will play in the planning for the juvenile;

(5) Reports on the placements the juvenile has had and any services offered to the juvenile and the parent;

(6) When and if termination of parental rights should be considered;

(7) Any other criteria the court deems necessary.

The judge, after making findings of fact, shall enter an order continuing the placement under review or providing for a different placement as is deemed to be in the best interest of the juvenile. If at any time custody is restored to a parent, the court shall be relieved of the duty to conduct periodic judicial reviews of the placement.

As previously noted, the Court of Appeals held that the trial court had imposed an erroneous burden of proof on the mother, Mrs. Omega James, at the review hearing. In reaching the conclusion that the trial court erred by using "a change of circumstance standard and by requiring the mother to show that it was not in the child's best interest for the child to stay with the father," the majority panel of the Court of Appeals stated the following:

> N.C. Gen. Stat. § 7A-657 contemplates that a child will be returned to the parent from whose custody it was taken *if* the trial court finds sufficient facts to show that the child will receive proper care and supervision from that parent. The quintessential purpose of reuniting child and parent is not inconsistent, however, with custody being placed in the father in this case. Removal from one parent to another parent, simply put, does not fit neatly into the language in the first paragraph of the statute. (Footnote omitted.)
>
> . . . .
>
> The burden placed on the mother—to prove a negative—is almost impossible as a practical matter, and more than G.S. § 7A-657 requires as a legal matter. So, we state the principle applicable to this case. In order to have custody restored to her, G.S. § 7A-657 requires the mother to show only that the child "will receive proper care and supervision" *and* that such "placement . . . is deemed to be in the best interest of the [child]." Consequently, evidence of the mother's own changed circumstances and evidence that the child's wel-

> fare is being adversely affected by the child's present environment are both factors in the equation. (Emphases in original.)

In re Shue, 63 N.C. App. 76, 80-82, 303 S.E. 2d 636, 639 (1983).

[1] A careful reading of G.S. 7A-657 along with the other statutes contained in the Juvenile Code supports the conclusion reached by the majority panel of the Court of Appeals. However, we disagree with the following sentence in the majority opinion of the Court of Appeals: "N.C. Gen. Stat. § 7A-657 contemplates that a child will be returned to the parent from whose custody it was taken *if* the trial court finds sufficient facts to show that the child will receive proper care and supervision from the parent." *In re Shue*, 63 N.C. App. at 80, 303 S.E. 2d at 639. The correct interpretation of G.S. 7A-657 is that it contemplates that a child *may* be returned to the parent(s) from whose custody it was taken if the trial court finds sufficient facts to show that the child "will receive proper care and supervision" from the parent(s). However, before custody is restored to that parent, the trial court also must find that such "placement . . . is deemed to be in the best interest of the [child]."

It is clear from the statutory framework of the Juvenile Code that one of the essential aims, if not the essential aim, of the dispositional hearing and the review hearing is to reunite the parent(s) and the child, after the child has been taken from the custody of the parent(s). The fact that the eventual return of the child to the parent(s) is in practice a central focus of the dispositional hearing and the review hearing is evidenced in this case by a DSS report entitled, "Disposition Hearing or 30-Day Hearing." In that report, DSS enumerated the specific areas which had to be addressed by Ms. Omega Lee before Loretta Shue could be returned to her custody. After further stating what was expected of Ms. Omega Lee, DSS stated that the primary plan for Loretta Shue was as follows:

> VI. Primary plan for child: Eventual return of Loretta to Ms. Omega Lee once Ms. Lee has met the conditions stated above and any other changes that may occur in the future.

However, in spite of the contents of the above report and in spite of the fact that the trial court knew that "the best interest

of the child" was the "polar star" by which its final decision was to be made, the trial court erroneously employed a change of circumstance standard upon the review hearing, and additionally, the trial court erroneously imposed upon the mother the burden of proving that Loretta Shue was being inappropriately cared for by Roy and Marilyn Shue. Although not explicitly stated in the majority opinion of the Court of Appeals, the statutory language of G.S. 7A-640 and G.S. 7A-657 does not place any burden of proof upon either the parent(s) or DSS during the dispositional hearing or the review hearing. The essential requirement, at the dispositional hearing and the review hearing, is that sufficient evidence be presented to the trial court so that it can determine what is in the best interest of the child.

In determining the best interest of the child, the trial court should consider a number of factors, too numerous to be named here. However, those factors would include the changed circumstances of the mother's environment and the type of care which the Shues are providing for Loretta Shue. Nevertheless, neither of the above factors would necessarily be controlling nor determinative of the best interest of Loretta Shue.

[2] Whenever the trial court is determining the best interest of a child, any evidence which is competent and relevant to a showing of the best interest of that child must be heard and considered by the trial court, subject to the discretionary powers of the trial court to exclude cumulative testimony. Without hearing and considering such evidence, the trial court cannot make an informed and intelligent decision concerning the best interest of the child. In view of the foregoing, it is clear that the trial court erred by trying this case as a change of circumstance case and by requiring the mother to show that Loretta Shue was being inappropriately cared for by the Shues before custody of Loretta Shue would be returned to her. The commission of the above errors by the trial court was prejudicial to the mother's case and entitles her to a new review hearing.

[3] Additionally, as held by the majority panel of the Court of Appeals, the trial court erred by not hearing all of the evidence which the mother was prepared to present to the court.[4] This

4. Although we agree with the conclusion reached by the majority opinion of the Court of Appeals finding error in the trial court's failure to hear all of the

evidence consisted of the testimony of several witnesses, some of whom resided in South Carolina, who were prepared to testify on behalf of Mrs. Omega James. Their testimony, which was put into the record after the trial judge had left the bench and had stated his decision concerning the future custody of Loretta Shue, tended to disclose, *inter alia*, relevant facts and circumstances concerning the mother's changed circumstances[5] and the care or lack of care which Roy and Marilyn Shue were then providing for Loretta Shue. Without hearing and considering this evidence (although the trial court was not required to believe this evidence), the trial court could not intelligently decide what was in the best interest of Loretta Shue. In spite of the fact that all of the psychological reports and the reports prepared by various DSS professionals recommended that it was in the best interest of Loretta Shue for her to remain in the custody of her father, Roy Shue, the trial court was still required to hear and consider all of the evidence tendered to the court by the mother which was competent, relevant and non-cumulative. In failing to do so, the trial court committed prejudicial error.

[4] For the purpose of providing guidance to the trial court upon the rehearing of this case, we note that the trial court entered an Order at the end of the review hearing which stated as follows: "Loretta Diane Shue is hereby placed in the full legal and physical care, custody and control of Roy Eugene Shue." Additionally, the trial court terminated its jurisdiction over this case citing G.S. 7A-524 (1981). The trial court did not have authority to make an award of permanent custody during the review hearing of the *trial placement* of Loretta Shue which was based upon a prior adjudication of neglect. Furthermore, the trial court did not have authority to terminate its jurisdiction over the instant case.

In the case *sub judice*, the trial court was reviewing the *trial placement* of Loretta Shue with her father, Roy Shue, and his

evidence tendered by the mother, we note that nothing herein is intended to affect the trial court's authority to exclude incompetent, irrelevant and cumulative evidence.

5. Since the trial placement of Loretta Shue with Roy and Marilyn Shue, the mother had gotten married and had moved into her own home in South Carolina. It was disclosed at oral argument that, sometime after the review hearing, the mother and her husband moved to Charlotte, North Carolina.

wife, Marilyn Shue. In accordance with the explicit language of G.S. 7A-657, the trial court was only authorized to do one of the following: (1) enter an order continuing the placement under review; (2) enter an order providing for a different placement; or (3) restore custody of Loretta Shue to her mother. Regardless of the option chosen by the trial court, the trial court must deem that option to be in the best interest of Loretta Shue. *See* G.S. 7A-657.

The trial court would have been authorized to award custody of Loretta Shue to Roy Shue in this *neglect proceeding* if Roy Shue had filed a motion in the cause pursuant to G.S. 50-13.1 (1976) seeking custody of Loretta Shue. That is so because pursuant to G.S. 7A-523 (Cum. Supp. 1983) the district court has "exclusive, original jurisdiction over any case involving a juvenile who is alleged to be . . . neglected." Additionally, G.S. 7A-524 provides as follows:

> § 7A-524. Retention of jurisdiction.
>
> When the court obtains jurisdiction over a juvenile, jurisdiction shall continue until terminated by order of the court or until he reaches his eighteenth birthday. Any juvenile who is under the jurisdiction of the court and commits a criminal offense after his sixteenth birthday is subject to prosecution as an adult. Any juvenile who is transferred to and sentenced by the superior court for a felony offense shall be prosecuted as an adult for all other crimes alleged to have been committed by him while he is under the active supervision of the superior court. Nothing herein shall be construed to divest the court of jurisdiction in abuse, neglect, or dependency proceedings.

Therefore, since the district court has exclusive original jurisdiction over Loretta Shue, a juvenile as defined in G.S. 7A-517(20) (1981), until her eighteenth birthday or until the court legally terminates its jurisdiction over her pursuant to statutory authority, *see* G.S. 7A-524, Roy Shue could have filed a motion in the cause pursuant to G.S. 50-13.1 seeking custody of Loretta. Since Roy Shue had not filed such a motion in the instant case, the district court was not authorized, during the review hearing, to enter an

order making an award of custody, other than a temporary placement pursuant to G.S. 7A-647.

We are not persuaded by the appellants' arguments that G.S. §§ 7A-640, -646, -647, and -657 should be read together to allow the trial court to make an award of custody, continue the trial placement under review, order a new trial placement, or return the child to the custody of the parent(s) from whom it was taken. We find G.S. 7A-647, which lists the dispositional alternatives, and G.S. 7A-657, which delineates the options available to the trial court in a review hearing of a trial placement, to be controlling in this case. During the review hearing of a *trial placement* pursuant to G.S. 7A-657, the trial court may, in its discretion, order the implementation of any dispositional alternative listed in G.S. 7A-647. However, if the trial court does not dismiss the case or continue the case pursuant to G.S. 7A-647(1), then G.S. 7A-657 limits the trial court's options to entry of an order continuing the placement, entry of an order providing for a different placement, or entry of an order restoring custody of the child to the parent(s) from whom custody was taken, whichever is deemed to be in the best interest of the child.

We also note that the trial court erroneously terminated its jurisdiction over Loretta Shue and this case. In view of the facts of this case which disclosed that: (1) Loretta Shue had not reached her eighteenth birthday; (2) Neither Roy Shue, Mrs. Omega James, nor "any other person, agency, organization or institution claiming the right to custody of [Loretta Shue]" had made a motion in the cause seeking custody of her, pursuant to G.S. 50-13.1; and (3) Custody of Loretta Shue was not *restored* to the parent from whom custody was taken, i.e. Mrs. Omega James,[6] the trial court was without authority to terminate its jurisdiction over Loretta Shue in the instant case. *See generally* G.S. 7A-524 and -657; G.S. 50-13.1. Until the trial court's jurisdiction was properly terminated pursuant to statutory authority, the trial court was required by G.S. 7A-657 to conduct periodic reviews of all *placements* of Loretta Shue.

6. G.S. 7A-657 provides as follows: "If at any time custody is restored to a parent, the court shall be relieved of the duty to conduct periodic judicial reviews of the placement." If custody had been *restored* to Mrs. Omega James, the trial court could have, although it was not required to, terminated its jurisdiction over Loretta Shue and this case.

In conclusion, we hold that the Court of Appeals correctly held that the mother was entitled to a new review hearing because the trial court erred by conducting this hearing as if it were a "change of circumstances" case, by placing an erroneous burden of proof upon the mother, and by failing to hear and consider the testimony of various witnesses which were tendered to the court by the mother. We also hold that the trial court did not have the authority to make an award of custody in this neglect proceeding under the existing facts nor did the trial court have the authority to terminate its jurisdiction over this case. For the errors committed, the mother, Mrs. Omega James, is entitled to a new review hearing.

Upon the rehearing of this case, the trial court is directed that the best interest of the child is the proper standard which governs its decision in this case. The trial court must consider all of the evidence tendered by the respective parties which tends to show what is in the best interest of Loretta Shue, as long as such evidence is relevant, competent and non-cumulative. An award of custody, as distinguished from a *trial placement* of custody of Loretta Shue, may not be made during the review hearing unless Mr. Shue, Mrs. Omega James, or some other person, agency, organization or institution claiming the right to custody of Loretta Shue files a motion in the cause pursuant to G.S. 50-13.1 seeking an award of custody of Loretta Shue and thereafter all of the parties are given sufficient notice of all the determinations which will be made during the review hearing. If such a motion is properly filed with the trial court and allowed by it, and if, at the end of the review hearing, the trial court awards custody to the party who has filed the motion pursuant to G.S. 50-13.1, or if custody of Loretta Shue is restored to her mother, Mrs. Omega James, then the trial court may terminate its jurisdiction over Loretta Shue and this case.

For all of the foregoing reasons, the majority opinion of the Court of Appeals, as herein modified, is affirmed.

Modified and affirmed.

Justice MEYER concurring in result.

I concur in the result reached by the majority. I desire to add the following: The facts of this case represent an unusual and

complex hybrid situation not easily reconciled under either our North Carolina Juvenile Code or under our Domestic Relations statutes. It is a case involving a custody dispute between the two *natural parents* of a *neglected child.* Temporary placements of neglected children are made pursuant to the North Carolina Juvenile Code, particularly G.S. § 7A-516, -640, -646, -647 and -657 (1981). Custody contests between natural parents are determined in a custody proceeding pursuant to G.S. § 50-13.1, *et seq.*

By failing to recognize the unusual nature of the facts so presented, the majority has fashioned a confusing remedy which serves to cloud the distinction between temporary placement proceedings and the Juvenile Code, and custody proceedings between parents.

In order to support its analysis under the North Carolina Juvenile Code, the majority opinion treats the natural father here as if he were a non-parent. The majority's reasoning throughout the opinion is valid only if the father is so treated.

I would submit that the more appropriate approach under these facts would be to admit of an unusual situation and fashion a remedy to meet the exigency.

Here, when the DSS placed temporary custody in the natural father and the father sought permanent custody, the proceeding should have been converted to a Chapter 50 proceeding upon proper notice to the parties. This could have been done upon motion of the father or by the trial judge *ex mero motu.* Or, under G.S. § 7A-657 the trial judge could have perhaps terminated the temporary placement hearings and awarded custody to the father. That statute specifically so provides.

STATE OF NORTH CAROLINA v. JUNIOR BRAGG KING

No. 521A82

(Filed 28 August 1984)

1. **Homicide § 12— general indictment for murder—no decision as to degree of murder before indictment returned—trial for first degree murder not barred**

The State was not barred from prosecuting defendant for first degree murder because he was indicted under a general indictment for murder which did not specify whether it charged first or second degree murder and the district attorney had not made a decision to prosecute for first degree murder at the time the bill of indictment was submitted to the grand jury.

2. **Criminal Law § 22— arraignment for "murder"—prosecution for first degree murder not barred**

The prosecution of defendant for first degree murder was not barred on the ground that he was arraigned generally for "murder" and not specifically for first degree murder where defendant waived a reading of the indictment at his arraignment and made no objection at the arraignment to the proceedings.

3. **Constitutional Law § 28; Homicide § 31.3— first degree murder—no arbitrary selection of defendant for prosecution**

The prosecution of defendant for first degree murder was not barred on the ground that he was arbitrarily and capriciously selected for trial under our capital sentencing statute where there was no showing that the district attorney based his decision to prosecute defendant for first degree murder upon an unjustifiable standard like race, religion or other arbitrary classification.

4. **Criminal Law § 75.12— confession violating Miranda rights—use for impeachment**

A defendant's statement elicited in violation of his Miranda rights may nevertheless be used on cross-examination to impeach defendant's testimony provided the statement was voluntarily made.

5. **Criminal Law § 75.12— confession violating Miranda rights—use for impeachment—voluntariness**

The evidence and the trial court's findings of fact supported the conclusion of law that defendant's in-custody statements, even if obtained in violation of defendant's Miranda rights, were voluntary and could properly be used to impeach defendant's testimony.

6. **Jury § 5— hearing impaired juror—refusal to excuse**

Although it is the better practice for trial judges freely to excuse any juror who has a genuine hearing impairment which in the juror's opinion would hamper his or her ability to perform a juror's duties, the trial judge's failure to do so in this case did not constitute an abuse of discretion where the trial judge questioned the juror and concluded that his hearing was not so impaired as to prevent him from serving as a juror, and the juror stated that he

could raise his hand during the trial if anything was said which he did not understand.

7. Criminal Law §§ 34.7, 34.8— proof of another crime—admissibility to show motive and common scheme

In a prosecution for first degree murder, testimony by a witness tending to show that defendant shot the victim's current boyfriend before he went to the victim's house and shot her was relevant to show that defendant's motive for shooting the victim was jealousy and to show that both shootings arose out of a common scheme of defendant.

8. Homicide § 15.4— testimony about autopsy—sufficient foundation

An officer's testimony that he knew the murder victim personally and attended the autopsy and received a large caliber bullet which the pathologist removed from the victim's abdomen laid a sufficient foundation for the pathologist's testimony concerning the autopsy.

9. Criminal Law § 42.6— tests on weapons and other items—chain of custody

Testimony concerning tests performed on a pistol and rifle seized from defendant's car, a spent projectile removed from decedent's body, and spent shell casings were properly admitted where the State established a sufficient chain of custody of all the items and showed that there was no material change in their condition from the seizure to the analysis and to the identification during trial.

10. Criminal Law § 99.2— inquiry by court—no expression of opinion

The trial court did not express an opinion on the evidence by an inquiry to the jury, immediately before defendant testified, concerning whether it would prefer to reconvene on Saturday or the following Monday. G.S. 15A-1222.

11. Bills of Discovery § 6— failure to disclose defendant's statements to officers—exclusion of statements not required

Although defendant's oral statements to officers fall within our discovery statute, G.S. 15A-903(a)(2), and should have been disclosed by the State pursuant to defendant's request, the trial court did not err in failing to exclude such statements as a sanction for failure to disclose them to defendant where defendant was well aware of his pretrial statements to one officer and admitted in his own direct testimony that he had made them; defendant had full opportunity to inquire about his statements to the second officer on voir dire in the absence of the jury; and there was no suggestion that defendant would not have testified had he been previously apprised of the State's contentions about his statements to the second officer.

12. Bills of Discovery § 6— failure to disclose criminal record—mistrial not required

The trial court did not abuse its discretion in the denial of defendant's motion for a mistrial made because the State had failed to disclose his criminal record and defendant was cross-examined regarding a 1966 conviction for "an affray with a deadly weapon" where defendant did not object to the cross-

examination, and defendant had admitted on direct examination two prior convictions for assault with a deadly weapon in 1968.

APPEAL by defendant from a verdict of guilty of first degree murder and a judgment sentencing him to life imprisonment entered by *Judge Fetzer Mills* at the 7 June 1982 Criminal Session of the Superior Court of RANDOLPH County.

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

Thomas F. Kastner for defendant appellant.

EXUM, Justice.

Defendant raises a number of errors in the pretrial and trial proceedings which led to his conviction of first degree murder. He challenges the sufficiency of the indictment, the manner in which he was arraigned, the exercise of prosecutorial discretion, the admission into evidence of his out-of-court statement, denial of his motion to excuse a juror for cause, various evidentiary rulings, a comment of the trial judge to the jury, denial of a mistrial motion for prosecutorial misconduct, and the trial judge's charge to the jury on motive. We find no reversible error.

I.

Defendant and deceased, Callie Bittle, lived together for a number of years although they were not married. They ceased living together in July 1981 when defendant moved into a house across the street from the house in which they had lived together.

On 22 September 1981 Letha Bittle, mother of the deceased, was at Callie's home with Callie and defendant. John Brown, Callie's new boyfriend, arrived. He approached defendant and asked him why defendant had wanted him to come to the house. Defendant told Brown to leave his wife alone. Callie responded to defendant, "Junior, I'm not your wife. Me and you are not married." Defendant repeated that they were married. Defendant then threatened Callie, saying, "If I catch you with John Brown, I'm going to kill you and him both, and if I catch you with any man, I'm going to kill both you and him."

A neighbor of Brown's, Weldon Garner, testified that on 22 September at approximately 9 or 9:30 p.m. he observed Callie and Brown sitting on the front steps of Brown's trailer. When Garner returned to his trailer at about 10:45 p.m., he observed defendant at Brown's front door. After going into his home, Garner heard a loud noise and remarked to his wife "that's a gunshot." Garner looked and saw defendant coming out of Brown's trailer. Garner went to Brown's trailer, entered it through a window because the front door was locked, and found Brown sitting beside the front door bleeding. Garner did not believe that Brown was breathing.

Later that same night, at approximately 11 p.m., defendant went to Callie's house and knocked on the door. Defendant forced his way into the house. He told Callie that he wanted the title to his truck. Callie began to laugh and giggle. Defendant shot Callie twice with a pistol and, after finding and loading a rifle, shot her again while she was lying on the floor.

Defendant testified in his own behalf. His son from a previous marriage had been killed in an accident in 1974. Using some of the insurance money, defendant paid off the balance due on his truck. He put the title to the truck in Callie's name. When they separated, Callie refused to return the title of the truck to him. Defendant explained that the truck was like a memorial to his dead son; he could not abide the thought of something happening to the truck or of anyone else owning it.

Defendant testified that Callie told him she intended to give the truck to her boyfriend despite her knowing it belonged to him and he valued it greatly. According to defendant, she told him she would take everything he owned and he would have nothing. Callie told him she knew his not having the truck would drive him crazy and after she gave the truck to Brown, her boyfriend, the two of them would ride around in it for everyone to see.

Defendant testified that on the day Callie was killed, he went to Brown's trailer to discuss the truck. Brown laughed at him and told him he had been having sex with Callie and that he would drive defendant's truck any time he wished. Defendant further testified that Brown threatened and struck him. As the defendant fell back, he observed Brown reach into his pocket. At this point defendant shot Brown.

Thereafter defendant drove to Liberty, North Carolina, and went to Callie's residence. He carried the pistol with him. When he asked Callie to transfer the title of the truck to him, she laughed. Defendant stated he had no recollection of what occurred after that, but he "guessed" he shot her. He said the rifle accidentally fired as he was unloading it.

Defendant left Callie's house and went to the police. He told the police that Callie had been shot and that he might be the one for whom they were looking. Defendant denied threatening either Brown or Callie. He said his actions that night were based upon his desire to protect the memory of his dead son and to regain possession of his truck.

Defendant was arrested and charged with the murder of Callie Bittle. A probable cause hearing was held, at which probable cause was found and defendant was bound over to superior court for trial. Relying upon the arrest warrant, the district attorney's office submitted a bill of indictment to the grand jury charging defendant with murder. On 9 November 1982 the grand jury returned the indictment as a true bill.

Defendant moved for a bill of particulars on 11 December 1981. In the motion, defendant requested that the state disclose certain items of information including the degree of the crime being charged.

Three days later the state arraigned defendant for murder. Defendant, represented by counsel, pled not guilty. Thereafter he was tried and convicted of first degree murder and sentenced to life imprisonment. He appeals to this Court as a matter of right. N.C. Gen. Stat. § 7A-30.

II.

[1] Defendant assigns error to the trial court's denial of his motion to bar his prosecution for first degree murder. First, he claims that prosecution for first degree murder should be barred because he was indicted under a general indictment for murder which did not specify whether it charged first or second degree murder and the district attorney had not made a decision to pros-

ecute for first degree murder at the time the bill of indictment was submitted to the grand jury.[1]

The statute governing murder indictments contains no requirement that the indictment specify the degree of murder sought. N.C. Gen. Stat. § 15-144 provides, in pertinent part, that in an indictment for murder

> after naming the person accused, and the county of his residence, the date of the offense, the averment 'with force and arms,' and the county of the alleged commission of the offense, as is now usual, it is sufficient in describing murder to allege that the accused person feloniously, willfully, and of his malice aforethought, did kill and murder [naming the person killed], and concluding as is now required by law. . . .

The indictment involved in this case contained these essential allegations and was returned as a true bill by the grand jury. It alleged "That on or about the 22nd day of September, 1981, in Randolph County Junior Bragg King unlawfully and willfully did feloniously and of malice aforethought kill and murder Callie Belle Bittle." We have held that an indictment which meets the requirements of section 15-144 will support a plea of guilty to or a conviction of either first or second degree murder. *State v. Melton*, 307 N.C. 370, 372, 298 S.E. 2d 673, 676 (1983); *State v. Davis*, 290 N.C. 511, 532, 227 S.E. 2d 97, 110 (1976).

We have not found, in this statute or elsewhere, nor has defendant offered any authority or persuasive reason to require that a prosecutor must determine, before the return of the indictment, whether he will ultimately prosecute a defendant for murder in the first or second degree. We decline to impose such a requirement.

1. This fact was established through the testimony of the district attorney who said, "At the time of the grand jury indictment, we have not normally designated whether it will be tried at that point for first or second degree." His assistant district attorney who prepared the indictment testified that he did so "in the form provided by the statute and had absolutely not decided at that time what degree of offense the defendant would be tried on."

[2] Defendant next argues that his prosecution for first degree murder should be barred on the ground that he was arraigned generally for "murder" and not specifically for first degree murder.[2]

> An arraignment consists of bringing a defendant in open court before a judge having jurisdiction to try the offense, advising him of the charges pending against him, and directing him to plead. The prosecutor must read the charges or fairly summarize them to the defendant. If the defendant fails to plead, the court must record that fact, and the defendant must be tried as if he had pleaded not guilty.

N.C. Gen. Stat. § 15A-941.

An arraignment allows a defendant to enter a plea after hearing the charges against him. *State v. Brown*, 306 N.C. 151, 174, 293 S.E. 2d 569, 584, *cert. denied*, 459 U.S. 1080 (1982). If a defendant feels that he has not been properly informed of the charges against him at arraignment, it is "his duty to object at that time and to have appropriate entries made in the record to show the basis for the objection." *State v. Small*, 301 N.C. 407, 431, 272 S.E. 2d 128, 143 (1980). An objection to the arraignment made just before trial begins some months later "does not suffice to preserve defendant's complaint about what might have occurred when the arraignment actually took place." *Id.*

Defendant was represented by counsel at his arraignment and waived a reading of the indictment. He entered a plea of not guilty. Defendant made no objection at the arraignment to the proceedings. As we have noted above, an indictment drawn in

2. The actual arraignment proceedings did not appear in the original record on appeal. There appeared only an entry prepared by defendant's attorney that at arraignment "[t]o the . . . charge of murder the defendant . . . entered a plea of Not Guilty." After inquiry regarding this omission at oral argument, defendant took the following steps: First he moved in superior court to amend the arraignment form originally signed by an assistant clerk which showed that defendant had "entered a plea of not guilty to the charges [sic] of: 1st deg. Murder." The clerk, apparently with the acquiescence of the district attorney, allowed this motion and "corrected" the original arraignment form to read: "To the criminal charge of Murder the defendant, when called upon to plead, entered a plea of not guilty." Thereafter defendant moved this Court pursuant to App. P. R. 9(b)(6) to amend the record on appeal to include the arraignment proceeding *as amended* by the clerk. We have determined to allow this motion and order that the record on appeal be amended accordingly.

conformity with section 15-144, as is the indictment in this case, is sufficient in law to charge first degree murder and all lesser included offenses. Defendant is deemed to have understood the legal effect of the indictment when he entered his plea, absent any showing to the contrary. There is no such showing in this case. We find, therefore, no properly preserved error in defendant's arraignment.

[3] Defendant also contends that his prosecution for first degree murder should have been barred on the ground that he was arbitrarily and capriciously selected for prosecution under our capital sentencing statute. In support of his allegations, defendant examined the district attorney and several of his assistants. This testimony tended to show: (1) The prosecutor's office has no specific policies or guidelines to determine which cases would be prosecuted as capital cases. (2) "It would depend on the aggravating circumstances and also . . . the circumstances of each case." (3) Generally in homicide cases indictments are sought for first degree murder. (4) Thereafter in the exercise of the prosecutor's discretion a decision is made whether to try the case as a capital case or on some lesser degree of homicide. (5) In a homicide prosecution against Dallas Hoover "there were very aggravating circumstances . . . but . . . our decision to prosecute on second degree . . . was based on the weakness of the evidence against the defendant basically."

We addressed the constitutionality of our capital sentencing procedure with regard to this argument in *State v. Lawson*, 310 N.C. 632, 314 S.E. 2d 493 (1984). In *Lawson* we acknowledged that prosecutors have "no statutory or any other kind of guidelines to follow in making these decisions. Often [a prosecutor] declines to seek a first degree murder verdict and the death penalty because of a case's technical or evidentiary problems." *Id.* at 643, 314 S.E. 2d at 500. Nevertheless, we affirmed Lawson's death sentence. We said:

> 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 456 (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, re-

> ligion, or some other impermissible classification. We are not inclined to interpret our state constitution to require more.

Id. at 643-44, 314 S.E. 2d at 500-01.

Defendant's argument herein is based in part on a comparison of his case with another prosecution against Dallas Hoover. In the Hoover case Mr. Roose, the assistant district attorney who also tried defendant, elected to prosecute for second degree rather than first degree murder. Mr. Roose testified that he based his decision to prosecute Hoover for second degree murder on the weakness of the evidence. Indeed, "there was not," Mr. Roose said, "a conviction" in the Hoover case. Mr. Roose further explained that the presumptive sentence for second degree murder was not applicable to the Hoover case, but was applicable to defendant's case. Mr. Roose felt the 15-year presumptive sentence for second degree murder was inappropriate in defendant's case. Accordingly, he prosecuted defendant for first degree murder.

We find no suggestion supported by the record that the state deliberately employed an "unjustifiable standard" when it chose to prosecute defendant for first degree murder. Defendant has failed to show that "race, religion or other arbitrary classification" led to his prosecution for first degree murder. The reasons which the prosecutors gave in the instant case for seeking a first degree murder conviction were not impermissible. Neither did they make any impermissible distinctions between this case and the Hoover case in determining how to prosecute each of the cases.

We find no error in the trial court's denial of defendant's motion to bar prosecution for first degree murder.

III.

Defendant assigns error to the denial of his motion to suppress his out-of-court, in-custody statements to law enforcement officers. These were not offered during the state's case in chief. When defendant testified, his testimony conflicted with these statements. The district attorney cross-examined defendant concerning the prior inconsistent statements in an effort to impeach his credibility. Defendant argues this cross-examination was improper. We disagree.

[4] The United States Supreme Court has decreed that a defendant's statement, elicited in violation of *Miranda v. Arizona*, 384 U.S. 436 (1966), may nevertheless be used on cross-examination to impeach that defendant's testimony provided the statement was voluntarily made. *Harris v. New York*, 401 U.S. 222, 225-26 (1971). We have adopted that rule in North Carolina. *See State v. Overman*, 284 N.C. 335, 200 S.E. 2d 604 (1973); *State v. Bryant*, 280 N.C. 551, 187 S.E. 2d 111, *cert. denied*, 409 U.S. 995 (1972). To determine the voluntariness or trustworthiness of a confession obtained in violation of *Miranda*, the trial court should conduct a voir dire hearing and make appropriate findings of fact and conclusions of law. *See State v. Richardson*, 295 N.C. 309, 245 S.E. 2d 754 (1978).

[5] In the instant case, defendant objected to the attempted impeachment. The trial court excused the jury and conducted a lengthy voir dire hearing. At the conclusion of this hearing, the court made the following findings of fact:

> That on September 23, 1981, the defendant, Junior Bragg King, was in police—in custody of the officer at the Randolph County Jail at approximately 3:20 a.m., he having voluntarily surrendered himself to the police officers . . . sometime shortly after 11 p.m.; that he was either charged with murder or was charged with some serious assault; that Officer Donald Compton who is a detective with the Alamance County Sheriff's Department had come to the Randolph County Jail for the purpose of talking with Junior Bragg King concerning an incident which occurred in Alamance County sometime before 11 p.m. on the night of September 22. . . . That as Officer Compton talked with Mr. King, that Mr. King told him that he wanted to tell him what happened; that Officer Compton, as he went through the standard form—rights waiver form which his department uses, that he kept having to interrupt Mr. King and say, don't tell me what happened and let me explain the rights form; and that by the time that Officer Compton had finished reading the rights form to the defendant, he had substantially told the Officer his version of what he said had happened. Thereafter, the waiver form was signed and that he indicated on the form that he wanted a lawyer; that he had signed yes to the question do you want a lawyer; that Officer Hinshaw talked to the defendant at

> the—sometime before 3:20 a.m. on the early morning hours of September 23rd, 1981, at the Randolph County Jail and explained the standard rights waiver—Miranda Rights Waiver Form to the defendant and the defendant signed the waiver form and told the Officer, Hinshaw, that he did want a lawyer; that after that, the defendant proceeded to tell the Officer what had happened; that the Assistant District Attorney, Mr. Roose, handling this case had a conversation at sometime past with the defense counsel which indicated that he had told the defense counsel that Mr. Hinshaw had asked some clarifying questions in the midst of the statement that Mr. King gave to him after having signed a Miranda form indicating he wanted a lawyer; that later, upon examination of Mr. Hinshaw, Mr. Roose, the Assistant District Attorney, found that Mr. Hinshaw had told him that he had not asked any clarifying questions during the statement made to Mr. Hinshaw by Mr. King; . . . .

Based upon these findings of fact, the trial court concluded that the statements made by defendant in the early morning hours of 23 September 1981 were not coerced and were voluntarily made.

Our review of the record convinces us that these findings of fact are amply supported by competent evidence. Likewise, the findings of fact support the conclusion of law that these statements, even if obtained in violation of defendant's *Miranda* rights, were voluntary and could properly be used to impeach defendant's testimony.

IV.

[6] Defendant argues the trial judge erred in not excusing juror Wesley Winfield Evans for cause on the ground that the juror's hearing was impaired. *See* N.C. Gen. Stat. § 15A-1212(2). During defense counsel's voir dire Evans responded to a general question concerning whether any potential juror knew of a reason why he or she should not hear defendant's case as follows: "My only reason [for not wanting to hear the case] would be that I have a hearing problem and I don't hear every word or don't understand every word that is spoken. If it's pitched right I can." Evans again expressed this feeling to the court when the trial judge inquired further into the matter. After examining the juror, the trial court denied defendant's challenge of Evans for cause. De-

fendant then exercised a peremptory challenge and excused Evans. He preserved this question for appellate review by following the procedure in N.C. Gen. Stat. § 15A-1214(h).

The trial judge is empowered to decide all questions regarding the competency of jurors. N.C. Gen. Stat. § 9-14. His decision as to a juror's competency is a matter vested in his sound discretion and will be reversed only upon a demonstration that he abused this discretion. *See State v. Lee*, 292 N.C. 617, 234 S.E. 2d 574 (1977); *State v. Sweezy*, 291 N.C. 366, 230 S.E. 2d 524 (1976).

After observing and questioning Evans, the trial judge concluded that Evans' hearing was not so impaired as to prevent him from serving as a juror. There is a rational basis for this conclusion in the record. The juror stated he had understood what the lawyers had said during the voir dire; he had not understood the trial judge at first; he did understand the questions presently being put to him by the judge; and he could raise his hand during the proceeding if anything was said which he did not understand. The juror said, "The majority of people I can hear well enough, but sometimes I meet people that to me sounds [sic] like they are mumbling and I don't understand too well."

Although we think it the better practice for our trial judges freely to excuse any juror who has a genuine hearing impairment which in the juror's opinion would hamper his or her ability to perform a juror's duties, in this case we cannot say that the trial judge's failure to do so amounted to an abuse of his discretion.

V.

[7] Defendant raises a number of issues relating to the admission of evidence. First, he challenges the denial of his motion to suppress the testimony of Weldon Garner. Defendant contends the state failed to present sufficient evidence of what occurred at Brown's trailer. We disagree.

The evidence tends to show that defendant threatened to kill both Brown and Callie Bittle because of jealousy engendered by their relationship. Garner testified that he saw Brown and Bittle sitting on the steps to Brown's trailer. Later that night, he observed defendant at the front door of Brown's trailer. Garner went into his own trailer and heard a loud noise from inside Brown's trailer. He heard another noise from inside Brown's

trailer and said to his wife, "That's a gunshot." He looked out the door of his trailer and saw defendant leave through the front door of Brown's trailer, pulling the door shut behind him. Garner then went to Brown's trailer and crawled through a window, because the door was locked. Brown was sitting on the floor bleeding and did not appear to be breathing. This testimony raises a reasonable inference that defendant shot Brown. Defendant testified that he shot Brown, although he claimed it occurred only after Brown "reached into his pocket."

Defendant seems to suggest that the state never demonstrated the relevancy of Garner's testimony. We believe this evidence is relevant on the issues of defendant's motive for shooting Bittle and the existence of a common scheme or plan. Although evidence of other crimes for which defendant is not on trial is generally inadmissible, there are exceptions. *See State v. McClain*, 240 N.C. 171, 81 S.E. 2d 364 (1954). Among these are two which permit the use of evidence of other crimes (1) to prove a motive on the part of defendant to commit the crime charged even though it discloses the commission of another offense and (2) to establish a common plan or scheme embracing crimes so related to each other that proof of one tends to prove the crime charged and to connect the accused with its commission. *Id.* at 175-76, 81 S.E. 2d at 367. Garner's testimony relating to the events at Brown's trailer the night of the murder was admissible under both exceptions. Garner's testimony helped to establish a motive, jealousy, for Bittle's murder. This testimony and defendant's threats to both Brown and Bittle helped to show that both crimes arose out of a common scheme of defendant. Defendant's shooting of Brown in partial execution of the scheme tended to prove that he also shot Bittle in furtherance of his plan to shoot both.

[8] Second, defendant contends that the trial court committed reversible error by overruling his objection to Dr. Mary Steuterman's testimony that she performed the autopsy on Bittle. Dr. Steuterman, a forensic pathologist, described the procedures which she followed during the autopsy and described with particularity the various locations of the victim's wounds and injuries. Defendant essentially contends there was no foundation laid regarding the identity of the body upon which Dr. Steuterman performed the autopsy. This position is feckless.

Detective M. L. Hinshaw, who knew Bittle personally for a number of years, testified that he attended the autopsy and received a large caliber bullet which Dr. Steuterman removed from Bittle's abdomen. Detective Hinshaw's ability to identify Bittle's body and testimony about the autopsy laid a sufficient foundation for Dr. Steuterman's testimony concerning the autopsy.

[9] Third, defendant contends the court committed reversible error by overruling his objection to the results of tests performed on a pistol and rifle because a proper chain of custody was not shown.

In order for real evidence to be admitted, it is necessary to lay a proper foundation. This includes identifying the evidence as being the same as that involved in the incident and showing that since the incident occurred, the evidence has not undergone material change in condition. *See State v. Barfield*, 298 N.C. 306, 259 S.E. 2d 510 (1979); *State v. Harbison*, 293 N.C. 474, 238 S.E. 2d 449 (1977).

Officer Hill of the Liberty Police Department testified that he saw Officer Lineberry seize two weapons from defendant's car. He took the weapons and locked them in his locker to which he alone had a key. He later gave them to Detective Hinshaw. He identified these weapons during defendant's trial.

Detective Hinshaw also identified these weapons by noting that when he received them he scratched his initials in the rifle stock and placed the pistol in a plastic bag with a sticker containing its serial number. He identified a spent shell casing which he had removed from the rifle and said it was in the same condition as when he first observed it. He stated that he had packaged it in the same manner in which it appeared in court. He also identified a shell casing which he removed from the pistol. He testified that this particular casing had a crack in it at the left of the shell where it was bent as a result of being jammed in the slide of the pistol. Detective Hinshaw also identified the spent projectile which Dr. Steuterman gave him during the autopsy. He had observed Dr. Steuterman remove it from Bittle's body. Detective Hinshaw testified that he appropriately packaged, sealed, and marked each casing or shell and personally delivered them, along with the rifle and pistol, to the SBI laboratory in Raleigh for appropriate testing.

SBI Agent Douglas Branch testified that he received the shell and casings from his assistant, who had received them from another agent. Each was in a sealed container. He observed no indication of tampering or breaking of any seals or parts of the containers. Each was marked with Detective Hinshaw's initials. Following routine SBI policy, he opened each container at a place away from the seal in order to preserve the seal. Upon completion of his examination, he resealed each container and tagged the area where he had opened it. Branch further identified the rifle and the pistol as the weapons submitted to him for comparison. He testified that, as a result of his microscopic examinations, one casing and the shell had been fired from the rifle. The other casing had been fired from the pistol.

This evidence reveals that the state established a proper chain of custody of both the weapons seized from defendant's car and the projectile and casings. There was no material change in their condition from the seizure to the analysis and to the identification during the trial. Defendant's assignment of error is overruled.

VI.

[10] Defendant assigns error to comments made by the court to the jury immediately before defendant testified. The court's statement, in short, was an inquiry to the jury concerning whether it would prefer to reconvene on Saturday or the following Monday. This inquiry became necessary when the trial judge realized the case could not be completed on Friday.

Our statutes prevent a judge from expressing any opinion in the presence of the jury on any question of fact to be decided by it during any stage of the trial. N.C. Gen. Stat. § 15A-1222. A remark by the court is not grounds for a new trial if, when considered in the light of the circumstances under which it was made, it could not have prejudiced defendant's case. *State v. Green*, 268 N.C. 690, 693-94, 151 S.E. 2d 606, 609 (1966). Nothing in these remarks made by the trial court can be construed as expressing an opinion on any fact involved in the case. Defendant's bare contention that they could have prejudiced his case by distracting the jury from defendant's testimony is completely without merit.

VII.

Defendant moved for a mistrial at the close of the evidence. The trial court denied the motion, and defendant alleges error in this ruling. We disagree.

A trial judge must declare a mistrial upon defendant's motion if conduct or error occurs "resulting in substantial and irreparable prejudice to the defendant's case." N.C. Gen. Stat. § 15A-1061. A motion for mistrial under this section is addressed to the sound discretion of the trial judge. We will not reverse the trial judge's decision on appeal unless defendant demonstrates an abuse of discretion. *See State v. Craig*, 308 N.C. 446, 302 S.E. 2d 740 (1983); *State v. McCraw*, 300 N.C. 610, 268 S.E. 2d 173 (1980).

[11] Defendant argues that a mistrial should have been declared because the prosecution failed to disclose, despite defendant's request for discovery, certain of his pretrial statements to Officers Lineberry and Compton. The admissibility of these statements was the subject of a lengthy voir dire at which both officers testified and were subject to cross-examination. Defendant on direct examination admitted he had made the statements about which Officer Lineberry testified. These statements were that he had shot Bittle and that the weapons were in his car. Defendant was cross-examined about statements made to Officer Compton which tended to be inconsistent with defendant's version of his shooting Brown.

Although defendant's oral statements to the officers fall within our discovery statute, *see* 15A-903(a)(2), and should have been disclosed by the state pursuant to defendant's request, sanctions for failure to comply with the discovery procedures, N.C. Gen. Stat. § 15A-910, are permissive and are imposed in the sound discretion of the trial judge. *State v. Dukes*, 305 N.C. 387, 390, 289 S.E. 2d 561, 563 (1982). Defendant himself was well aware of his pretrial statements to Lineberry and admitted in his own direct testimony having made them. Further, he had full opportunity to inquire about his statements to Compton on voir dire in the absence of the jury. There is no suggestion that defendant would not have testified had he been previously apprised of the state's contentions about his statements to Compton. We see no abuse of discretion under the circumstances in the trial court's

failure to exclude these statements. *State v. Stevens*, 295 N.C. 21, 243 S.E. 2d 771 (1978).

[12] Defendant also argues for a mistrial on the ground of nondisclosure of his prior criminal record. Defendant was cross-examined regarding a 1966 conviction for "an affray with a deadly weapon." He alleges that this cross-examination was improper because the prosecution had failed to disclose, despite defendant's request, his prior criminal record. Defendant did not object to the cross-examination. Defendant had admitted on direct examination two prior convictions for assault with a deadly weapon in 1968. Under the circumstances we see no abuse of discretion in the trial court's denial of the mistrial motion insofar as it is based on cross-examination about the 1966 conviction.

Defendant also argues for a mistrial because the prosecution used Garner's testimony relating the events which occurred at Brown's trailer. As we previously stated, this evidence was relevant and admissible on the issues of defendant's motive and the existence of a common scheme or plan. It provides no basis for defendant's motion for mistrial.

Accordingly, we hold the trial court did not err in denying the mistrial motion.

VIII.

Finally, defendant contends the trial court erred in charging the jury regarding motive. Defendant concedes these instructions are a correct statement of the law, but he argues the state offered no evidence of motive. As we have previously noted, there is ample evidence of defendant's motive in this case. Accordingly, the court did not err in explaining the law of motive to the jury.

In conclusion, defendant received a fair trial free from prejudicial error. Accordingly, in the judgment and conviction we find

No error.

JEFFREY P. MAZZA v. MEDICAL MUTUAL INSURANCE COMPANY OF NORTH CAROLINA AND ROBERT A. HUFFAKER

No. 415PA83

(Filed 28 August 1984)

1. **Insurance § 150— professional liability insurance—medical malpractice—coverage for compensatory and punitive damages—public policy**

Public policy of this State does not preclude liability insurance coverage for punitive and compensatory damages in a medical malpractice case based on wanton or gross negligence in the care and treatment of a patient.

2. **Insurance § 150— physician's liability policy—coverage for punitive damages for medical malpractice**

A physician's liability policy which required the insurer to pay on behalf of the insured "all sums which the insured shall become legally obligated to pay as damages" and which defined "damages" as "all damages, including damages for death, which are payable because of injury to which this insurance applies" provided coverage for punitive damages for medical malpractice.

3. **Appeal and Error § 69— effect of Court of Appeals precedent**

Precedents set by the Court of Appeals are not binding upon the Supreme Court.

WE allowed defendant's petition for discretionary review of the judgment entered in this declaratory judgment action by *Judge Brannon* at the 16 May 1983 Civil Session of WAKE County Superior Court, under N.C. Gen. Stat. § 7A-31, prior to a determination by the Court of Appeals.

Plaintiff appellee Jeffrey P. Mazza brought this action which is the subject of this appeal on 8 October 1981 against both defendants, Medical Mutual Insurance Company of North Carolina, hereinafter referred to as Medical Mutual, and Dr. Robert A. Huffaker. Plaintiff sought a determination of whether the Physicians' Liability Insurance Policy, hereinafter referred to as the insurance contract, issued by Medical Mutual to Dr. Huffaker, provides coverage for certain compensatory and punitive damages which were awarded earlier to plaintiff against Dr. Huffaker for medical malpractice.

The facts, as they relate to this case, indicate that on or about 1 May 1976, Medical Mutual issued an insurance contract to

Dr. Huffaker. During all times pertinent to the medical malpractice action, the insurance contract was in full force and effect.

On 20 October 1979, plaintiff filed a civil action against defendant in Orange County Superior Court. He alleged that Dr. Huffaker, his attending psychiatrist, had caused him injury and damage in several respects, such as by engaging in sexual intercourse with plaintiff's estranged wife and by abandoning plaintiff in a critical stage of plaintiff's treatment without reasonable notice to him. Plaintiff sought to recover compensatory and punitive damages for criminal conversation, alienation of affections, and medical malpractice arising out of the alleged misconduct of Dr. Huffaker.

At the conclusion of the trial in Orange County, the jury rendered a verdict in favor of plaintiff, awarding him $102,000.00 in compensatory damages and $500,000.00 in punitive damages on the medical malpractice count, $50,670.00 in compensatory damages on the criminal conversation count, and denying him a recovery for alienation of affections. This declaratory judgment action involves only the punitive and compensatory damages awards on the medical malpractice count.

The record discloses that Dr. Huffaker appealed the decision of the trial court, including the portion of the decision with respect to plaintiff's recovery of compensatory and punitive damages for the alleged medical malpractice. In an opinion reported at 61 N.C. App. 170, 300 S.E. 2d 833 (1983), the North Carolina Court of Appeals affirmed in all respects the judgment of the trial court, and we subsequently denied discretionary review.

Pending the appeal of the above civil case, the plaintiff brought this declaratory judgment action seeking a determination that the insurance contract obligates Medical Mutual to pay on behalf of Dr. Huffaker the actual damages and punitive damages assessed against Dr. Huffaker on the medical malpractice portion of the judgment in the Orange County civil trial. The trial court granted summary judgment in favor of the plaintiff, ruling that the terms of the insurance contract obligate Medical Mutual to pay plaintiff for both the actual damages and the punitive damages awarded on the medical malpractice count.

On 6 December 1983, we allowed defendant's petition for discretionary review. The matter was duly argued before us at our February Term, 1984.

Boyce, Mitchell, Burns & Smith, P.A., by G. Eugene Boyce and Lacy M. Presnell, III for plaintiff-appellee.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan by James D. Blount, Jr., Henry A. Mitchell, Jr., and Nigle B. Barrow, Jr. for defendant-appellant Medical Mutual Insurance Company of North Carolina.

COPELAND, Justice.

Medical Mutual maintains that it is not liable for either the punitive damages or the actual damages awarded to plaintiff, and that the trial court committed reversible error in finding it liable. With regard to both the punitive and actual damages, the insurance company proffers similar arguments in support of its contention of non-liability. Defendant first argues that North Carolina's public policy precludes insurance coverage of punitive and compensatory damages caused by intentional misconduct. Second, the terms of the insurance contract did not include coverage for punitive damages.

The provision of the insurance contract which is at issue reads as follows:

> I. *Terms.* The Company will pay on behalf of the Insured all sums which the Insured shall become legally obligated to pay as damages because of:
>
> 1. *Individual Professional Liability Coverage.*—A. Any claim or claims made against the Insured during the policy period arising out of the performance of professional services rendered or which should have been rendered . . . by the Insured . . .

According to our interpretation of the insurance contract, the terms provide coverage for actual and punitive damages. Further, this State's public policy does not prohibit insurance coverage of punitive damages nor of actual damages. We shall consider first the contentions of the parties with regard to the punitive damage award.

I.

[1] In making the determination as to punitive damages, we are concerned first with whether public policy prohibits insurance coverage of punitive damages based upon wanton or gross negligence or, as in the present case, medical malpractice, and second, whether the terms of the insurance contract cover punitive damages. There are no North Carolina cases directly on point. Courts in other jurisdictions have considered these questions, and before 1970, it appears that a particular court's decision depended primarily upon which of these two issues the court focused its attention. Our research discloses that courts relying upon the language of the insurance policy generally have decided that punitive damages were recoverable. One of the leading cases reaching this conclusion is *Lazenby v. Universal Underwriters Insurance Co.*, 214 Tenn. 639, 383 S.W. 2d 1 (1964). Other cases reaching the same conclusion are *Carroway v. Johnson*, 245 S.C. 200, 139 S.E. 2d 908 (1965); *Pennsylvania Threshermen & Farmers' Mutual Casualty Insurance Co. v. Thornton*, 244 F. 2d 823 (4th Cir. 1957); *Glens Falls Indemnity Co. v. Atlantic Building Corp.*, 199 F. 2d 60 (4th Cir. 1952); *American Fidelity & Casualty Co. v. Werfel*, 230 Ala. 552, 162 So. 103 (1935); *Ohio Casualty Insurance Co. v. Welfare Finance Co.*, 75 F. 2d 58 (8th Cir. 1934), *cert. denied*, 295 U.S. 734, 79 L.Ed. 1682 (1934). *See* Annot., 16 A.L.R. 4th 14 (1982).

We believe that the recent trend of those courts considering the public policy question, has been to allow insurance coverage for punitive damages. *See: Anthony v. Frith*, 394 So. 2d 867 (Miss. 1981); *Harrell v. Travelers Indemnity Co.*, 279 Or. 199, 567 P. 2d 1013 (1977); *Abbie Uriguen Oldsmobile Buick, Inc. v. United States Fire Insurance Co.*, 95 Idaho 501, 511 P. 2d 783 (1973); *Price v. Hartford Accident & Indemnity Co.*, 108 Ariz. 485, 502 P. 2d 522 (1972). Some of these courts have reasoned that public policy is not an issue. Others say that competing public policies outweigh the consideration of punishing the insured by way of punitive damages. Comment, The Exclusion Clause: A Simple and Genuine Solution to the Insurance for Punitive Damages Controversy, 12 U.S.F.L. Rev. 743, 746 (1978). Additionally, "[w]ith respect to construction of various types of insurance contracts . . . the courts . . . have usually held that coverage of punitive damages was provided when construing policies covering . . . pro-

fessional . . . entities or their employees. . . ." Annot., 16 A.L.R. 4th 14, 16.

Many courts have allowed recovery of punitive damages for willful and wanton negligence because there existed a distinction between negligence and intentional torts. *Hensley v. Erie Insurance Co.*, 283 S.E. 2d 227 (W. Va. 1981); *Continental Insurance Cos. v. Hancock*, 507 S.W. 2d 146 (Ky. 1974); *Ohio Casualty Insurance Co. v. Welfare Finance Co.*, 75 F. 2d 58, *cert. denied*, 295 U.S. 734. This rationale was applied in *Morrell v. Lalonde*, 45 RI 112, 120 A. 435, *error dismissed*, 264 U.S. 572, 68 L.Ed. 855 (1923). That court held that punitive damages were recoverable for medical malpractice under a liability insurance policy.

The main thrust of defendant's argument concerning punitive damages is that allowing insurance coverage for punitive damages is contrary to public policy. Defendant asserts that the "purposes of awarding punitive damages in North Carolina are to punish the wrongdoer individually and to deter the wrongdoer and others from engaging in similar misconduct." Medical Mutual contends that this Court, by allowing insurance coverage for punitive damages, would frustrate the purposes for which punitive damages are awarded.

We know of no public policy of this State that precludes liability insurance coverage for punitive damages in medical malpractice cases. North Carolina General Statute § 58-72 appears to authorize insurers to provide coverage for punitive damages. The modern trend and better reasoned decisions in other jurisdictions are to the effect that it is not against public policy to insure against punitive damages. *Harrell v. Travelers Indemnity Co.*, 279 Or. 199, 567 P. 2d 1013; *Price v. Hartford Accident & Indemnity Co.*, 108 Ariz. 485, 502 P. 2d 522; *Dairyland County Mutual Insurance Co. v. Wallgren*, 477 S.W. 2d 341 (Tex. Civ. App. 1972); *Southern Farm Bureau Casualty Insurance Co. v. Daniel*, 246 Ark. 849, 440 S.W. 2d 582 (1969).

The relief the insurance company now seeks is the development by this Court of a statement of public policy regarding punitive damages stemming from medical malpractice. Defendant bases its argument upon its contention that the act or acts constituting the medical malpractice were intentional. However, the record fails to indicate a specific determination by the jury that

the medical malpractice was intentional, as opposed to wanton or gross negligence. We find no merit in defendant's contention that the medical malpractice aspects of this case involved intentional acts by Dr. Huffaker. Medical Mutual argued at trial and in its brief on appeal, that Dr. Huffaker's actions did not constitute medical malpractice since the physician-patient relationship between Dr. Huffaker and the plaintiff no longer existed at the time in question. The trial judge, having determined that there was sufficient evidence of a physician-patient relationship, instructed the jury that the medical malpractice was the negligent care and treatment of a patient by a doctor. The jury returned a verdict in favor of plaintiff based on that charge. Thus, in our opinion, the medical malpractice in the instant case resulted from the attending doctor's negligence in abandoning treatment of the plaintiff and in failing to follow the applicable medical standard of care. However, we emphasize that at this time we neither reach nor decide the question of whether public policy prohibits one from insuring himself from the consequences of his or her intentional tortious acts.

In reviewing the considerations pertaining to public policy in North Carolina, it is important to note that punitive damages are recoverable for injuries other than those intentionally inflicted. This Court has stated that:

> It is generally held that punitive damages are those damages which are given in addition to compensatory damages because of the "wanton, reckless, malicious or oppressive character of the acts complained of."

Oestreicher v. American National Stores, Inc., 290 N.C. 118, 134, 225 S.E. 2d 797, 807 (1976). Thus in North Carolina, punitive damages may be awarded in negligence cases for wanton or gross acts.

Since punitive damages are recoverable in North Carolina in cases where intentional injury is not involved, there is a compelling reason that this Court should not create a new public policy prohibiting insurance coverage for punitive damages. The interests of doctors and patients alike can best be served by medical malpractice insurance that protects the doctor and patient, even when the doctor's negligence is wanton or gross. The insurance company in this case would not contend that doctors

would be more reckless or would more frequently commit gross negligence simply because they are insured under a professional liability insurance policy that covers punitive damages.

Medical Mutual, in advancing its "public policy" argument, seems to ignore the proposition that the concept of "public policy" involves not one simplistic rule, but various competing doctrines. In this case, the law of contracts and the "public policy" doctrines encompassing that body of law, compete with the defendant's tort related "public policy" argument.

This declaratory judgment action arose out of a contract controversy between Dr. Huffaker and Medical Mutual. The issues before this Court are based on contract, thus, we must consider applicable public policy concerning contract rights. The competing public interests must be carefully balanced. A significant public policy consideration focuses on insurance companies' obligations to honor their contracts. In the present case, Medical Mutual drafted the insurance contract presumably upon the advice of competent counsel, sold the contract, accepted the requisite premiums and tendered protection. Thus under the circumstances, requiring Medical Mutual to honor its obligations would best serve public policy. The right of parties to enter into contracts is a valid and important public interest to consider in balancing the competing interests involved. We should not be quick to invalidate private insurance contracts.

The North Carolina Legislature has not imposed any restrictions or regulations on insurance companies' right to sell liability insurance in this State which covers punitive damages for medical malpractice. *See*: N.C. Gen. Stat. § 58-72.

In addition to the absence of legislative restriction, there is an area of North Carolina case law that supports plaintiff's position in this case. The law and public policy in North Carolina regarding liability for punitive damages under the doctrine of *respondeat superior* is germane to the issue involved in the present case. In our State, a master is liable for punitive damages awarded when the servant or agent causing the injury was acting in the course and scope of the master's business. *Hairston v. Atlantic Greyhound Corp.*, 220 N.C. 642, 18 S.E. 2d 166 (1942). This rule refutes the insurance company's contention that public

policy prohibits anyone other than the actual wrongdoer or tortfeasor from paying punitive damages.

Our research reveals a recent case from Michigan involving a similar fact situation and almost identical insurance policy language. In *Vigilant Insurance Company v. Kambly*, 114 Mich. App. 683, 319 N.W. 2d 382 (1982), a psychiatrist had induced his patient to engage in sexual relations with him as part of her purported therapy. The insurance company, with whom the doctor had his professional liability coverage, sought to escape payment of the punitive damages awarded claiming that public policy grounds prohibited such coverage. The insurance company contended that the doctor's conduct was intentional and, under Michigan law, felonious, and public policy would therefore preclude the applicability of liability insurance for his protection. It further argued that it was contrary to public policy to permit an insured to profit from his own wrongdoing or to encourage the commission of unlawful acts by relieving the wrongdoer of financial responsibility.

In ruling against the insurance company, the Michigan Supreme Court noted first and foremost that the "insurance policy does not provide exemption for the insurer from liability for judgment arising from injuries sustained as a result of this form of malpractice." *Id.* at 687, 319 N.W. 2d at 384. That court further held that:

> Insurance policies drafted by the insurer must be construed in favor of the insured to uphold coverage. Limitations in the policy must be clearly expressed . . . [Citation omitted.] Moreover, the public policy considerations raised by plaintiff which prohibit the insurability of criminal or intentionally tortious conduct are not present here.

Id. at 687, 319 N.W. 2d at 385.

[2] With regard to Medical Mutual's argument that there is no contractual liability, we shall utilize a strict contractual analysis focused on the language of the insurance contract to determine whether coverage exists. Medical Mutual Insurance Company contracted to pay on behalf of its insured ". . . all sums which the insured shall become legally obligated to pay as damages . . ." We believe that the language used in the present insurance contract

is so broad that it must be interpreted to provide coverage for punitive damages for medical malpractice. Many courts have held that the insurer's use of such broad language does include punitive damages. *Hensley v. Erie Insurance Co.*, 283 S.E. 2d 227; *Cedar Rapids v. Northwestern National Insurance Co.*, 304 N.W. 2d 228 (Iowa 1981); *Dayton Hudson Corp. v. American Mutual Liability Insurance Co.*, 621 P. 2d 1155 (Okla. 1980); *State v. Glens Falls Co.*, 137 Vt. 313, 404 A. 2d 101 (1979); *Colson v. Lloyd's of London*, 435 S.W. 2d 42 (Mo. App. 1968); *Carroway v. Johnson*, 245 S.C. 200, 139 S.E. 2d 908; *Glens Falls Indemnity Co. v. Atlantic Building Corp.*, 199 F. 2d 60.

Nevertheless, defendant Medical Mutual argues that this policy does not cover punitive damages. It bases this contention upon the policy's definition of damages and one of the stated reasons for punitive damages in North Carolina. The insurance company suggests that this Court isolate one of the stated purposes for punitive damages in North Carolina and construe that together with the definition of "damages" in the policy to arrive at a conclusion that the parties in this case did not intend the policy to cover punitive damages relating to professional malpractice. We believe this to be contrary to ordinary common sense and the rules enunciated by our Court in *Grant v. Emmco Insurance Co.*, 295 N.C. 39, 243 S.E. 2d 894 (1978) where we stated, speaking through Justice Lake in an unanimous opinion, that:

> . . . a contract of insurance should be given that construction which a reasonable person in the position of the insured would have understood it to mean and, if the language used in the policy is reasonably susceptible of different constructions, it must be given the construction most favorable to the insured, since the company prepared the policy and chose the language. (Citations omitted.)

Id. at 43, 243 S.E. 2d at 897.

Medical Mutual argues that the term "damages" as defined in its insurance contract, includes "only those damages attributable to a particular injury" and do not include punitive damages. In looking at the language in the policy, we find the term "damages" defined as "all damages, including damages for death, which are payable because of injury to which this insurance applies." In its brief Medical Mutual emphasizes the word "injury" and argues

that the use of that word in some way excludes punitive damages from the damages covered by the policy. According to Black's Law Dictionary, 706 (rev. 5th ed. 1979) the word "injury" is defined as "any wrong or damage done to another, either in his person, rights, reputation or property."

We said in *Jamestown Mutual Insurance Co. v. Nationwide Mutual Insurance Co.*, 266 N.C. 430, 438, 146 S.E. 2d 410, 416 (1966), speaking again through Justice Lake:

> In the construction of contracts, even more than in the construction of statutes, words which are used in common, daily, nontechnical speech, should, in the absence of evidence of a contrary intent, be given the meaning which they have for laymen in such daily usage, rather than a restrictive meaning which they may have acquired in legal usage.

We do not believe that an ordinary layman would interpret or understand the insurance policy in this case to mean what Medical Mutual contends. The plain and ordinary meaning of the language used in the policy, particularly from the viewpoint of a layman, covers "all damages" and contains no exclusion for punitive damages.

If any ambiguity exists in the insurance contract, then, the fault lies with the insurance company and not with the insured. Medical Mutual selected and adopted the language and terms used in its policy of insurance and thus placed itself in the position in which it now finds itself. If the insurance company uses "slippery" words in its policy, it is not the function of this Court "to sprinkle sand upon the ice by strict construction" to assist the insurance company. *See*: *Id.* at 437, 146 S.E. 2d at 416. We place great emphasis on the fact that there is no specific exclusion in the insurance contract for punitive damages. If the insurance carrier to this insurance contract intended to eliminate coverage for punitive damages it could and should have inserted a single provision stating "this policy does not include recovery for punitive damages."

Furthermore, the fact that a dispute arose as to the interpretation of the insurance contract, which resulted in this lawsuit, makes it apparent that the language of the policy is at best ambiguous. In *Maddox v. Colonial Life and Accident Insurance Co.*,

303 N.C. 648, 650, 280 S.E. 2d 907, 908 (1981), we stated that "[a]n ambiguity exists where, in the opinion of the court, the language of the policy is fairly and reasonably susceptible to either of the constructions asserted by the parties." The well established and universal rule is that insurance contracts will be liberally construed in favor of the insured and strictly construed against the insurer, since the insurance company selected the language used in the policy. 43 Am. Jur. 2d, *Insurance*, § 272 (1982); 7 Strong's N.C. Index 3d, *Insurance*, § 6.3 (1977). Thus, any ambiguity, with respect to the policy's coverage of punitive damages for medical malpractice, must be resolved in favor of coverage.

In its brief, Medical Mutual relies upon two North Carolina cases, *Cavin's Inc. v. Atlantic Mutual Insurance Co.*, 27 N.C. App. 698, 220 S.E. 2d 403 (1975) and *Nationwide Mutual Insurance Co. v. Knight*, 34 N.C. App. 96, 237 S.E. 2d 341, *cert. denied*, 293 N.C. 589, 239 S.E. 2d 263 (1977), to support its argument that North Carolina case law precludes insurance coverage of punitive damages. A careful examination of the insurance contracts, factual situations, and holdings in *Cavin's* and *Knight* convinces us that these two cases are clearly distinguishable from the case *sub judice*, and are not any legal precedent upon which to base a decision favorable to the defendant Medical Mutual. In other words, neither *Cavin's* nor *Knight* control in this situation.

[3] We note also that, even if *Cavin's* and *Knight* were not distinguishable from this case, precedents set by the Court of Appeals are not binding on this Court. As we stated in our recent decision of *Northern Nat'l Life Ins. v. Miller Machine Co.*, 311 N.C. 62, 316 S.E. 2d 256 (1984), "[i]t is fundamental that the highest court of a jurisdiction may overrule precedents established by decisions of intermediate appellate courts." Nor do we find it determinative that this Court denied a petition for discretionary review in *Knight*, since such a denial does not signify our approval of the Court of Appeals' decision. "It may mean only that no harmful result is likely to arise from the Court of Appeals' opinion." *Id.*

For the foregoing reasons, we conclude that the terms of the insurance contract in the present case provide coverage for punitive damages, and public policy does not prohibit such coverage.

II.

[1] We next address the defendant's challenge to the trial court's ruling that plaintiff was entitled to recover against Medical Mutual for the actual damages awarded. Medical Mutual argues that public policy precludes liability insurance coverage of actual damages caused by intentional wrongdoing. We do not have to reach this question, since we determined earlier that the medical malpractice aspects of this case do not involve intentional acts. In support of its argument that the doctor's conduct was intentional, Medical Mutual confuses the criminal conversation cause of action with the medical malpractice cause of action. Unquestionably, the doctor's "criminal conversation" was intentional. However, the allegations of the doctor's medical malpractice in his treatment of the plaintiff and his careless disregard of the effect of his actions involved wanton negligence, and are quite different from the allegations of an intentional act of criminal conversation. The jury decided that Dr. Huffaker's treatment of the plaintiff constituted negligence and a conscious disregard for the "mental well-being" of the plaintiff. The record discloses no evidence indicating that the doctor intended to inflict the injuries that resulted to his patient. While the doctor voluntarily engaged in lascivious activities with plaintiff's wife, he did not intentionally commit malpractice nor cause the resulting injury sustained by plaintiff. Additionally, unlike most general liability insurance policies, the policy in question has no specific exclusion for "intentional" acts or injury intentionally inflicted by the insured.

Accordingly, we conclude that the trial court properly held that the insurance contract covers the award for punitive damages as well as the award for actual damages. We find no error in the trial court's granting of summary judgment for the plaintiff.

Affirmed.

STATE OF NORTH CAROLINA v. CHARLES ARRINGTON

No. 122A84

(Filed 28 August 1984)

1. Searches and Seizures § 20— affidavit for search warrant

An affidavit for a search warrant is sufficient under G.S. 15A-244 if it supplies reasonable cause to believe that the proposed search for evidence probably will reveal the presence upon the described premises of the items sought and that those items will aid in the apprehension or conviction of the offender.

2. Searches and Seizures § 21— affidavit for search warrant—informant hearsay—"totality of circumstances" test

In *Illinois v. Gates*, --- U.S. --- (1983), the U. S. Supreme Court abandoned the two-pronged test of veracity and basis of knowledge for determining the sufficiency of affidavits based on informant hearsay to establish probable cause for a search warrant for Fourth Amendment purposes and adopted a "totality of the circumstances" test.

3. Searches and Seizures § 24— affidavit for search warrant—tips from informants—probable cause under "totality of circumstances" test

Under the "totality of circumstances" test, an officer's affidavit based on information from two informants provided a substantial basis for the magistrate's finding of probable cause for issuance of a warrant to search defendant's home for controlled substances where information supplied by the first informant established, against his penal interest, that he had purchased marijuana from defendant; the first informant also stated that defendant was growing marijuana in his home which, taken with the fact that the informant had bought marijuana from defendant, supported the probability that the informant spoke with personal knowledge and that marijuana would be found at defendant's home; the second informant stated that there had been a steady flow of known drug users to defendant's home within the past twenty-four hours; and both informants were identified as reliable ones whose information had led to arrests in the past.

4. Searches and Seizures § 1— unreasonable searches and seizures—prohibition by N. C. Constitution

Art. I, Sec. 20 of the Constitution of North Carolina prohibits unreasonable searches and seizures.

5. Searches and Seizures § 21— probable cause for search warrant—N. C. Constitution—totality of circumstances test

The totality of circumstances test is adopted for resolving questions arising under Art. I, Sec. 20 of the Constitution of North Carolina with regard to the sufficiency of probable cause to support the issuance of a search warrant.

APPEAL by the State from the decision of a divided panel of the Court of Appeals, 66 N.C. App. 215, 311 S.E. 2d 33 (1984),

which affirmed the Order entered by *Judge R. Michael Bruce* in Superior Court, BEAUFORT County, on October 14, 1982.

The defendant was indicted and arrested for unlawfully, willfully and feloniously possessing more than an ounce of marijuana in violation of N.C.G.S. 90-95(a)(3). Prior to trial, the defendant filed a motion to suppress evidence. The trial court entered an order suppressing evidence seized pursuant to a search warrant. On appeal by the State, the Court of Appeals affirmed the trial court's order. Judge Braswell dissented, and the State appealed to the Supreme Court as a matter of right under N.C.G.S. 7A-30(2). Heard in the Supreme Court June 13, 1984.

Rufus L. Edmisten, Attorney General, by Newton G. Pritchett, Jr., Associate Attorney, for the State.

Stephen A. Graves, for the defendant-appellee.

MITCHELL, Justice.

The issue presented is whether an affidavit detailing the tips of confidential informants to police provided a sufficient basis to support the magistrate's finding of probable cause. We hold that there was substantial basis for finding probable cause and issuing a search warrant, and we reverse the Court of Appeals' decision affirming the order of the trial court to the contrary.

On May 14, 1982 Beaufort County A.B.C. Enforcement Officer William Boyd applied for a warrant to search the mobile home and truck of the defendant Charles Arrington for controlled substances. In an affidavit included in the application, Officer Boyd swore to the following:

> I received from a confidential source within the last forty-eight (48) hours that Charles Arrington had in his possession at his mobile home marijuana for sale. Confidential source advised that they had purchased marijuana from Charles Arrington. Source also advised that Arrington was growing marijuana in his home. A second confidential source advised that within the last twenty-four hours that there had been a steady flow of traffic to the Arrington home and also a steady flow of traffic for the past 2 months. The traffic is known to source as people that use drugs. The first source and second source has proven to be reliable in the past in

that the first source has given information on numerous occasions in the past that has led to arrests. The second source has proven to be reliable in that I have known this source for many years and that they have furnished information not only to me but to other law enforcement officers that has proven to be reliable and arrests have been made.

Magistrate K. V. Swindell issued a search warrant on May 14, 1982. On the same day Officer Boyd searched the mobile home of the defendant and found thirty-six manila envelopes containing marijuana, three plastic bags of marijuana, thirteen packs of rolling paper and a bag containing marijuana residue. The defendant was arrested and indicted for felonious possession of more than an ounce of marijuana.

On June 14, 1982, the defendant moved pursuant to N.C.G.S. 15A-974 to suppress evidence obtained as the result of the execution of the search warrant. At the October 11, 1982 Criminal Session of Superior Court, Beaufort County, Judge Bruce heard the motion and entered an order suppressing the evidence. The findings and conclusions supporting the order stated that the affidavit included with the application for a search warrant was insufficient to show probable cause because it showed "no circumstances from which it could be determined that the information known to Officer Boyd came to him from the personal knowledge of a reliable confidential source." The State gave notice of appeal in open court and later certified that the evidence suppressed was essential to the case and that appeal was not taken merely for the purpose of delay.

The Court of Appeals affirmed the order of the trial court and held that considering the totality of the circumstances, the "stale, unverified, and uncorroborated allegations" of the officer in the affidavit gave the magistrate no basis for finding probable cause. 66 N.C. App. at 220, 311 S.E. 2d at 36. Judge Braswell dissented, reasoning that the majority's analysis was based on a standard which had been rejected and abandoned by the United States Supreme Court in *Illinois v. Gates*, --- U.S. ---, 76 L.Ed. 2d 527 (1983). Judge Braswell's position was that considering the totality of the circumstances, the trial court erred in suppressing evidence seized pursuant to the search warrant.

[1] An understanding of certain principles governing the issuance of search warrants is necessary for discussion of this issue. In North Carolina an applicant for a search warrant must complete an application in writing containing:

> (1) The name and title of the applicant; and
>
> (2) A statement that there is probable cause to believe that items subject to seizure under G.S. 15A-242 may be found in or upon a designated or described place, vehicle, or person; and
>
> (3) Allegations of fact supporting the statement. The statements must be supported by one or more affidavits particularly setting forth the facts and circumstances establishing probable cause to believe that the items are in the places or in the possession of the individuals to be searched; and
>
> (4) A request that the court issue a search warrant directing a search for and the seizure of the items in question.

N.C.G.S. 15A-244. The affidavit is sufficient if it supplies reasonable cause to believe that the proposed search for evidence probably will reveal the presence upon the described premises of the items sought and that those items will aid in the apprehension or conviction of the offender. *State v. Riddick*, 291 N.C. 399, 230 S.E. 2d 506 (1976). Probable cause does not mean actual and positive cause nor import absolute certainty. *State v. Campbell*, 282 N.C. 125, 191 S.E. 2d 752 (1972). The facts set forth in an affidavit for a search warrant must be such that a reasonably discreet and prudent person would rely upon them before they will be held to provide probable cause justifying the issuance of a search warrant. *Dumbra v. United States*, 268 U.S. 435 (1925); *State v. Campbell*, 282 N.C. 125, 191 S.E. 2d 752 (1972). A determination of probable cause is grounded in practical considerations. *Jaben v. United States*, 381 U.S. 214 (1965).

The Supreme Court of the United States in recent years has relied upon a "two-pronged" test for determining the sufficiency of affidavits based on informant hearsay to establish probable cause for Fourth Amendment purposes. In *Aguilar v. Texas*, 378 U.S. 108 (1964), the Court stated that although an affiant may rely on hearsay information in his or her application for a warrant, the

magistrate must be informed of some of the circumstances from which the informant concluded that the evidence sought was where it was claimed to be. The magistrate also must be informed of some of the underlying circumstances showing that the informant was credible or the information reliable. *Aguilar v. Texas*, 378 U.S. at 114-15.

In *Spinelli v. United States*, 393 U.S. 410 (1969) the Supreme Court elaborated on *Aguilar* and reiterated that to establish probable cause, hearsay information must satisfy the "two-pronged" test. The Court also indicated that it was important that a tip contain sufficient detail to enable a magistrate to conclude that he was relying on something more substantial than "a casual rumor circulating in the underworld" before he could find probable cause. 393 U.S. at 416. This Court also has applied the two-pronged test. *E.g. State v. Hayes*, 291 N.C. 293, 230 S.E. 2d 146 (1976); *State v. Campbell*, 282 N.C. 125, 191 S.E. 2d 752 (1972).

[2] In 1983 the Supreme Court of the United States undertook a reexamination of principles surrounding the sufficiency of informants' tips to supply probable cause. In *Illinois v. Gates*, --- U.S. ---, 76 L.Ed. 2d 527 (1983) the Court expressly abandoned the two-pronged test of *Aguilar* and *Spinelli* and adopted a "totality of circumstances test."

In *Gates* the police department received an anonymous letter stating that the defendants, husband and wife, were engaged in selling narcotics. The letter stated that the wife, Sue Gates, would drive to Florida, load the Gates' car with drugs, and fly back to Chicago. The husband, Lance Gates, would fly to Florida and drive the loaded car back to Chicago. The letter stated that the couple had drugs worth over $100,000 in their basement. The police, on receiving the letter, confirmed that the Gates lived at the address identified and that an "L. Gates" had made plane reservations from O'Hare Airport in Chicago to West Palm Beach, Florida. The police watched Gates as he boarded the flight at O'Hare and flew to West Palm Beach. Once there, the defendant Gates checked into a hotel room registered to Sue Gates. The following day he and an unidentified woman left the motel in a car bearing Illinois license plates and driving northbound on an interstate frequently used by travelers to the Chicago area. Based on the above information, the police officers sought and ob-

tained a search warrant. A search of the Gates' car and residence revealed over three hundred fifty pounds of marijuana.

The Gates were arrested and brought to trial. The trial court suppressed evidence obtained pursuant to the search warrant, and the Illinois Supreme Court affirmed, basing its analysis on the two-pronged test of *Aguilar* and *Spinelli*. The Supreme Court of the United States, alluding to hypertechnical rules developed by lower courts in applying the two-pronged test, abandoned it and reaffirmed the "totality of circumstances" analysis that traditionally has controlled probable cause determinations.

Under the totality of circumstances test, the two prongs of *Aguilar* and *Spinelli*—veracity and basis of knowledge—are still relevant, but are not to be accorded independent status.

> The task of the issuing magistrate is simply to make a practical, common sense decision whether, given all the circumstances set forth in the affidavit before him, including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. And the duty of a reviewing court is simply to ensure that the magistrate had a "substantial basis for . . . conclud[ing]" that probable cause existed.

Id. at ---, 76 L.Ed. 2d at 548. The Court emphasized in *Gates* that great deference should be paid a magistrate's determination of probable cause and that after-the-fact scrutiny should not take the form of a *de novo* review. In analyzing the facts before it, the Supreme Court stated that the anonymous letter, corroborated by police investigative work, was sufficient basis for a finding of probable cause. *See also State v. Jackson*, 309 N.C. 26, 305 S.E. 2d 703 (1983) (citing *Gates* with approval and using a totality of circumstances test to analyze the sufficiency of probable cause for Fourth Amendment purposes).

Some courts were uncertain as to how significant a change *Gates* had wrought. The Supreme Judicial Court of Massachusetts stated:

> It is not clear that the *Gates* opinion has announced a significant change in the appropriate Fourth Amendment

> treatment of applications for search warrants. Looking at what the Court did on the facts before it, and rejecting an expansive view of certain general statements not essential to the decision, we conclude that the *Gates* opinion deals principally with what corroboration of an informant's tip, not adequate by itself, will be sufficient to meet probable cause standards.

Commonwealth v. Upton, 390 Mass. 562, 568, 458 N.E. 2d 717, 720 (1983), *rev'd, Massachusetts v. Upton*, --- U.S. ---, 80 L.Ed. 2d 721 (1984).

Upton involved a warrant to search a motor home pursuant to a telephone tip to the Yarmouth Police Department in Massachusetts. Several hours before the telephone tip, police had searched a motel room pursuant to a search warrant and had found several items which had been stolen in a burglary. Other items also stolen in the burglary had not been found. The telephone tip came from a woman who stated that she knew about the raid which had occurred only hours before. She said that the remainder of the items stolen in the burglary were in a motor home belonging to the defendant at a certain location. She stated that because of the earlier raid, the defendant had decided to move the motor home. The policeman receiving the call identified the voice as that of the former girl friend of the defendant. The woman then admitted her identity. The policeman verified that a motor home was at the location the informant indicated and submitted an affidavit setting out the information he had obtained. A magistrate issued a search warrant, and a subsequent search produced the stolen items identified by the caller.

The Supreme Judicial Court of Massachusetts held that there was insufficient corroboration of the tip to make up for the tip's failure to meet the two-pronged test. The Supreme Court of the United States reversed and stated that the Supreme Judicial Court of Massachusetts misunderstood the *Gates* decision. *Massachusetts v. Upton*, --- U.S. ---, 80 L.Ed. 2d 721 (1984). The Supreme Court stated that the Massachusetts Court did not consider the police officer's affidavit in its entirety, but instead judged bits and pieces of the information against the artificial standard of the two-pronged test. The Supreme Court also stated that the Massachusetts Court erred in failing to give deference to

the magistrate's decision. Instead of deciding whether the evidence as a whole provided a substantial basis for a finding of probable cause, the Massachusetts Court conducted an after-the-fact, *de novo* scrutiny rejected in *Gates*.

The Supreme Court held that the Massachusetts Court erred in concluding that the magistrate was in error in issuing a search warrant. In so holding, the Supreme Court said that, although the police officer had inferred that the woman was who she said she was, "[I]t is enough that the inference was a reasonable one and conformed with the other pieces of evidence making up the total showing of probable cause." --- U.S. at ---, 80 L.Ed. 2d at 728.

Turning to the facts of the case before us, we hold that the majority in the Court of Appeals erred in holding that the Fourth Amendment to the Constitution of the United States required the suppression of the evidence seized pursuant to the search warrant. In analyzing the affidavit included in the application for the search warrant, the majority concluded that the assertions by the first informant that the defendant had marijuana for sale and marijuana growing in his home were deficient. The majority cited as a deficiency the fact that the first informant's assertions gave no information as to time and no information about the basis of the informant's conclusions. The Court of Appeals noted that the statement that the defendant had marijuana growing in his home did not establish how the informant discovered that fact. Also, the statement that the informant had purchased marijuana from the defendant contained no information about where he had made the purchase.

The second informant stated that within the last twenty-four hours and over a two-month period, there had been a steady flow to the defendant's home of people known to the informant as users of drugs. The Court of Appeals stated that it was unclear whether the second informant spoke with personal knowledge. The Court also said that there were no underlying circumstances from which the magistrate could conclude that marijuana was located at the defendant's home. The majority opinion stated that under the *Aguilar* and *Spinelli* test, the affidavit in this case is "unquestionably deficient. *Gates* does not resurrect it." 66 N.C. at 220, 311 S.E. 2d at 36.

We need not decide whether the affidavit in this case was adequate under the now rejected two-pronged test of *Aguilar* and *Spinelli* and *State v. Hayes*, 291 N.C. 293, 230 S.E. 2d 146 (1976). The Supreme Court of the United States has now stated with unmistakable clarity that in applying the Fourth Amendment in *Gates*:

> We did not merely refine or qualify the "two-pronged test." We rejected it as hypertechnical and divorced from the "factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act."

Massachusetts v. Upton, --- U.S. at ---, 80 L.Ed. 2d at 726.

[3] Under the totality of circumstances analysis required by the Supreme Court of the United States in *Gates* and clarified in *Upton*, we find there to be a substantial basis for the magistrate's finding of probable cause in the present case. The information supplied by the first informant establishes, against the informant's penal interest, that he had purchased marijuana from the defendant. When considering an informant's statements that he had purchased illicit liquor from a defendant, a plurality of the Supreme Court of the United States stated in *United States v. Harris*, 403 U.S. 573 (1971):

> Common sense in the important daily affairs of life would induce a prudent and disinterested observer to credit these statements. People do not lightly admit a crime and place critical evidence in the hands of the police in the form of their own admissions. Admissions of crime, like admissions against proprietary interests, carry their own indicia of credibility—sufficient at least to support a finding of probable cause to search. That the informant may be paid or promised a "break" does not eliminate the residual risk and opprobrium of having admitted criminal conduct.

Id. at 583-84. We agree.

Additionally, the first informant in this case stated that the defendant had marijuana growing in his home which, taken with the fact that the first informant had bought marijuana from the defendant, supports the probability that the informant spoke with personal knowledge and that the marijuana would be found at the defendant's home. The tip from the second informant creates a

strong inference that the illegal activity was continuing and had occurred within the last twenty-four hours.

The reliability of the informants was not questioned by the trial court below. In the affidavit both sources were identified as reliable ones whose information had led to arrests in the past. The fact that statements from the informants in the past had led to arrests is sufficient to show the reliability of the informants. *See State v. Hayes*, 291 N.C. 293, 230 S.E. 2d 146 (1976).

A common sense reading of the information supplied by both informants provides a substantial basis for the *probability* that the defendant had sold marijuana, had grown it in his own home, and was continuing to sell it from his home to a steady flow of drug users within the last twenty-four hours. No more is required under the Fourth Amendment. *Massachusetts v. Upton*, --- U.S. ---, 80 L.Ed. 2d 721.

Applying the totality of the circumstances test prescribed by *Gates* and *Upton* and giving proper deference to the decision of the magistrate to issue the search warrant, we hold that there was a "substantial basis" for the finding of probable cause and that the Court of Appeals erred in reaching a contrary conclusion. This holding makes it unnecessary to consider whether the officer conducting the search acted in objectively reasonable reliance on the warrant so as to require the application of the good faith exception to the exclusionary rule announced in *United States v. Leon*, --- U.S. ---, 82 L.Ed. 2d 677 (1984) and *Massachusetts v. Sheppard*, --- U.S. ---, 82 L.Ed. 2d 737 (1984).

In his written motion to suppress filed with the trial court, the defendant also contended that exclusion of the evidence seized pursuant to the search warrant in this case was required by the Constitution of North Carolina because the affidavit failed to establish probable cause. In construing provisions of the Constitution of North Carolina, this Court is not bound by opinions of the Supreme Court of the United States construing even identical provisions in the Constitution of the United States. *White v. Pate*, 308 N.C. 759, 304 S.E. 2d 199 (1983); *Bulova Watch Co. v. Brand Distributors Inc.*, 285 N.C. 467, 206 S.E. 2d 141 (1974). *See Missouri v. Hunter*, 459 U.S. 359 (1983). Therefore, the decisions of the Supreme Court of the United States in *Gates* and *Upton* are not binding upon us with regard to this question which is ex-

clusively a question of State law, even though we accord such decisions great weight.

We recognize that certain of our prior opinions could lead a less than careful reader to the conclusion that the only protection against unreasonable searches and seizures in North Carolina law was contained in former N.C.G.S. 15-25 which was repealed by Chapter 1286, § 26 of the 1973 Session Laws of North Carolina. *See, e.g., State v. Miller*, 282 N.C. 633, 194 S.E. 2d 353 (1973); *State v. Vestal*, 278 N.C. 561, 180 S.E. 2d 755 (1971). Any such conclusion would be erroneous, however, and we reject any such notion.

[4] It is true, of course, that the language of Article 1, Section 20 of the Constitution of North Carolina differs markedly from the language of the Fourth Amendment to the Constitution of the United States. Nevertheless, Article 1, Section 20 of the Constitution of North Carolina prohibits unreasonable searches and seizures. *State v. Ellington*, 284 N.C. 198, 200 S.E. 2d 177 (1973).

[5] Whether rights guaranteed by the Constitution of North Carolina have been provided and the proper tests to be used in resolving such issues are questions which can only be answered with finality by this Court. *White v. Pate*, 308 N.C. 759, 304 S.E. 2d 199 (1983). *See Missouri v. Hunter*, 459 U.S. 359 (1983). However, we find compelling the reasoning of the Supreme Court of the United States in adopting the totality of circumstances test of *Gates* and *Upton* for determining whether probable cause exists for issuance of a search warrant. Therefore, for resolving questions arising under Article 1, Section 20 of the Constitution of North Carolina with regard to the sufficiency of probable cause to support the issuance of a search warrant, we adopt the totality of circumstances test of *Gates* and *Upton*. We reject the two-pronged test of *Aguilar* and *Spinelli*.

As previously stated herein, application of the totality of circumstances test leads us to hold that there was a substantial basis for the finding of probable cause in the present case. Therefore, we need not consider or decide whether the guarantees against unreasonable searches and seizures in Article 1, Section 20 of the Constitution of North Carolina require the exclusion of evidence seized under a search warrant not supported by probable cause. *See, e.g., State v. Small*, 293 N.C. 646, 239 S.E. 2d 429

(1977) (implying an exclusionary rule arising from Article 1, Section 20); *State v. Reams*, 277 N.C. 391, 178 S.E. 2d 65 (1970) (same); *State v. Colson*, 274 N.C. 295, 163 S.E. 2d 376 (1968) (same).

The decision of the Court of Appeals affirming the trial court's order suppressing evidence seized pursuant to the search warrant in the present case is reversed. The case is remanded to the Court of Appeals with instructions to vacate the trial court's order and to further remand to the Superior Court, Beaufort County, for proceedings according to law.

Reversed and remanded.

THE BOARD OF TRUSTEES OF THE UNIVERSITY OF NORTH CAROLINA AT CHAPEL HILL v. THE UNKNOWN AND UNASCERTAINED HEIRS, IF ANY, OF LILLIAN HUGHES PRINCE, DECEDENT

No. 503A83

(Filed 28 August 1984)

1. **Trusts § 4.1— *modification of charitable trust*—prerequisites**

In order for a charitable trust to be modified pursuant to G.S. 36A-53(a), the plaintiff must show that the three following conditions exist: (1) the testatrix manifested a general charitable intent; (2) the trust has become either illegal, impossible or impracticable of fulfillment; and (3) the testatrix made no provision for alternative disposition of the trust corpus in the event the charitable trust failed.

2. **Trusts § 4.1— *modification of charitable trust*—general charitable intent**

The trial court properly found that testatrix manifested a general charitable intent in establishing a testamentary trust "for the purpose of erecting a building for the Carolina Playmakers" where the will contained other bequests to charities which sought to benefit the University of North Carolina, the Boston Museum School of Art and their respective students; testatrix made no provision for a gift over or reversion if the gift failed or could not be effectuated; the making of a gift for a charitable purpose which might not occur for an indefinite period of time shows the testatrix's awareness that a material change in circumstances might occur which could render impractical a literal compliance with the terms of the gift; and testatrix had a longstanding and close association with the object of her bounty, the Carolina Playmakers.

3. **Trusts § 4.2— charitable trust—impossibility of fulfillment—modification under cy pres doctrine**

A charitable trust established by a will "for the purpose of erecting a building for the Carolina Playmakers" became impracticable or impossible of

fulfillment when a dramatic arts building was constructed on the UNC-CH campus solely with funds appropriated by the General Assembly; therefore, the terms of the trust could be modified by application of the *cy pres* doctrine pursuant to G.S. 36A-53 so as to fulfill as nearly as possible the testatrix's manifested general charitable intention.

4. Equity § 1.1— modification of charitable trust—clean hands doctrine

The record did not disclose fraudulent acts by officials of UNC-CH in failing to disclose the availability of funds from a trust established "for the purpose of erecting a building for the Carolina Playmakers" so as to prohibit the University from seeking modification of the trust pursuant to G.S. 36A-53(a) when a dramatic arts building was constructed solely with funds appropriated by the General Assembly.

DEFENDANTS appeal as of right pursuant to N.C. Gen. Stat. § 7A-30 from the judgment of the Court of Appeals, 64 N.C. App. 61, 306 S.E. 2d 838 (1983) (*Hedrick, J.* with *Wells, J.* concurring and *Phillips, J.* dissenting) which affirmed the judgment for plaintiff entered by *Martin (John C.), Judge* in Superior Court, ORANGE County.

Plaintiff, The Board of Trustees of the University of North Carolina at Chapel Hill, brought this action for Declaratory Judgment under N.C. Gen. Stat. § 1-253, seeking the court's construction of Article IX of the Last Will and Testament of Lillian Hughes Prince. Plaintiff requested that the court exercise its statutory powers of *cy pres* over the charitable trust created by Article IX of the will. By and through their court appointed guardian ad litem, the defendants answered and counterclaimed for a declaration of resulting trust held for their benefit.

Although the testatrix, Lillian Hughes Prince, died on 25 February 1962 as a resident of the State of New York, she lived most of her adult life in Chapel Hill, North Carolina. Both she and her husband were closely involved with The Carolina Playmakers, a touring repertory company associated with the University's Dramatic Art Department. Upon her death, Mrs. Prince bequeathed in Article IX of her will her residuary estate, comprising approximately $135,000, in the following manner:

Article IX

All of the rest, residue and remainder of my property of whatsoever kind and wheresoever located, I give and bequeath to the University of North Carolina at Chapel Hill, in

> trust nevertheless, to accumulate the income until such time as the University shall determine to use said principal and any accumulated income together with such other funds as may be available to it, for the purpose of erecting a building for the Carolina Playmakers. I ask that a suitable recognition of this gift be placed in or on the building, and it is my hope, without attaching any condition, that the building will be named the "Lillian Prince Theatre."

In 1964, officials of the University of North Carolina [hereinafter referred to as the University] requested $1,245,000 from the North Carolina General Assembly for the construction of a new theatrical facility. Thereafter, a portion of the Prince Funds was used to acquire architectural plans for a proposed theater building. In July 1971, the General Assembly appropriated $2,250,000 for the construction of a "Dramatic Arts Building," to be used for the production activities of the University's Department of Dramatic Art, which includes the Carolina Playmakers. Implementation of this project was delayed for various reasons. Eventually it became apparent to the University officials that the financing, including the addition of the Prince Funds, would be inadequate to build a facility suitable for the purposes of the University's diverse theatrical activities. As a consequence, a new design and new site had to be chosen. Finally, the University constructed a new dramatic arts facility, designated as the Paul Green Theatre, using a 1971 special appropriation by the General Assembly. The Prince Funds were not used in the construction of this theater.

The trial court concluded that the 1971 appropriation by the General Assembly constituted sufficient funding for the construction of the dramatic arts facility, thus eliminating the need for the use of the Prince Funds for that particular purpose. This sufficiency created changed circumstances which necessitated the application of the doctrine of *cy pres*, pursuant to N.C. Gen. Stat. § 36A-53, "so as to permit a modification of the terms of the decedent's bequest in order to as nearly as possible fulfill the testatrix's manifested general charitable intention."

The Court of Appeals, in upholding the trial court's judgment, found Judge Martin's findings of fact supported by the evidence and his conclusions of law properly substantiated.

Attorney General Rufus L. Edmisten, by Assistant Attorney General George W. Boylan, for plaintiff-appellees.

O. Kenneth Bagwell, Jr., for defendant-appellant.

COPELAND, Justice.

The sole issue before us is whether the charitable trust established by the will of Mrs. Prince may be modified pursuant to the *cy pres* doctrine. This principle of equity is a saving device applied to charitable trusts by the courts "to direct the application of the property to a charitable purpose as near as possible to the precise objective of the donor," when his precise intention cannot be effectuated. E. Fisch, D. Freed, and E. Schachter, Charities and Charitable Foundations § 561 (1974).

The application of the *cy pres* doctrine in North Carolina is governed by N.C. Gen. Stat. § 36A-53(a), which provides in pertinent part:

> If a trust for charity is or becomes illegal, or impossible or impracticable of fulfillment . . . and if the settlor, or testator, manifested a general intention to devote the property to charity, any judge of the superior court may . . . order an administration of the trust . . . as nearly as possible to fulfill the manifested general charitable intention of the settlor or testator. . . . This section shall not be applicable if the settlor or testator has provided, either directly or indirectly, for an alternative plan in the event the charitable trust, devise or bequest is or becomes illegal, impossible or impracticable of fulfillment. . . .

[1] Accordingly, to invoke the application of this statute the plaintiff must show that the three following conditions exist: (1) that the testatrix manifested a general charitable intent; (2) the trust has become either illegal, impossible or impracticable of fulfillment; and (3) the testatrix made no provision for alternative disposition of the trust corpus in the event the charitable trust fails. The record reveals that the third condition has been met in this case, in that the will does not provide for an alternative disposition of the trust property. Thus, we focus our inquiry on the remaining conditions to determine whether N.C. Gen. Stat. § 36A-53(a) is appropriately applied in this case.

I.

[2] It is a well recognized principle that gifts and trusts for charities are highly favored by the courts. Thus, the donor's intentions are effectuated by the most liberal rules of construction permitted. 15 Am. Jur. 2d, *Charities*, § 126 at 147 (1964). Courts endeavor to find, when possible, a general charitable intent where the donor's specified charitable purpose is impossible to fulfill. More specifically:

> Courts have less difficulty finding a general charitable intent where the particular object fails after the charitable disposition has taken effect than when it ceased to exist before the gift took effect. In the former situation the courts infer an expectation by the donor that changing conditions resulting from the passage of time might make the effectuation of the particular purpose impossible or impracticable and that in such eventuality the donor would prefer modification of the disposition rather than reversion of the property to his heirs.

Fisch, Freed, and Schachter, *supra*, at 440. See also: *Union Methodist Episcopal Church v. Equitable Trust Co.*, 32 Del. Ch. 197, 83 A. 2d 111 (1951); *Powers v. Home for Aged Women*, 58 R.I. 323, 192 A. 770 (1937); Restatement (Second) of Trusts § 399, comment i (1957).

In considering defendants' contention that the trial court erred in finding that Mrs. Prince possessed the requisite "general charitable intent," we have carefully reviewed the facts and circumstances at bar, as well as the general legal principles applicable to the construction and interpretation of charitable trusts. We believe that the trial court's determination that the testatrix possessed a general charitable intent was proper and well supported by the evidence.

As in most situations where the settlor's intent is in question, the courts must look for evidence of that intent from the "four corners" of the instrument being construed and from the situation of the parties to the trust. *Davison v. Duke University*, 282 N.C. 676, 194 S.E. 2d 761 (1973). As the Court of Appeals pointed out, Mrs. Prince bequeathed a great portion of her estate to charity. In addition to leaving her residuary estate to the University, she bequeathed her husband's illustrations, cor-

respondence, art books, proofs, sketches and other memorabilia to the University's Art Department. She also provided for graduate scholarships at the Boston Museum School of Art for students enrolled in the Art Department at the University of North Carolina. The presence within a will of other bequests to charities, especially those of a similar character, is indicative of a general charitable intention. Fisch, Freed, and Schachter, *supra*, at 439; 15 Am. Jur. 2d, *Charities* § 163. The fact that a testator bequeathed practically all of his estate for charitable purposes is sound evidence denoting that he had a general charitable intention. *Wachovia Bank & Trust Co., N.A. v. Buchanan*, 346 F. Supp. 665 (D.D.C. 1972), *aff'd*, 487 F. 2d 1214 (D.C. Cir. 1973); *Miller v. Mercantile-Safe Deposit & Trust Co.*, 224 Md. 380, 168 A. 2d 184 (1961); *Re Stouffer's Trust*, 188 Or. 218, 215 P. 2d 374 (1950); *Christian Herald Ass'n. v. First Nat. Bank*, 40 So. 2d 563 (Fla. 1949). All of Mrs. Prince's gifts to charities sought to benefit the University of North Carolina, the Boston Museum School of Art and their respective students.

In bequeathing her residuary estate to the University, Mrs. Prince made no provision for a gift over or reversion if the gift failed or could not be effectuated. Survivorship was required, however, in her private gifts to relatives and friends. The failure, or conscious omission, to provide for the possibility of trust failure is further evidence of the testatrix's general charitable intentions. *See: In re Estate of Thompson*, 414 A. 2d 881 (Me. 1980); *Re Estate of Rood*, 41 Mich. App. 405, 200 N.W. 2d 728 (1972); *First Nat. Bank v. Elliott*, 406 Ill. 44, 92 N.E. 2d 66 (1950); Bogert, Trusts, 5th Ed., § 147.

Mrs. Prince instructed in Article IX that the University was to hold her residual estate in trust and "accumulate the income until such time as the University shall determine to use said principal and any accumulated income. . . ." for the purpose of building a theater. The making of a gift for a charitable purpose which may not occur for an indefinite period of time is a strong indication of a general charitable intent. It presupposes the settlor's awareness that a material change in the surrounding circumstances may occur which could render impractical a literal compliance with the terms of the gift. *See: Will of Porter*, 301 Pa. Super. 299, 447 A. 2d 977 (1982); *Fulton v. Trustees of Boston College*, 372 Mass. 350, 361 N.E. 2d 1297 (1977).

Finally, we note with interest Mrs. Prince's longstanding and close association with the object of her bounty, the Carolina Playmakers, a University organization whose purpose is the production performance of dramatic art. As early as 1940, the testatrix became involved with the Carolina Playmakers. She personally appeared in a number of plays and other theatrical works produced by this company, and was given "leading roles" in at least five of the productions. Since the Carolina Playmaker's inception, it endured a lack of adequate theater facilities; a situation of which Mrs. Prince was acutely aware.

In support of their contention, defendants cite *Wilson v. First Presbyterian Church*, 284 N.C. 284, 200 S.E. 2d 769 (1973), our leading case determining the applicability of the *cy pres* doctrine. [There this Court interpreted N.C. Gen. Stat. § 36-23.2 which has since been superseded by a similar N.C. Gen. Stat. § 36A-53.] The defendants insist that the trust language and factual situations in *Wilson* and the case *sub judice* are almost identical. We believe the present case is readily distinguishable from *Wilson*.

The *Wilson* case involved a testamentary bequest by Miss Pinnix to the First Presbyterian Church in Reidsville, North Carolina "for the purpose of building a Presbyterian Church . . ., which church shall be built as a memorial to my beloved brother M. F. Pinnix, deceased." *Id.* at 287, 200 S.E. 2d at 771. In that case this Court held that the trustor had no general charitable intent to benefit the First Presbyterian Church, based on the following reasoning:

> Pertinent circumstances are: Miss Pinnix was not a Presbyterian, but a Baptist. She obviously had a deep affection for her brothers, living and deceased. She desired the construction of a lasting memorial to her deceased brother, a former sheriff of the county, from whom she inherited much of the property disposed of by her will. She was a resident of Reidsville, acquainted with the area in which she proposed that the church be built and with the inhabitants of that area and their needs.
>
> Nothing in the will, the pertinent portions of which are quoted above, or in any other circumstances set forth in the record, indicates that Miss Pinnix had more than a casual in-

> terest in the general religious or charitable program of First Presbyterian or of the Presbyterian denomination. Her two-fold purpose was to establish a memorial to her brother at the specified location and to promote religious activities in this part of her native city. A reasonable inference is that she believed the inhabitants of this area of the city would remember affectionately their former sheriff and, for reasons not disclosed in the record, a Presbyterian church was more likely to be constructed and to succeed therein than a church of her own denomination would be. There is nothing in the will, or elsewhere in the record, to indicate the remotest possibility that she contemplated that First Presbyterian, itself, would remove to this location and occupy the proposed building. Thus, the design of the testatrix was not to confer a benefit upon First Presbyterian, but to use the good offices of First Presbyterian in the establishment in this area of a kindred but separate church.

Id. at 296, 200 S.E. at 776.

Our comparison of this case and *Wilson* reveals pronounced substantive factual differences. The terms of the *Wilson* gift mandated a "memorial" to the decedent's brother, while Mrs. Prince specified no such narrow, limited intent. Although Mrs. Prince asked that her gift be appropriately recognized, she acknowledged that her wishes were clearly precatory. In *Wilson* the decedent had no "more than a casual interest in the general religious or charitable program of First Presbyterian," while for many years Mrs. Prince had been personally involved with the dramatic activities of the University. The conclusion of this Court in *Wilson* was that the testatrix did not intend to confer a benefit on the church itself. Mrs. Prince's will evinces an objective to benefit the University and those associated with its dramatic activities. Mrs. Prince did not attempt to use the University as a conduit for more paramount purposes. Instead her wishes clearly signify an intent to benefit the plaintiff. Consequently, in view of the salient distinctions which go to the underlying question of fundamental motivation, the *Wilson* case is inapposite and inappropriate.

It is our opinion that the existing evidence supports the conclusion that Mrs. Prince expressed in her will a general charitable intent to benefit the plaintiff.

II.

[3] We now address the remaining condition necessary to invoke the Charitable Trusts Administration Act, to wit, that the charitable trust has become illegal or impracticable or impossible of fulfillment. Many courts have applied the doctrine of *cy pres* in cases where the purpose of the trust had been already accomplished. Bogert, Trusts, 5th Ed. § 147; *Red Willow County v. Wood*, 144 Neb. 241, 13 N.W. 2d 153 (1944); *In re Neher's Estate*, 279 N.Y. 370, 18 N.E. 2d 625 (1939); *City of Newport v. Sisson*, 51 R.I. 481, 155 A. 576 (1931).

Plaintiff alleged in its complaint that:

> The inadequacy of the funds committed to trust by the testatrix and the authorization by the General Assembly of North Carolina of the erection of the Paul Green Theater for use by the Department of Dramatic Art, including its 'Carolina Playmakers' and the 'Playmakers Repertory Company' constitute changed circumstances rendering the trust created under Article IX of the will of Lillian Hughes Prince impossible or impracticable of fulfillment. . . .

In denying this allegation, defendants claim that the language of the gift precludes any assertion that the gift was impossible or impracticable of fulfillment. The pertinent language directs the University to:

> accumulate the income until such time as the University shall determine to use said principal and any accumulated income together with such other funds as may be available to it, for the purpose of erecting a building for the Carolina Playmakers.

The trial court, sitting without a jury, agreed with the University and made a corresponding finding of fact and conclusion of law that the trust had become impossible or impracticable of fulfillment, thus invoking N.C. Gen. Stat. § 36A-53. The Court of Appeals upheld that judgment.

Upon a review of the record, we believe that there was sufficient evidence to support the trial court's findings and conclusions. That court appropriately realized the significance of the factual circumstances and sequence of events surrounding the efforts to effectuate the trust purpose.

In 1962 the University acquired the Prince money, which amounted to approximately $132,000. With the addition of accumulated interest, the fund at the time in question totaled about $210,000. The University initiated its first official attempt to finance construction of a dramatic arts facility in 1964 by requesting $1,245,000 from the General Assembly. Funding was not available at this time. Thereafter, the University used part of the Prince Fund to acquire architectural plans for the new building. The cost of the facility was estimated at $3,000,000. On 21 July 1971, the Legislature appropriated $2,250,000 for the dramatic arts building. It appears that a series of delays, program alterations and budgetary problems hindered the implementation of this building project. In May of 1973, the University sought authorization to supplement the original legislative appropriation with money from the Prince Fund for the purpose of obtaining and installing specialized theatrical production equipment. Later that month, the North Carolina Department of Administration's Office of State Property and Construction acknowledged the Advisory Budget Commission's approval of this incorporation of the Prince Funds into the original appropriation.

Nevertheless, the combined funds still proved inadequate to construct the facility as planned. Consequently, the University had to redesign and relocate its building to reduce size and cost. Thereafter, in February 1976, the architect estimated that the new cost of building the theater would be approximately $1,364,209, which was substantially below the original appropriation of $2,250,000. The radical changes to the project had produced an unexpected result—a surplus of funds.

Finally, using the special appropriation by the Legislature, the theatrical facilities were constructed with an excess in funding remaining. The foregoing developments lead us to believe that the University acquired this surplusage not by calculated design, but by the circumstances thrust upon it. Simply, the Prince Fund was not needed to supplement the adequate State money for the building costs. If all had gone according to the University's pre-1976 plan, the Prince money would have been incorporated into the building fund. However, unforeseen events inflicting delays, modifications and radical alterations occurred, as they are apt to do with such large construction projects. Suddenly, 12 years after its initial request for a much needed theatrical

facility, the University found itself in the unexpected position of holding excess State funding.

Perhaps the University should have offered to return to the General Assembly an amount of state funding equivalent to the Prince money, as the defendants contend, or at least made sure that the Legislature was informed of the availability of the Prince Fund. Although, with regard to requests for appropriations to our General Assembly, we advocate financial disclosure by those groups seeking state assistance, we do not construe, in this instance, the University's failure to use the Prince Funds in the construction project as a fraudulent act.

[4] Defendants argue that the relief sought by the University is barred by the general equitable doctrine "that he who comes into equity must come with clean hands." The record does not support the accusation of fraudulent acts indicating a manifest abuse of fiduciary responsibility by the University.

Defendants predicate their claim of "unclean hands" mainly on a memorandum from the University's director of operations and engineering to two University officials. This document, whose purpose was to arrive at a "probable budget," discussed the unresolved construction details, the names of the low bid contractors and their respective cost estimates, and the recommendations of the architect. The memorandum also includes the director's comments that:

> If State makes us put our $210,000 (Prince Funds) into the project the the (sic) State could retract an additional $210,000. . . . I suggest no one publicize this budget.

Defendant reasoned that the University officials' action in not disclosing the availability of the Prince Funds in this "proposed budget" constituted sharp practice. We disagree. The document was not a "proposed budget" that the University intended to present or ever in fact presented to the State; rather, it was an analysis by a University employee of the possible expenses which might be incurred. The construction contracts involved were still at the tentative stage, thus any publication of this probable budget would be premature. The record was devoid of any evidence that this document was or was not in fact publicized by University officials.

Indeed, the record indicates that the plaintiff was well aware of its responsibilities imposed by the Prince bequest. The University expressly acknowledged in its May 1973 request to the Office of State Property and Construction that:

> As you are aware, the University has a special Trust Fund (The "Prince Fund") which was given to the University for the specific use in a theater for dramatic arts. The restrictions of this gift fund are such that we cannot use these funds elsewhere; . . .

This letter to the Office of State Property and Construction reflects the positive actions by the plaintiff, consistent with the wishes of Mrs. Prince, to obtain the proper authorization to add the trust funds to the legislative appropriation. In further keeping with the testatrix's objective, the University used part of the Prince money to acquire the design of the theater facility. We do not find these actions consistent with the defendants' claim of deliberate efforts of concealment.

We hold that the construction of the new dramatic arts facility, made possible by the legislative grant of sufficient funds, expressly made "impracticable" the achievement of Mrs. Prince's trust. Her primary objective has been fulfilled. Consequently, in consideration of the evidence before us, we conclude that the trial court did not err in ruling that this charitable trust had become "impossible or impracticable of fulfillment" within the meaning of N.C. Gen. Stat. § 36A-53.

III.

Application of the *cy pres* doctrine mandated by the Charitable Trusts Administration Act reflects this State's "strong policy" that courts shall modify the terms of a trust instrument "in order to preserve the trust." *Edmisten v. Sands*, 307 N.C. 670, 675 n. 1, 300 S.E. 2d 387, 391 (1983). In accord with our above holdings that competent evidence supports the trial court's findings of fact that the decedent possessed a general charitable intent and that the trust had become impossible or impracticable of fulfillment, we conclude that the plaintiff is entitled to reformation of the charitable trust established under Article IX of the Will of Mrs. Prince. We further approve of the trust amendment ordered by the trial court which provides for the distribution of

income for "activities that enhance the production, development, maintenance, and student participation in theatrical productions sponsored by the Department of Dramatic Art," with appropriate recognition given to Mrs. Prince's generosity.

The judgment of the Court of Appeals is hereby affirmed.

Affirmed.

STATE OF NORTH CAROLINA v. PAUL WAYNE WHITLEY

No. 564A83

(Filed 28 August 1984)

1. **Criminal Law § 32.1— testimony about "crime scene"—no violation of presumption of innocence**

An officer's references to the "crime scene" in his testimony did not deprive defendant of the presumption of innocence and were not prejudicial since the term "crime scene" is neutral as to whom criminal conduct is attributable. Furthermore, defendant waived his right to raise on appeal his objection to such evidence where references to the "crime scene" were admitted without objection both before and after defendant's objection.

2. **Criminal Law § 73.2— statements by another—admissibility to explain subsequent conduct**

Testimony by decedent's wife that decedent had told her to go inside the house and to lock the door when they got home was not inadmissible hearsay, since it was not offered to prove the truth of the matter asserted, and was admissible to explain the wife's subsequent conduct in going inside the house and locking the door as requested by decedent.

3. **Criminal Law § 89.4— prior inconsistent statement—admissibility for impeachment**

The pretrial statement of a defense witness was properly admitted on rebuttal for impeachment purposes where the prior statement was inconsistent in part with the trial testimony of the witness and was material in that it related to events immediately leading to the shooting in this case.

4. **Criminal Law § 95.1— evidence competent for restricted purpose—failure to request limiting instruction**

The admission without limitation of evidence which is competent for a restricted purpose will not be held to be error in the absence of a request by the defendant for limiting instructions.

5. Homicide § 21.5— first degree murder—sufficiency of evidence

There was substantial evidence that defendant unlawfully killed his son with premeditation and deliberation so as to support his conviction of first degree murder where the evidence tended to show that defendant and his son quarreled at the mother's home during which defendant threatened to kill the son; the son left his mother's home and went to his home several hundred yards away where he pulled his truck sideways into his driveway; defendant followed his son, and when he arrived at his son's house, the son fired a shot into the air above his father's truck; several seconds later the son's wife heard three shots in rapid succession; the son had been shot three times with bullets from a pistol the defendant admitted firing; and two shots which were consistent with distant shots had been fired into the son's back.

6. Homicide §§ 30.2, 32.1— first degree murder—failure to submit voluntary manslaughter

The trial court in a first degree murder case did not err in refusing to submit involuntary manslaughter as a possible verdict where defendant did not claim that his gun discharged accidentally but relied upon a theory of self-defense, stating that he shot decedent to save his own life. Furthermore, the jury verdict of guilty of first degree murder rendered harmless the failure to submit a possible verdict of manslaughter.

BEFORE *Freeman, Judge*, at the September 19, 1983 Criminal Session of Superior Court, WILKES County, the defendant was tried and convicted of murder in the first degree. The trial court sentenced him to life imprisonment and he appealed to the Supreme Court pursuant to G.S. 7A-27(a). Heard in the Supreme Court on March 14, 1984.

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

E. James Moore, for the defendant appellant.

MITCHELL, Justice.

The defendant seeks a reversal of his conviction of first degree murder, contending that the trial court erred in submitting a possible verdict of first degree murder to the jury and in failing to find the guilty verdict contrary to the weight of the evidence. He also contends that the trial court erroneously allowed certain testimony to be admitted. He finally assigns as error the trial court's refusal to instruct the jury on involuntary manslaughter as a possible verdict. Having examined the evidence presented, we find no merit in the defendant's contentions.

The State's evidence tended to show that the deceased, Billy Joe Whitley, lived with his wife and young son in a house located about two hundred yards from the home of his mother, Betty Whitley. Betty Whitley and the father of the deceased, the defendant Paul Whitley, had been separated for several months when the death of Billy Joe Whitley occurred in May, 1983. On May 7, 1983 at approximately 6:00 p.m. Billy Joe Whitley, his wife Theresa and his son Joey rode in a red pickup truck to Betty Whitley's house to pick up mail. Billy Joe Whitley went inside the house.

Theresa Whitley testified that shortly after her husband went inside his mother's home, she heard the raised voices of her husband and his father, the defendant, in argument. She heard the defendant say "Joe, I'm gonna come up there and kill you." She heard her husband say, "Daddy, don't come up there and bother us anymore." Theresa Whitley testified that Billy Joe Whitley came back outside, got into the truck and started driving home. He told his wife to get out her house key and to go inside their home and lock the door. When they arrived home, her husband pulled the red pickup truck sideways across their driveway. Billy Joe Whitley then got his shotgun and some shells from the house. Theresa Whitley went inside the house with her son and locked the door. She watched as the defendant drove up in an El Camino truck and pulled into the driveway. Theresa Whitley observed her husband fire a shot into the air over the defendant's truck. She looked around to locate her young son, and then heard two or three more shots in rapid succession. She ran outside and saw her husband, who had blood on him, getting up from the ground. Her husband walked toward his father's El Camino and said, "Daddy, you shot me. I'm bleeding, take me to the hospital." He then got into the El Camino with his father. The defendant drove his son to a hospital.

Further evidence presented by the State tended to show that the deceased suffered three gunshot wounds. One wound was a grazing wound to the right arm. One wound was to the right back, eleven inches from the top of the deceased's head. The third wound was to the right lower back, fifteen to sixteen inches below the top of the head. The wounds were consistent with having been caused by distant shots.

Two witnesses for the State testified to their observations of the defendant at Wilkes County General Hospital. They observed the defendant bring his son to the door of the hospital and heard him say, "I think he's been shot." After two men helped Billy Joe Whitley inside the hospital emergency room, the defendant left without reentering the emergency room. The defendant was not arrested until May 16, 1983, although a warrant was issued May 7, 1983 and a search for him conducted throughout the county.

The evidence presented by the defendant included his own testimony concerning the events of May 7, 1983. The defendant testified that he was at his home that day and that although he did not stay with his wife all of the time, he and his wife did live together. He acknowledged having an argument with his son over money he said Billy Joe owed him. He testified that he did not threaten his son, but told him that he wanted to talk with him further.

The defendant stated that Billy Joe left in his truck and that he, the defendant, followed his son in an El Camino truck to his son's house. He testified that when he arrived at the house, Billy Joe had blocked the driveway with his truck. Billy Joe walked from behind the truck, fired a shotgun above the El Camino, and immediately began reloading his gun. He walked toward the defendant's El Camino and said, "Dad, do you believe I'll kill you?" The defendant answered, "Billy Joe, I hope not." Billy Joe then put the shotgun in the window of the El Camino and hit his father several times with the barrel. The defendant was knocked down onto the seat by the blows and while he was down, he reached under the seat for his pistol. The defendant's testimony was that as he came back up from the floor, his son backed off. The defendant fired three shots at his son to save his own life. He then drove Billy Joe to the hospital. After leaving the hospital, he saw several friends. He then spent four days in a hay barn thinking, after which he went home, sent for a minister, and surrendered to police. The defendant acknowledged that prior to May 7, 1983 he had lived with a twenty-three year old woman, Penny Whitley [unrelated], in a house across the road from the house occupied by his wife.

Several witnesses testified on behalf of the defendant. Several of his friends testified that they had seen the defendant on

the night after the shooting. At that time he was bruised about the head and shoulders. They testified that the defendant had told them that his son had hit him with the barrel of a gun.

Betty Whitley, the defendant's wife, testified on his behalf that she remembered an argument over money between her husband and her son on May 7, 1983. She recalled no threats, but stated that she went after her husband when he followed their son to their son's house. She testified that her husband told her to go back home because he did not intend any trouble. She testified that she and her husband had been separated for several months, but that he spent most days and some nights with her.

Detective David Call testified that Betty Whitley had made several statements to the police after the death of her son. She told them that on May 7, 1983 her husband had been in a very bad mood, and that after the argument over money, she ran out to the road to stop her husband because she thought there would be trouble.

I.

[1] The defendant first contends that the trial court erred in admitting over objection references by Detective Call to the "crime scene" in his testimony about his investigation of the shooting. The defendant maintains that the references deprived him of a fair trial by violating the requirement that the State prove every element of a crime and by depriving him of the presumption of innocence.

The defendant raised no objection at trial to the first reference to "crime scene." He made a general objection to the "terminology 'crime scene' " at the second reference by Detective Call, and the trial court overruled the objection. The detective made three further references to the crime scene in his testimony to which no objection was raised.

We are not persuaded by the defendant's argument that the references to the "crime scene" were prejudicial. It is clear that some sort of crime was committed at the residence of Billy Joe Whitley on May 7, 1983. Several gunshots were fired which caused the death of Billy Joe Whitley. At the very least, an unlawful affray occurred at the scene. The phrase "crime scene" does not suggest whose conduct was criminal, however, and did

not relieve the State's burden of proving that a crime had been committed and that it was committed by the defendant. Because the term "crime scene" is neutral as to whom criminal conduct is attributable, the defendant was not deprived of the presumption of innocence.

Furthermore, the defendant waived his right to raise on appeal his objection to the evidence. Where evidence is admitted over objection, and the same evidence has been previously admitted or is later admitted without objection, the benefit of the objection is lost. *State v. Maccia*, 311 N.C. 222, 316 S.E. 2d 241 (1984); *State v. Chapman*, 294 N.C. 407, 241 S.E. 2d 667 (1978); 1 Brandis on North Carolina Evidence § 30 (1982). Reference to the "crime scene" was admitted without objection both before and after the defendant's objection. We overrule this assignment of error.

II.

[2] The defendant next contends that the trial court erred in admitting the testimony of Theresa Whitley concerning statements made by her husband before his death. She testified over objection that on the way to their home after the argument between the defendant and her husband, her husband asked her if she had a house key. She said she told him "yes." Theresa Whitley testified that her husband told her to go inside the house and to lock the door when they got home. The defendant contends that the testimony was inadmissible hearsay. We hold that the testimony was properly allowed.

Hearsay is defined in our cases as the assertion of any person other than that of the witness himself in his present testimony offered to prove the truth of the matter asserted. 1 Brandis on North Carolina Evidence § 138 (1982). Although the statement of Billy Joe was the assertion of someone other than the witness Theresa Whitley in her testimony, it was not offered to prove the truth of the matter asserted. Instead, the evidence was offered to explain Theresa's subsequent conduct in going inside the house and locking the door as requested by her husband. This Court has long held admissible statements by a declarant other than the witness for the purpose of explaining subsequent conduct. *State v. Maynard*, 311 N.C. 1, 316 S.E. 2d 197 (1984); *State v. White*, 298 N.C. 430, 259 S.E. 2d 281 (1979); *State v. Potter*, 295 N.C. 126, 244

S.E. 2d 397 (1978); *State v. Irick*, 291 N.C. 480, 231 S.E. 2d 833 (1977). We find this assignment of error to be meritless.

III.

[3] The defendant argues in his next assignment of error that the trial court erred in admitting a pretrial statement of Betty Whitley. The defendant's contention is that the matters referred to in the statement were collateral and not properly subject to proof by extrinsic evidence. He further argues that the trial court should have given a limiting instruction to the jury.

On direct examination, the witness testified about events leading up to the shooting. She testified that an argument had occurred between her husband and her son. After her husband left the house, she walked down the road after him. She testified that she did not know why she followed her husband. Her testimony was that her husband told her to go back because he was not going for any trouble. She stated that she and her husband had been separated for several months at the time of the shooting but that he had returned home.

On cross examination the witness did not remember stating to police officers that her husband was in a bad mood on the day of the shooting. She stated that he was not in a bad mood. She further stated that she did not remember telling officers that her husband had said to her son during the argument, "I'll show you." The prosecutor questioned her about her statement to officers that she ran rather than walked to Billy Joe's house. She did not remember making the statement and denied making it. She did not remember telling officers that she ran to Billy Joe's house because she thought there would be trouble.

As part of its rebuttal evidence, the State called Detective Call, and the trial court permitted Call to read from a prior statement made by the witness. It conflicted in some ways with her trial testimony. In her statement to the officers she said that the defendant had been in a bad mood on the day of the shooting and had told her son,"I'll show you," during the argument. She also said that she ran to Billy Joe's house because she thought there would be trouble.

The trial court did not err in permitting the State to offer the prior statement of the witness Betty Whitley. Under certain circumstances a witness may be impeached by proof of prior conduct or statements which are inconsistent with the witness's testimony. 1 Brandis on North Carolina Evidence § 46 (1982). Inconsistent prior statements are admissible for the purpose of shedding light on a witness's credibility. *Id.*

When the witness's prior statement relates to material facts in the witness's testimony, extrinsic evidence may be used to prove the prior inconsistent statement without calling the inconsistencies to the attention of the witness. *State v. Green*, 296 N.C. 183, 250 S.E. 2d 197 (1978). Material facts involve those matters which are pertinent and material to the pending inquiry. *Id.* When the prior statement of the witness is collateral but tends to show bias, it must be called to the witness's attention but may be proved by extrinsic evidence. *Id.* If the prior statement of the witness is collateral and does not tend to show bias, the cross examiner is bound by the answer of the witness on cross examination. No other witness may be called to prove the prior inconsistent statement. *Id.* Because the prior statement with which Betty Whitley was impeached was inconsistent in part with her testimony and material in that it related to events immediately leading to the shooting in this case, we hold that the trial court committed no error in allowing the testimony of Detective Call on rebuttal.

The defendant contends in particular that evidence concerning Betty Whitley's separation from her husband was collateral and that the prosecutor should have been bound by her answers upon cross examination. Having examined both the testimony and the prior statement of the witness offered on rebuttal, we find that the part of the statement concerning the marital relations of the Whitleys was not inconsistent but instead was corroborative of Betty Whitley's direct testimony.

On direct examination the witness testified that the defendant was living with her and that he had never been away for long. It was revealed on cross examination that the couple had been separated for seven months and that the defendant had lived with Penny Whitley. The prior statement of the witness which Detective Call read to the jury also stated that the couple had been

separated for several months. Since the testimony about the separation had already been admitted into evidence without objection, repetition of the evidence was cumulative and clearly not prejudicial. If such corroborative testimony did relate to collateral matters, the defendant has not demonstrated a reasonable possibility that a different result would have been reached at the trial had the prior statement concerning the marital status of the couple not been introduced. *See* G.S. 15A-1443(a). The trial court did not commit prejudicial error in admitting extrinsic evidence of Betty Whitley's prior statement, and the defendant's assignment of error is overruled.

[4] The defendant also complains that the trial court did not instruct the jury to consider the prior statement for the sole purpose of evaluating Betty Whitley's credibility. It does not appear from the record that the defendant requested such an instruction. The admission without limitation of evidence which is competent for a restricted purpose will not be held to be error in the absence of a request by the defendant for limiting instructions. *State v. Maccia*, 311 N.C. 222, 316 S.E. 2d 241 (1984); *State v. Montgomery*, 291 N.C. 91, 229 S.E. 2d 572 (1976). We overrule this assignment of error.

IV.

The defendant has raised four additional issues on appeal for which there is one dispositive inquiry: was there sufficient evidence of first degree murder to submit to the jury? The defendant contends the trial court erred (1) in denying his motion to dismiss the charges at the end of all of the evidence, (2) in instructing the jury on first degree murder as a possible verdict, (3) in entering judgment for first degree murder, and (4) in denying the defendant's motion for appropriate relief for insufficiency of evidence. If there was sufficient evidence of first degree murder to submit to the jury and to withstand a motion to dismiss, the trial court properly instructed the jury on first degree murder and entered judgment.

In deciding whether the trial court erred in denying a motion to dismiss, the question is whether substantial evidence was introduced of each essential element of the offense charged or a lesser offense included therein and of the defendant's having been the perpetrator. If so, the motion is properly denied. *State v.*

Powell, 299 N.C. 95, 261 S.E. 2d 114 (1980). The evidence must be considered in the light most favorable to the State, and the State is entitled to every reasonable intendment and every reasonable inference to be drawn therefrom. If the trial court determines that a reasonable inference of the defendant's guilt can be drawn from the evidence, then the defendant's motion to dismiss must be denied and the case must be submitted to the jury. *State v. Bright*, 301 N.C. 243, 271 S.E. 2d 368 (1980). Contradictions and discrepancies are matters for the jury to resolve. *State v. Bolin*, 281 N.C. 415, 189 S.E. 2d 235 (1972).

Murder in the first degree is a murder "which shall be perpetrated by means of poison, lying in wait, imprisonment, starving, torture or by any other kind of premeditated killing." G.S. 14-17. Premeditation and deliberation are essential elements of murder in the first degree. Premeditation means thought beforehand for some period of time, however short. *State v. Lowery*, 309 N.C. 763, 768, 309 S.E. 2d 232, 237 (1983). Deliberation means intention to kill, executed by the defendant in a cool state of blood, in furtherance of a fixed design to gratify a feeling of revenge or to accomplish some unlawful purpose and not under the influence of violent passion suddenly aroused by some just or lawful cause or legal provocation. *Id.* The defendant need not be calm and tranquil to satisfy the requirement of a cool state of blood. *State v. Myers*, 299 N.C. 671, 263 S.E. 2d 768 (1980). If done pursuant to a fixed design to kill, an unlawful killing may be deliberate and premeditated "notwithstanding that defendant was angry or in an emotional state at the time, unless such anger or emotion was such as to disturb the faculties and reason." *Id.* at 677, 263 S.E. 2d at 772-73.

[5] Guided by these principles, we hold that there was substantial evidence that the defendant in this case unlawfully killed his son with premeditation and deliberation. When considered in the light most favorable to the State, the evidence showed a quarrel between the defendant and his son during which one witness heard the defendant say, "Joe, I'm gonna come up there and kill you." The son responded, "Daddy, don't come up there and bother us anymore." The deceased left his mother's house and went to his home several hundred yards away where he pulled his truck sideways into his driveway. The defendant followed his son. When he arrived at his son's house the deceased fired a shot into

the air above his father's truck. Several seconds later the defendant's daughter-in-law heard three shots in rapid succession. The deceased had been shot three times with bullets from a pistol the defendant admitted firing. Two shots were fired into the decedent's back and were consistent with distant shots.

The evidence that the defendant threatened to kill his son and then drove to his son's house where he shot him three times, twice in the back, is substantial evidence from which the jury properly could have found a premeditated and deliberate murder. The trial court did not err in denying the defendant's motion for dismissal for insufficiency of evidence. The trial court properly instructed the jury that it could find the defendant guilty of first degree murder and entered judgment accordingly.

V.

The defendant also contends that the trial court erred when it denied his motion to set aside the jury verdict as contrary to the weight of the evidence. Such a motion is addressed to the sound discretion of the trial court and is not reviewable in the absence of manifest abuse of discretion. *State v. Jones*, 310 N.C. 716, 314 S.E. 2d 529 (1984); *State v. Witherspoon*, 293 N.C. 321, 237 S.E. 2d 822 (1977). We believe the trial court acted within its sound discretion when it refused to set aside the jury verdict as contrary to the weight of the evidence, and we overrule this assignment of error.

VI.

[6] The defendant in his final assignment of error contends the trial court erred in its charge to the jury when it refused to submit a possible verdict of involuntary manslaughter. The defendant contends that the facts of this case could support the finding of an unintentional homicide resulting from the reckless use of a deadly weapon. In support of his argument, he points to his testimony in response to a question as to what he saw at the moment he fired his gun. He stated, "I saw [the son's] shotgun more than anything else . . . . The shotgun was the main thing I saw. I mean, I probably saw him, too, but the shotgun was really what I saw." We find no merit in this argument.

The defendant was not entitled to an instruction on involuntary manslaughter. The necessity for instructing a jury as to a

lesser included offense arises only when there is evidence from which a jury could find such an included crime was committed. *State v. Ward*, 286 N.C. 304, 210 S.E. 2d 407 (1974), *death sentence vacated*, 428 U.S. 903 (1976). Involuntary manslaughter is the unlawful killing of a human being, unintentionally and without malice, proximately resulting from the commission of an unlawful act not amounting to a felony nor naturally dangerous to human life, or resulting from a culpably negligent act or omission. *State v. Redfern*, 291 N.C. 319, 230 S.E. 2d 152 (1976). There is no evidence from which a jury could find that involuntary manslaughter was committed in this case. The defendant did not claim that his gun discharged accidentally. Instead, he relied upon a theory of self-defense, stating that he shot his son to save his own life. Further, even had the trial court's refusal to submit a possible verdict of involuntary manslaughter been error, the jury verdict of guilty of first degree murder rendered harmless the failure to submit a possible verdict of manslaughter. *State v. Bush*, 307 N.C. 152, 297 S.E. 2d 563 (1982).

We hold that the defendant received a fair trial free of prejudicial error.

No error.

STATE OF NORTH CAROLINA v. ROOSEVELT WALDEN

No. 540A83

(Filed 28 August 1984)

1. **Criminal Law § 73.4— statements by victim—admissibility as part of res gestae and to show state of mind**

Statements by a murder victim tending to show that she did not want to see the defendant and did not want defendant in her home were properly admissible as an exception to the hearsay rule as part of the *res gestae* and to show the victim's state of mind.

2. **Criminal Law § 73.2— statements by decedent—admission for non-hearsay purpose**

Testimony by a witness that decedent had asked him to come by her house was properly admitted for the non-hearsay purpose of explaining the witness's subsequent conduct in going to decedent's house.

3. Homicide § 20.1— photographs of decedent's body—admission for illustrative purposes

Two photographs of the body of decedent lying on the floor were properly admitted to illustrate testimony concerning the position, location and appearance of the body of decedent after she was shot by defendant.

4. Criminal Law § 169.3— exclusion of evidence—failure to place in record—admission of similar evidence

Defendant failed to show prejudice in the exclusion of testimony where he failed to include in the record what the witness's answer to the proper question would have been and where substantially the same evidence was subsequently admitted through the testimony of defendant.

5. Criminal Law § 73.2— testimony not hearsay

Testimony that after the victim was fatally shot by defendant, the witness heard a voice say, "I guess you're satisfied now, ain't you M----- F-----?" was not inadmissible hearsay since it was not offered to prove that defendant was in fact satisfied after he shot and killed the victim but was offered to prove that the statement was in fact made by someone present at the scene of the crime.

6. Criminal Law § 77.1— statement competent as admission

A statement made by defendant to a witness that he was fleeing to New Jersey rather than "turning himself in" was competent as an admission against defendant, and the trial court's exclusion of such statement was error favorable to defendant.

7. Criminal Law § 99.3— examination of shotgun by jury—instructions by court—no expression of opinion

When the prosecutor requested that a shotgun used in a murder be passed to the jury for examination and the trial court sustained an objection to the prosecutor's suggestion as to how the jury should examine the shotgun, the trial court did not express an opinion in then instructing the jury that it could "look at the weapon, if you like, and use the hammer to cock it, if you desire."

8. Criminal Law § 116— instruction that defendant not required to testify

When the defendant testifies, the trial court is not required to instruct the jury, upon request or otherwise, that defendant cannot be compelled to testify. G.S. 8-54.

9. Homicide § 21.5— first-degree murder—sufficiency of evidence

The State's evidence was sufficient to support conviction of defendant for first-degree murder by shooting the victim with a shotgun.

DEFENDANT appeals as a matter of right, pursuant to G.S. 7A-27(a), from the judgment and sentence entered by the *Honorable Elbert S. Peel, Jr., Judge* presiding, at the 11 July 1983

Criminal Session of Superior Court, HALIFAX County. Heard in the Supreme Court 9 May 1984.

Rufus L. Edmisten, Attorney General, by Christopher P. Brewer, Assistant Attorney General, for the State.

W. Lunsford Crew, for defendant-appellant.

FRYE, Justice.

I.

Defendant brings forward numerous assignments of error which he alleges entitle him to a new trial. Those assignments of error allege that the trial court erred by admitting various hearsay statements into evidence, by expressing an opinion on the evidence when it gave an instruction to the jury following an improper statement by the prosecutor, by failing to instruct the jury that defendant was not required to testify, and by denying defendant's motions for a mistrial and dismissal of the charges against him. Our review of the entire record discloses that no error was committed by the trial court.

On 14 July 1983, a jury convicted defendant of murder in the first degree. The victim was Donnie Mae Kittrell. After the jury had rendered its verdict, the trial court sentenced defendant to life imprisonment.

The evidence relied upon by the jury to find defendant guilty of murder in the first degree was as follows:

The State's evidence disclosed that on 28 December 1982, Donnie Mae Kittrell was married to Bernard Kittrell and had five children, four of whom were living with Mr. and Mrs. Kittrell. Although Mrs. Kittrell was married, she and the defendant, Roosevelt Walden, had been going together for quite some time, and they saw each other on a regular basis.

During the evening hours on 28 December 1982, Mr. Kittrell was at work in Lewiston, North Carolina, and Mrs. Kittrell was at home with her four children. Terry Boone, Richard Moore and the defendant's nephew, Victor Dwayne Walden, were also present at the Kittrell residence. At least one of the men ate dinner at the Kittrell residence while they were visiting Mrs. Kittrell.

Between 8:30 and 9:00 p.m., the defendant arrived at the Kittrell residence while the three men were present and knocked on

the front door. Defendant was alone and unarmed. After Mrs. Kittrell discovered that it was defendant at the door, she refused to open the door. Thereafter, the three men and Mrs. Kittrell's eldest son, Tommy Earl Hill, attempted to get defendant to leave the premises. He refused to do so.

After being refused entry to the Kittrell residence, defendant attempted to force his way into the house. Then, the three men and Tommy Hill leaned against the front door to prevent the defendant from entering the house. The front and back doors were locked. After several unsuccessful attempts to break into the house, defendant left the scene.

Between ten and fifteen minutes later, defendant returned to the Kittrell residence. He was armed with a single-barrel .12 gauge shotgun. After unsuccessfully attempting to enter the front door, defendant tried to enter the back door. By this time, the men in the house had moved a refrigerator against the back door. Nevertheless, defendant was able to force his way into the house through the back door. As defendant entered the house, Mr. Moore and Mr. Walden attempted to take the shotgun away from him. Mr. Boone left the house so that he could go to a neighbor's house to call the police. As the three men struggled over the shotgun, the shotgun discharged into the wall. No one was hurt. Thereafter, Mr. Moore and Mr. Walden shoved the defendant out the front door of the house.

Shortly thereafter, defendant returned to the front door with the shotgun and shot through the front door. He then entered the house and began looking for Mrs. Kittrell. After a short while, Mrs. Kittrell appeared from one of the rooms of the house and was walking through the kitchen. Defendant was a few steps behind her. As Mrs. Kittrell walked through the kitchen, defendant shot her in the back. After defendant had left the scene, Mr. Walden checked the victim, but was unable to detect a heartbeat. As Terry Boone was returning to the victim's house, he heard a gunshot and saw the defendant leaving the house in his car.

Defendant left the scene of the shooting and went to the home of Mr. and Mrs. Ernest Williams. Mr. Williams subsequently drove the defendant to Suffolk, Virginia, where he caught a bus to Newark, New Jersey, where defendant's sister lived. Defendant remained in Newark, New Jersey, until he was apprehended

by the F.B.I. in early March 1983. After waiving extradition, he was returned to North Carolina.

Dr. William Franklin Hancock, Jr., M.D., a pathologist, performed the autopsy on the victim. Dr. Hancock testified that the victim died from a shotgun wound to the back. He defined the biological cause of death as being "a combination of excessive bleeding and massive damage to [Mrs. Kittrell's] vital organs."

The defendant testified in his own behalf. His testimony was virtually consistent with the evidence presented by the State, except it differed, in the most significant respects, as follows: Defendant testified that he always carried his shotgun to the Kittrell residence because he was afraid of Mr. Kittrell. Defendant also testified that his shotgun was accidentally fired through the front door of the Kittrell residence as a result of a struggle between himself, Mr. Moore and Mr. Walden, which occurred after they had pushed him out of the front door. Defendant testified that he then entered the house and reloaded his shotgun because "[he] was afraid to let [Mr. Moore and Mr. Walden] have his gun." According to defendant, after he had looked through the house for Mrs. Kittrell, he was standing in the den doorway with the shotgun in his hand when Mrs. Kittrell walked by him. Although the shotgun was loaded, it was broken down and incapable of being fired unless the breech was closed up and the hammer cocked. As defendant saw Mrs. Kittrell, he stepped toward her and at that time, someone grabbed him from behind and the shotgun fired, shooting Mrs. Kittrell in the back. Defendant did not know who grabbed him. After kneeling down beside the victim's body, defendant left the scene because he was afraid.

II.

Defendant's first assignment of error alleges that the trial court erred by allowing several State's witnesses to testify concerning various statements made by the decedent. Defendant contends that these statements were inadmissible hearsay which was prejudicial to him. We disagree.

[1] During direct examination in response to the statement by the prosecutor, "Tell what she [Mrs. Kittrell] said," State's witness Terry Boone testified that, "Well, she was saying that she didn't want to see him, telling him to go ahead on." Richard

Moore testified that Mrs. Kittrell stated, "Please don't let him in," and Victor Walden testified, "Like she started to the door, you know, and she asked who was at the door?"

Assuming *arguendo* that the statements were hearsay, they were properly admissible as an exception to the hearsay rule as part of the *res gestae*. The statements were admissible because they were part of the transactions which immediately preceded the homicide in the instant case and arguably precipitated it. *See State v. Covington*, 290 N.C. 313, 226 S.E. 2d 629 (1976); *State v. Burleson*, 280 N.C. 112, 184 S.E. 2d 869 (1971); 1 Brandis on North Carolina Evidence § 158 (1982). Additionally, the statements were admissible to show the victim's state of mind since they tended to show that the victim did not want to see the defendant and did not want him in her home. *See generally* 1 Brandis on North Carolina Evidence § 162 (1982).

[2] Defendant also alleges that the trial court erred by admitting additional testimony of Mr. Moore concerning statements made by the decedent. In response to the question asked on direct examination, "Why did you go to [Mrs. Kittrell's] house?," Mr. Moore responded, "She asked me to come by." On re-direct examination Mr. Moore answered the question, "Why did Mrs. Kittrell ask you there?," by saying, "She asked me to come around to the house." Both of the above statements were clearly offered for a non-hearsay purpose since they were offered to explain Mr. Moore's subsequent conduct in going to Mrs. Kittrell's residence after she had made the statement to him. As stated on numerous occasions by this Court, "the statements of one person to another are admissible to explain the subsequent conduct of the person to whom the statement was made." *State v. Maynard*, 311 N.C. 1, 16, 316 S.E. 2d 197, 205 (1984); *see also State v. Tate*, 307 N.C. 242, 297 S.E. 2d 581 (1982). Defendant's assignment of error is rejected.

III.

[3] Defendant next contends that the trial court erred by admitting into evidence two photographs of the decedent's body. Defendant argues that the photographs "were not necessary or really helpful to illustrate the testimony of the witness."

It is well settled law in North Carolina that a witness may use a photograph to illustrate his testimony and make it more in-

telligible to the court and jury. *State v. Young*, 291 N.C. 562, 231 S.E. 2d 577 (1977). As long as the photograph is properly authenticated as a correct portrayal of the conditions observed and related by the witness who uses the photograph to illustrate his testimony, "the fact that it is gory or gruesome, or otherwise may tend to arouse prejudice, does not render it inadmissible." *Young*, 291 N.C. at 570, 231 S.E. 2d at 582; *State v. Atkinson*, 275 N.C. 288, 167 S.E. 2d 241 (1969), *death sentence vacated*, 403 U.S. 948 (1971).

In the instant case, two photographs of the body of the decedent lying on the kitchen floor were admitted into evidence to illustrate the testimony of Terry Boone. These photographs were not gruesome or gory nor were they excessive in number. They were admitted for the limited purpose of illustrating the testimony of Mr. Boone, and they did in fact illustrate his testimony concerning the position, location and appearance of the body of the decedent after she had been shot by the defendant. Therefore, the photographs were properly admitted.

IV.

[4] By his next assignment of error, defendant contends that the trial court erred by not allowing State's witness Richard Moore to testify concerning Mrs. Kittrell's use of his charge account at a local grocery store. Defendant argues that this testimony "would be some evidence that he loved her and had no reason to kill her." Defendant's argument is without merit.

The relevancy of the above testimonial evidence is questionable to say the least. However, assuming *arguendo* that the testimony was relevant, defendant has failed to include in the record what Mr. Moore's answer to the proffered question would have been and thereby he has failed to show prejudice. *State v. Maynard*, 311 N.C. 1, 316 S.E. 2d 197 (1984).

Additionally, we note that the same or similar evidence was admitted into evidence when the defendant was testifying. During the direct examination of defendant by defense counsel, defendant was allowed to testify concerning the use of two of his charge accounts by the decedent. Since substantially the same evidence that defendant initially sought to elicit from Mr. Moore was subsequently admitted into evidence through the testimony of

defendant, the defendant cannot show any prejudice resulting from the trial court's previous exclusion of such evidence. *State v. Hageman*, 307 N.C. 1, 296 S.E. 2d 433 (1982); *State v. Matthews*, 299 N.C. 284, 261 S.E. 2d 872 (1980). This assignment of error is rejected.

V.

[5] Defendant's next assignment of error alleges that the trial court erred by admitting the testimony of a State's witness in violation of the hearsay rule. On direct examination by the prosecutor, Victor Walden testified that after the victim was fatally shot by the defendant, he heard a voice say, "I guess you're satisfied now, ain't you M----- F----?" Mr. Moore was unable to identify the person who made the statement. For this reason, defendant argues that the statement was inadmissible hearsay.

The above statement was not hearsay, since it was not offered to prove the truth of the matter asserted therein. That is, the testimony of Mr. Moore was not offered to prove that defendant was in fact satisfied after he had shot and killed the victim, but it was instead offered to prove that the statement was in fact made by someone present at the scene of the crime. Therefore, it was not inadmissible because it was hearsay.

Assuming *arguendo* that the statement was inadmissible for some other reason, defendant has failed to show that he was prejudiced by the admission of that statement. Stated differently, defendant has failed to show that there is a reasonable possibility that had the statement not been admitted at trial, a different result would have been reached. *See* G.S. 15A-1443(a).

VI.

[6] During the course of the trial, Ernest Williams, a friend of the defendant, testified concerning a conversation he had with the defendant shortly after the crime had occurred. Mr. Williams testified that while he was driving the defendant to Suffolk, Virginia, to catch a bus to Newark, New Jersey, the following conversation transpired, "I asked him why didn't he turn himself in and he said because his brother had killed someone." At this point, counsel for defendant objected and the trial court sustained the objection and instructed the jury not to consider that testimony. Subsequently, defendant moved for a mistrial, and his motion was

denied by the trial court. Now, on appeal, the defendant contends that the statement "is of such a nature as to mislead the jury and certainly prejudice the defendant." Therefore, defendant asserts that his motion for a mistrial was improperly denied by the trial court. We disagree.

The trial court sustained defendant's objection to the above testimony and thereafter instructed the jury not to consider that testimony. This was error in the defendant's favor. The statement showed why defendant was fleeing to New Jersey rather than "turning himself in" and was relevant to the issues in the case as an admission against him. 2 Brandis on North Carolina Evidence § 167 (1982). The statement by defendant to Williams was competent, material, and relevant and therefore admissible. This assignment of error is rejected.

VII.

[7] Near the end of the presentation of rebuttal evidence by the State, the prosecutor made the following request of the trial court:

> BY MR. BEARD:
>
> At this time the State would request permission, because of the particular offense, in this case, to pass State's Exhibit #1 [the shotgun used to shoot Mrs. Kittrell] to the members of the jury, and I request each one of them if they will, to pull the hammer back to get the pressure that it takes to pull the hammer back, and also to pull the trigger, see what is required to pull the trigger.

Immediately after the prosecutor had made the statement, counsel for the defendant objected to it, and the trial court sustained the objection. Thereafter, the trial court instructed the jury as follows: "You may look at the weapon, if you like, and use the hammer to cock it, if you desire." On appeal, defendant contends that the statement by the trial court "allow[ed] the jury to infer that the court had an opinion about the guilt of the defendant and the State's theory of the shooting, and thus violate[d] the guaranteed right of the defendant to a fair and impartial trial without bias, prejudice or opinion on the part of the Trial Judge." We disagree.

The shotgun had been properly introduced into evidence. Therefore, the State was entitled to have it passed to the jury for examination. We can see no reason why a prosecutor should not be allowed to suggest to a jury how it should examine real evidence, so long as he does not give his opinion as to the proof of a fact or state facts not in evidence. *See State v. Forney*, 310 N.C. 126, 310 S.E. 2d 20 (1984). We find nothing in the trial court's actions which suggests that the trial court improperly expressed an opinion to the jury. Therefore, this assignment of error is rejected.

VIII.

[8] Relying upon G.S. 8-54, defendant argues that the trial court erred by denying his request for an instruction to the jury that although he had testified, he was not required to do so. He contends that "the same logic that requires that instruction [required by G.S. 8-54], if requested, would also apply to defendant's specific request that the jury be instructed likewise that defendant is not compellable to testify." We find this argument to be without merit.

G.S. 8-54 provides as follows:

> In the trial of all indictments, complaints, or other proceedings against persons charged with the commission of crimes, offenses or misdemeanors, the person so charged is, at his own request, but not otherwise, a competent witness, and his failure to make such request shall not create any presumption against him. But every such person examined as a witness shall be subject to cross-examination as other witnesses. Except as above provided, nothing in this section shall render any person, who in any criminal proceeding is charged with the commission of a criminal offense, competent or compellable to give evidence against himself, nor render any person compellable to answer any question tending to [in]criminate himself.

In *State v. Bovender*, 233 N.C. 683, 65 S.E. 2d 323 (1951), this Court, in interpreting G.S. 8-54, stated:

> The decisions of this Court referring to this statute seem to have interpreted its meaning as denying the right of counsel to comment on the failure of a defendant to testify.

> The reason for the rule is that extended comment from the court or from counsel for the state or defendant would tend to nullify the declared policy of the law that the failure of one charged with crime to testify in his own behalf should not create a presumption against him or be regarded as a circumstance indicative of guilt or unduly accentuate the significance of his silence. *To permit counsel for a defendant to comment upon or offer explanation of the defendant's failure to testify would open the door for the prosecution and create a situation the statute was intended to prevent.* (Emphasis added.)

Id. at 689-90, 65 S.E. 2d at 329.

The policy served by instructing the jury upon defendant's request concerning G.S. 8-54, when he does not testify, is an attempt to ensure that the jury will not draw a negative or unfavorable inference from the defendant's failure to testify. However, if the defendant chooses to testify in his own behalf, as the defendant did here, there exists no reason to instruct the jury on defendant's decision to testify since the jury does not have any reason to draw a negative or unfavorable inference from that circumstance. Defendant, however, is not entitled to an instruction the inference of which would be to insure that the jury look favorably upon his willingness to testify. Therefore, we hold that when the defendant testifies, the trial court is not required to instruct the jury, upon request or otherwise, that the defendant cannot be compelled to testify.

IX.

[9] By his last assignment of error, defendant contends that the trial court erred by denying his motions for a mistrial and for dismissal of the charges against him at the end of the State's evidence and at the end of all the evidence, and after the jury verdict had been rendered. Defendant contends that all of the aforementioned errors argued on appeal, taken collectively, denied him a fair and impartial trial. We disagree.

After carefully reviewing the transcript of the trial proceedings, we find no error which would have warranted the trial court's granting defendant's motions for a mistrial. Additionally, there are certain fundamental legal principles which, when ap-

plied to the facts of this case, further negate any allegation of error in the trial court's denial of defendant's motion to dismiss the charges against him. Those fundamental principles were succinctly stated in *State v. Bell*, 311 N.C. 131, 316 S.E. 2d 611 (1984) as follows:

> It is well established law that ruling on a motion to dismiss, the trial court is to consider the evidence in the light most favorable to the State; that the State is entitled to every reasonable inference to be drawn therefrom; that contradictions and discrepancies are for the jury to resolve; and that the defendant's evidence, unless favorable to the State, is not to be taken into consideration. *State v. Earnhardt*, 307 N.C. 62, 296 S.E. 2d 649 (1982).

Id. at 138, 316 S.E. 2d at 615.

Applying the above principles to this case, we hold that there was substantial evidence adduced at trial of each and every element of the offense of murder in the first degree for which defendant was convicted and of defendant being the perpetrator of the crime. Therefore, defendant's motion to dismiss was properly denied.

Having carefully reviewed all of the assignments of error raised by the defendant, we find that defendant received a fair trial free from prejudicial error.

No error.

MARVIN L. SPECK AND STANLEY E. GILLILAND v. NORTH CAROLINA DAIRY FOUNDATION, INC., THE BOARD OF GOVERNORS OF THE UNIVERSITY OF NORTH CAROLINA, THE BOARD OF TRUSTEES OF NORTH CAROLINA STATE UNIVERSITY, A CONSTITUENT INSTITUTION AND THE ACTING CHANCELLOR OF NORTH CAROLINA STATE UNIVERSITY

No. 566A83

(Filed 28 August 1984)

Fiduciaries § 2; Master and Servant § 11.2— inventions and discoveries by employee—ownership by employer

Plaintiffs did not acquire any interest in a secret process for the use of lactobacillus acidophilus in dairy products which they discovered while employed as professors and researchers by N. C. State University and while using resources provided them for their research by the University absent a written contract by the University to assign. Therefore, defendants owed no fiduciary duty to plaintiffs as a result of plaintiffs' confidential revelation to the University of the secret process which it already owned, and plaintiffs were not entitled to impose a constructive trust on royalties received by the N. C. Dairy Foundation for its licensing of the use, under the trademark "Sweet Acidophilus," of the secret process discovered by plaintiffs.

APPEAL of right under N.C.G.S. 7A-30(2) from the decision of a divided panel of the Court of Appeals, 64 N.C. App. 419, 307 S.E. 2d 785 (1983), reversing summary judgment for the defendants entered by *Judge Robert L. Farmer* on July 2, 1982 in Superior Court, WAKE County. Heard in the Supreme Court March 14, 1984.

Boyce, Mitchell, Burns and Smith, P.A., by Lacy M. Presnell, III and Susan K. Burkhart, for the plaintiff-appellees.

Poyner, Geraghty, Hartsfield and Townsend, by Thomas L. Norris, Jr. and Cecil W. Harrison, Jr., for the defendant-appellant North Carolina Dairy Foundation, Inc.

Rufus L. Edmisten, Attorney General, by Thomas J. Ziko, Associate Attorney, for the defendant-appellants The Board of Governors of the University of North Carolina, The Board of Trustees of North Carolina State University, and The Acting Chancellor of North Carolina State University.

MITCHELL, Justice.

The underlying issue controlling the result in this case is whether the plaintiffs acquired any interest in a secret scientific process at the time they discovered it while employed by the defendant North Carolina State University. We hold that they did not. Accordingly, we reverse the decision of the Court of Appeals.

The plaintiffs brought this action seeking to impose a constructive trust upon royalties received by the defendant North Carolina Dairy Foundation (hereinafter "Foundation") for its licensing of the use, under the trademark "Sweet Acidophilus," of a secret process discovered by the plaintiffs. In support of this claim, the plaintiffs alleged that throughout the 1960's and the early 1970's they developed a secret process for the use of lactobacillus acidophilus in dairy products which made the production and marketing of "Sweet Acidophilus" milk possible. They alleged that they developed the secret process while employed by the defendant North Carolina State University (hereinafter "University") and that the defendants learned of the process because of their fiduciary relationship with the plaintiffs. The plaintiffs further alleged that the defendants had breached their fiduciary duties to the plaintiffs.

The defendants' motions for summary judgment came on for hearing before Judge Farmer. After considering the pleadings, affidavits, pertinent discovery, briefs and arguments, Judge Farmer allowed summary judgment for the defendants.

The plaintiffs gave timely notice of appeal to the Court of Appeals from the entry of summary judgment. The Court of Appeals reversed and remanded the case to Superior Court, Wake County, for further proceedings. Judge Hedrick dissented, and the defendants gave notice of appeal of right to the Supreme Court.

Summary judgment for the defendants was proper only if the pleadings and evidence before the trial court taken in the light most favorable to the plaintiffs showed no genuine issue of material fact and that the defendants were entitled to judgment as a matter of law. *Flippin v. Jarrell*, 301 N.C. 108, 270 S.E. 2d 482 (1980). We turn then to a review in such light of the pleadings and evidence before the trial court.

From 1957 until his retirement in June, 1979, the plaintiff, Dr. Marvin L. Speck, was a William Neal Reynolds Professor of Food Science and Microbiology at the University. He was engaged in this capacity in teaching and research on the use of high temperature for the pasteurization and sterilization of foods and the development of standards for attaining public health safety in processing treatments. In this capacity he also conducted research with micro-organisms used in food manufacturing—primarily lacticstreptococci, lactobacilli, and leuconostocs. As a part of such research, he conducted experiments and research with regard to the feasibility of developing a pleasant tasting milk containing lactobacillus acidophilus. Lactobacillus acidophilus is a bacteria that minimizes or eliminates certain undesirable microorganisms in the human intestinal tract and is believed by many in the scientific community to contribute to more favorable digestion, improved general health and longevity.

Milk containing lactobacillus acidophilus has been produced for decades since the development in 1931 of a process for adding the bacteria to milk and has been known as acidophilus milk. This process caused the milk to have a sour flavor because it had to be heated to high temperatures for an extended period of time before the lactobacilli could be introduced. Additional work in improving such processes was done by scientists at Oregon State University around 1958. Their research appears to have been very similar to that conducted by the plaintiffs.

With the assistance of the plaintiff, Dr. Stanley E. Gilliland, who was at all pertinent times an Assistant Professor of Food Science at the University, the plaintiff, Dr. Speck, conducted research into methods of preparing acidophilus milk so as to eliminate the sour flavor. As a result of a course of research, experiments and study conducted at the University during the 1960's and 1970's, the plaintiffs ultimately developed new procedures and technology for the easy preparation and preservation of concentrates of lactobacillus acidophilus and a process by which the bacteria could be added to milk without causing the milk to have a sour flavor.

Dr. Speck informed Dr. William Roberts, head of the Department of Food Science at the University of the plaintiffs' discovery in a memorandum dated September 15, 1972 in which he said that

there was nothing sufficiently novel about the process to "warrant the filing of a patent application on this product or means for its manufacture." He suggested the possibility of the use of a trademark and the licensing of dairies to use the trademark and the process discovered by the plaintiffs. Dr. Roberts suggested to Dr. Speck that he submit a proposal to the University's Patent Committee recommending that the licensing and marketing of acidophilus milk produced by the use of the secret process be handled through the Foundation.

The Foundation is a nonprofit corporation engaged in the support of research for the public good. From time to time it provides funds in support of research at the University. The Foundation and the University maintain a close relationship and the Vice-Chancellor of Foundations and Development of the University serves as the Secretary of the Foundation.

Dr. Speck submitted a proposal concerning acidophilus milk to the Patent Committee. Dr. Speck and Dr. Roberts were invited to appear before the Patent Committee at its meeting on October 19, 1972. The minutes of that meeting of the Patent Committee show that:

> Dr. Speck briefly outlined the background of his research and he and Dr. Roberts explained the way in which they proposed to get the product on the market. In general, they proposed to work through the North Carolina Dairy Foundation and employ a patent attorney to advise on the desirability of obtaining either a trademark or a copyright. Cost of the venture would be borne by the Dairy Foundation and a licensing of any trademark obtained would be handled through that organization. After a brief discussion by the Committee, which brought out that a patent application was not feasible, Mr. Conner moved that the request be approved and the motion was seconded by Dr. Bennett. Motion carried unanimously.

At the annual meeting of the Foundation on October 28, 1972, Dr. J. E. Legates, Dean of the School of Agriculture and Life Sciences of the University, made a presentation concerning Dr. Speck's discovery. The minutes of that meeting show that Dean Legates:

> stated that this new process had been taken before the Patent Committee of the University and, with the approval of President [of the Foundation] Davenport, the [University] Patent Committee was applying for a patent on [sic] a trademark for the product through the Dairy Foundation. Dean Legates said that any funds derived through the licensing of the trademark for the acidophilus milk would accrue to the Dairy Foundation and requested that the Board of Directors appropriate up to $3,000 to register the trademark and to develop a merchandising proposal for its promotion.

During this same meeting of the Foundation, which Dr. Speck attended, a motion was made for the President of the Foundation to appoint a committee composed of a producer, a processor, and a supplyman "to work with the appropriate people at the University to carry out this activity." The motion was passed.

In 1973, the Foundation requested that Dr. Speck work with Miles Laboratories, Inc. and other companies to explore possible arrangements for the manufacturing of the cultures to be used in producing the bacteria for acidophilus milk. The only question Dr. Speck raised in the initial stages of the preparations for production and marketing of the acidophilus milk was whether the ownership of the trademark "Sweet Acidophilus" would be in the name of the University or the name of the Foundation. On January 9, 1974, Dr. Speck called Dr. Rudolph Pate, Vice-Chancellor for Foundations and Development at the University and Secretary of the Foundation, to ask if it was not true that the Foundation would own the trademark. Dr. Pate informed him that this was correct.

During 1974, Dr. Speck, Dr. Roberts, Dean Legates and other University officials worked with the Foundation to find a licensee to market "Sweet Acidophilus" milk. All of these individuals were employed by and paid by the University at all times pertinent to this appeal. As a result of their efforts, an agreement was entered on December 18, 1974 between the Foundation, G. P. Gundlach & Company and Miles Laboratories, Inc., whereby G. P. Gundlach & Company agreed to handle marketing, product development and promotion of "Sweet Acidophilus" milk and Miles Laboratories, Inc. agreed to produce the lactobacillus acidophilus cultures.

The University sponsored a luncheon on April 18, 1975 to announce the development of "Sweet Acidophilus" milk. In a letter about the luncheon, Dr. Pate stated that:

> We believe that the development and franchising of this culture nationally are two very significant activities in food science and constitute notable accomplishments of the University.

In form letters about the luncheon, Dr. Pate also wrote that:

> North Carolina State University will review details of the development of a new acidophilus culture by its food scientists and the plans to merchandise this important new product throughout the nation at a special luncheon at the University Faculty Club, Friday, April 18, at 1:00 p.m. The Acidophilus culture is being marketed through a franchise arrangement by the North Carolina Dairy Foundation, Inc. . . .

Dr. Speck wrote to Dr. Roberts on November 3, 1975 stating that he thought it was:

> Entirely proper for the Dairy Foundation to be selected for the commercial development and marketing of "SWEET ACIDOPHILUS" and to be the University's agent to receive any royalties from our development. In attending to the various legal aspects of this project (which was the first experience for a number of us) participation by the inventor in the royalties was overlooked. It would seem that now is an appropriate time to take care of this matter.

In a November 10, 1976 response to Dr. Speck from Dr. Clauston Jenkins, Assistant to the Chancellor and Legal Advisor to the University, the University denied that Dr. Speck had any right to share in the royalties. Dr. Speck replied by a memorandum dated December 3, 1976 renewing his request for a share in the royalties.

On January 23, 1978, the Chairman of the University's Patent Committee wrote a memorandum to Dr. Joab Thomas, Chancellor of the University, recommending the University consider making a one time payment to Dr. Speck of fifteen percent of the royalty income from the successful marketing of the "Sweet Acidophilus" trademark. He based his recommendation on the fact that others

in the same department with Dr. Speck at the University had received, under the written Patent Policy of the University, fifteen percent of the royalty income from patents on their inventions. He suggested that the University adopt a similar approach to be applied to trademarks not covered by the written Patent Policy in order to prevent the possibility of the development of "hard feelings and tensions" within the faculty. No royalty income was paid to Dr. Speck. Approximately four years later, on December 11, 1981, the plaintiffs, Dr. Speck and Dr. Gilliland, instituted the present lawsuit.

The plaintiffs alleged in their complaint that the defendants learned of the secret process for the preparation and use of lactobacillus acidophilus in dairy products as a result of their fiduciary relationship with respect to the plaintiffs. The plaintiffs also alleged that the defendants breached their fiduciary duties by using the secret process to their own advantage. The plaintiffs further alleged that the defendants' violation of their fiduciary duties entitled the plaintiffs to a constructive trust on the proceeds from the secret process and from the trademark "Sweet Acidophilus" which was obtained by the defendant Foundation, since both represent "the culmination of the plaintiffs' ingenuity and efforts." We do not agree.

A confidential or fiduciary relationship exists in all cases where there has been a special confidence reposed in one who "in equity and good conscience is bound to act in good faith and with due regard to the *interests* of the one reposing confidence." *Abbitt v. Gregory*, 201 N.C. 577 at 598, 160 S.E. 896 at 906 (1931) (emphasis added). If the plaintiffs never had any interest in the process which they developed while employed by the University, the defendants did not stand in a fiduciary relationship to the plaintiffs with regard to the process. Further, even if a fiduciary relationship existed between the parties, the defendants were required only to refrain from abusing the confidence placed in them by taking advantage to themselves *at the expense of the plaintiffs*. *Vail v. Vail*, 233 N.C. 109 at 114, 63 S.E. 2d 202 at 206 (1951). Therefore, the threshold issue to be resolved on this appeal is whether the plaintiffs acquired any interests cognizable in equity or at law at the time they developed the secret process in question. We hold that they did not.

The respective rights of employer and employee in an invention or discovery by the latter arise from the contract of employment. *United States v. Dubilier Condenser Corp.*, 289 U.S. 178, 187 (1933). The fruit of the labor of one who is hired to invent, accomplish a prescribed result, or aid in the development of products belongs to the employer absent a written contract to assign. *E.g., Vigitron, Inc. v. Ferguson*, 419 A. 2d 1115 (N.H. 1980); *Amoco Production Co. v. Lindley*, 609 P. 2d 733 (Okla. 1980); *Whites' Electronics, Inc. v. Teknetics, Inc.*, 677 P. 2d 68 (Or. App. 1984); *Stevens v. National Broadcasting Co.*, 270 Cal. App. 2d 886, 76 Cal. Rptr. 106 (1969). In such instances:

> If the employee fails to reach his goal the loss falls upon the employer, but if he succeeds in accomplishing the prescribed result then the invention belongs to the employer even though the terms of employment contain no express provision dealing with the ownership of whatever inventions may be developed.

National Development Co. v. Gray, 55 N.E. 2d 783 at 787 (Mass. 1944).

In the instant case the plaintiffs' pleadings reveal that they developed the secret process for improved methods of preparation and preservation of concentrates of lactobacillus acidophilus while employed as teachers and researchers to engage *inter alia* in just such research and development for the University. At all times pertinent, the plaintiffs' salaries were paid by the University. Additionally, the plaintiffs candidly acknowledged during oral argument that the University was the place where they discovered the secret process and that the resources provided them for their research by the University enabled them to discover the process. Under these facts, the secret process developed through the research of the plaintiffs belonged to the University absent a written contract by the University to assign.

Regrettably, the plaintiffs in the instant case were not employed pursuant to a written contract detailing their duties as professors and researchers. It is clear, however, that the plaintiffs were permitted and encouraged by their employer the University to conduct the precise research which led to the discovery and perfection of the secret process. It is equally clear that the plaintiffs performed this work on their employer's time and using their

employer's research resources and that they were paid a salary to do so. As it has been clearly stated:

> It matters not in what capacity the employee may originally have been hired, if he be set to experimenting with the view of making an invention, and accepts pay for such work, it is his duty to disclose to his employer what he discovers in making the experiments, and what he accomplishes by the experiments belongs to the employer.

Houghton v. United States, 23 F. 2d 386 at 390 (4th Cir. 1928).

Further, the written Patent Policy of the University was not a written contract to waive the University's rights in the secret process or to assign all or any part of those rights to the plaintiffs. That policy merely assigns fifteen percent of the royalties from any *patent* obtained on an invention by an employee of the University to the inventor. The secret process developed by the plaintiffs was not patentable, and this fact was recognized by the plaintiffs at the time they discovered the process. The written Patent Policy adopted on November 16, 1973 by the defendant, The Board of Governors of The University of North Carolina, simply was silent as to trademarks and trade secrets. The defendant Board of Governors is responsible for the general control and management of the defendant University and fifteen other constituent institutions. N.C.G.S. 116-11. There is no indication in the record on appeal that the defendant Board of Governors has ever authorized or approved an amendment to its written Patent Policy in any way to cover trademarks and trade secrets.

As the secret process in question belonged to the University immediately upon its discovery by the plaintiffs, the plaintiffs never possessed any interest cognizable in equity or at law in the process. Therefore, the defendants owed no fiduciary duty to the plaintiffs as a result of the plaintiffs' confidential revelation to the University of the secret process it already owned. Indeed, any fiduciary duty owed with regard to the secret process was owed by the plaintiffs to the University in its capacity as the employer who had employed them to develop the process.

The plaintiffs pointed out during oral arguments that the November 10, 1976 letter to Dr. Speck from Dr. Jenkins, Assistant to the Chancellor and Legal Advisor to the University, character-

ized the actions of the Patent Committee of the University as "returning" all rights to Speck after concluding that the secret process was not patentable "to dispose of as you saw fit." They pointed out that Dr. Jenkins then took the position that the plaintiffs had waived any rights they had in the secret process in favor of the Foundation. The plaintiffs argued that the position taken by Dr. Jenkins, together with arguments made by the defendants in their briefs on appeal, alleged certain facts pertaining to the relationship between the plaintiffs and the defendants which caused the principles of law previously discussed in this opinion to be inapplicable. The plaintiffs argued that, if the construction given the facts by Dr. Jenkins and the defendants was correct, the plaintiffs own or did own rights in the secret process and that any remaining questions are questions of fact which the plaintiffs were entitled to have resolved by a jury. We do not find this argument persuasive.

The correspondence and actions of the parties previously reviewed herein clearly reveal that the plaintiffs at all pertinent times held the correct opinion that the secret process they had discovered belonged to the University and that the University was merely waiving its rights in favor of the Foundation or using the Foundation as its agent for marketing. Dr. Speck's letter of November 3, 1975 reveals that he clearly held this opinion. The letters by Dr. Pate and the statements by Dean Legates during the meeting of the Foundation attended by Dr. Speck on October 28, 1972—both previously set forth herein—could only have tended to lead Dr. Speck to hold the same opinion.

In any event, the characterization of facts concerning prior relationships of the parties by one of them does not control in a lawsuit. If in equity and at law the plaintiffs had no right to the secret process, and we have held that they did not, efforts by the defendants to construe the facts after they had occurred could not give the plaintiffs that which equity and the law did not give them.

Finally, it is worthwhile to note that the University and the Foundation are not dedicated to making and retaining profits, but instead use their income for the good of the public by promoting and financially assisting scientific research for the common good. Acidophilus milk is viewed by many experts as promoting good

health and increasing longevity and, thereby, as improving the human condition. Judge John J. Parker perhaps exhibited remarkable foresight and anticipated a case similar to the instant case when he wrote:

> It is unthinkable that, where a valuable instrument in the war against disease is developed by a public agency through the use of public funds, the public servants employed in its production should be allowed to monopolize it for private gain and levy a tribute upon the public which has paid for its production . . .

Houghton v. United States, 23 F. 2d 386 at 391 (1928).

The decision of the Court of Appeals reversing summary judgment for the defendants is reversed. The case is remanded to the Court of Appeals with instructions to reinstate the summary judgment for the defendants entered by the trial court.

Reversed and remanded.

DAVID E. STILLINGS AND FRANCIS D. SAWYER, A NORTH CAROLINA PARTNERSHIP, DOING BUSINESS AS "COMMUNITY GARBAGE SERVICE" v. THE CITY OF WINSTON-SALEM, NORTH CAROLINA, A MUNICIPAL BODY CORPORATE

CLYDE H. WHITMAN, JR., DOING BUSINESS AS "SOUTH FORK SANITARY SERVICE," A SOLE PROPRIETORSHIP v. THE CITY OF WINSTON-SALEM, NORTH CAROLINA, A MUNICIPAL BODY CORPORATE

LARRY K. TUTTLE, DOING BUSINESS AS "FORSYTH GARBAGE AND CONTAINER SERVICE," A SOLE PROPRIETORSHIP v. THE CITY OF WINSTON-SALEM, NORTH CAROLINA, A MUNICIPAL BODY CORPORATE

No. 488PA83

(Filed 28 August 1984)

Eminent Domain § 2; Municipal Corporations § 23— county franchises for garbage collection—city annexation of franchise areas—city garbage services—no compensation for taking

An exclusive solid waste collection franchise granted by a county pursuant to G.S. 153-136 does not remain effective in areas subsequently annexed by a city and thereby entitle the franchisees to compensation for a taking

when a city, pursuant to the mandate of G.S. 160A-47, begins providing its own garbage collection service in the newly annexed areas.

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

ON discretionary review of the decision of the Court of Appeals, 63 N.C. App. 618, 306 S.E. 2d 489 (1983), reversing the summary judgments for defendant entered by *Helms, J.*, 15 December 1981 in Superior Court, FORSYTH County. Heard in the Supreme Court 13 June 1984.

The plaintiffs in these three inverse condemnation actions operate garbage collection services in Forsyth County. In 1978, pursuant to N.C.G.S. 153A-122, each plaintiff was granted by Forsyth County an exclusive territorial franchise to perform commercial solid waste collection and disposal services in designated areas of the county, outside the city limits of Winston-Salem, in accordance with N.C.G.S. 153A-136. The franchises were for a period of five years, beginning on 1 January 1979.

Subsequently, on 17 December 1979, the City of Winston-Salem annexed some of the areas served by the franchisees. The annexations were upheld in *In re Annexation Ordinance*, 303 N.C. 220, 278 S.E. 2d 224 (1981), and became effective on 22 June 1981. On that date, the City began to furnish free solid waste collection services to the residents of the newly annexed areas in compliance with N.C.G.S. 160A-47 which requires a municipality to provide garbage collection services to annexed areas on substantially the same basis and in the same manner as such services are provided in the rest of the city.

Plaintiffs filed suits on 11 September 1981 seeking to recover compensation and damages for losses sustained by them resulting from the City's actions. Plaintiffs alleged that the City's actions violated their contractual rights under the county franchises or, alternatively, that the actions amounted to a taking of plaintiffs' property without due process of law.

On 5 October 1981, the City answered and the following day moved for summary judgment in each case. On 6 November 1981, plaintiffs filed cross-motions for summary judgment on the liability issue. Following a hearing on the motions, summary judgments were entered in favor of defendant on 15 December 1981.

The plaintiffs appealed to the Court of Appeals. That court, in a 6 September 1983 opinion, reversed the decision of the trial court, concluding that the City's extension of solid waste collection services into the newly annexed areas had so impaired the value of the franchises as to constitute a taking for which the plaintiffs are entitled to compensation. The cases were remanded to the trial court for a determination on the issue of damages. We allowed defendant's petition for discretionary review.

Pfefferkorn, Cooley, Pishko & Elliot, P.A., by Jim D. Cooley and William G. Pfefferkorn, for plaintiff appellees.

Womble, Carlyle, Sandridge & Rice, by Roddey M. Ligon, Jr., City Attorney Ronald G. Seeber, and Assistant City Attorney Ralph D. Karpinos for defendant appellant.

MARTIN, Justice.

The primary question presented for review is a matter of first impression for this Court: Does an exclusive solid waste collection franchise granted by a county remain effective in areas subsequently annexed by a city and thereby entitle the franchisees to compensation for a taking when the city, pursuant to statutory mandate, begins providing its own garbage collection service? For the reasons stated here, we answer the question in the negative and conclude that the Court of Appeals erred in finding a "taking" requiring compensation by the City of Winston-Salem.

In essence, plaintiffs contend that the City's extension of solid waste collection services into their franchise areas represented a governmental taking of their property for which plaintiffs are entitled to just compensation under the fifth and fourteenth amendments to the United States Constitution and under article I, section 19 of the Constitution of North Carolina. Plaintiffs also emphatically reject the premise that passage by the legislature of the annexation ordinance was an implied condition justifying termination of any exclusive franchise granted pursuant to N.C.G.S. 153A-136. We disagree with both contentions and will address the latter issue first.

The crux of the plaintiffs' argument is that the City's actions in terminating the franchises upon annexation is an unconstitutional taking of their property. Specifically, they rely on *Long v. City of Charlotte*, 306 N.C. 187, 293 S.E. 2d 101 (1982), in which

we held that for a "taking" to occur, "there need only be a substantial interference with elemental rights growing out of the ownership of the property." *Id.* at 199, 293 S.E. 2d at 109. In *Long*, we stated that:

> In order to recover for inverse condemnation, a plaintiff must show an actual interference with or disturbance of property rights resulting in injuries which are not merely consequential or incidental; a "taking" has been defined as "entering upon private property for more than a momentary period, and under warrant or color of legal authority, devoting it to a public use, or otherwise informally appropriating or injuriously affecting it in such a way as substantially to oust the owner and deprive him of all beneficial enjoyment thereof." *Penn v. Coastal Corp.*, 231 N.C. 481, 57 S.E. 2d 817 (1950).

306 N.C. at 199, 293 S.E. 2d at 109. Although we recognize a franchise as property, the use and enjoyment of which is entitled to protection as any other property right, 36 Am. Jur. 2d *Franchises* § 5 (1968), we also are constrained to reemphasize the axiom set forth in *Long*: "*Obviously not every act or happening injurious to the landowner, his property, or his use thereof is compensable.*" 306 N.C. at 199, 293 S.E. 2d at 109 (emphasis ours).

In general, a state legislature has the power to delegate to the state or inferior agency the authority to make ordinances, such as those giving rise to franchise rights, as it deems appropriate in the lawful exercise of the police power. *State v. Tenore*, 280 N.C. 238, 185 S.E. 2d 644 (1972); *Whitney Stores v. Clark*, 277 N.C. 322, 177 S.E. 2d 418 (1970). In North Carolina, authority of counties to issue exclusive solid waste collection franchises is derived from N.C.G.S. 153A-122 and -136. N.C.G.S. 153A-122, entitled "Territorial jurisdiction of county ordinances," provides in part:

> Except as otherwise provided in this Article, the board of commissioners may make any ordinance adopted pursuant to this Article applicable to any part of the county not within a city. In addition, the governing board of a city may by resolution permit a county ordinance adopted pursuant to this Article to be applicable within the city. The city may by resolution withdraw its permission to such an ordinance.

Under N.C.G.S. 153A-136, authority is conferred on counties to make ordinances to, *inter alia*,

> regulate the storage, collection, transportation, use, disposal, and other disposition of solid waste. Such an ordinance may . . . [g]rant a franchise to one or more persons for the exclusive right to commercially collect or dispose of solid wastes within all or a defined portion of the county and prohibit any other person from commercially collecting or disposing of solid wastes in that area. The board of commissioners may set the terms of any franchise. . . .

Thus Forsyth County, in enacting the ordinance giving birth to plaintiffs' franchises, was restricted to the powers, rights, and privileges conferred on it by the law which brought its authority into being.

> In granting franchises, a municipal corporation possesses and can exercise only powers granted by express words, or those *necessarily implied in or incident to the legislative grant*, and any ambiguity or doubt as to the existence of a power is to be resolved against the corporation, and the power denied; statutes delegating authority to grant franchises are subject to rules of strict construction. The agency to which such authority is delegated has only such powers as are expressed or *necessarily implied*, and must act in accordance with the conditions prescribed by law.

36 Am. Jur. 2d *Franchises* § 12 (1968) (emphases added). *See Elizabeth City v. Banks*, 150 N.C. 407, 64 S.E. 189 (1909). Plaintiffs, therefore, entered the franchise agreements, issued under N.C.G.S. 153A-136, subject to the condition in N.C.G.S. 153A-122 limiting the applicability of the ordinance to "any part of the county not within a city." Following the rule set out by the Oregon Court of Appeals in a case similar on its facts to those involved here, "any franchise granted was implicitly subject to the condition that it would only be exercisable in those areas in which the county had the power to grant, protect and regulate the franchise." *City of Estacada v. American Sanitary Service*, 41 Or. App. 537, 541, 599 P. 2d 1185, 1187 (1979). Therefore, plaintiffs' franchises would exist only so long as the county had the authority to grant and protect them; they would be valid for only so long as the territory involved was not within the City. Plaintiffs'

franchises were subject to the existing statutory right of the City to annex portions of the areas served by plaintiffs. The plaintiffs had no rights which the City was bound to respect.

It is essential to realize that "all grants of . . . franchises . . . are taken subject to existing laws, remaining unrepealed." *Chesapeake & Ohio Railway Co. v. Miller*, 114 U.S. 176, 188, 29 L.Ed. 121, 125 (1885). The City of Winston-Salem provides garbage collection services without charge to residents of newly annexed areas in compliance with the mandate set out in N.C.G.S. 160A-47:

> Prerequisites to annexation; ability to serve; report and plans.
>
> A municipality exercising authority under this Part shall make plans for the extension of services to the area proposed to be annexed and shall, prior to the public hearing provided for in G.S. 160A-49, prepare a report setting forth such plans to provide services to such area. The report shall include:
>
> . . . .
>
> (3) A statement setting forth the plans of the municipality for extending to the area to be annexed each major municipal service performed within the municipality at the time of annexation. Specifically, such plans shall:
>
> a. Provide for extending police protection, fire protection, *garbage collection* and street maintenance services to the area to be annexed on the date of annexation on substantially the same basis and in the same manner as such services are provided within the rest of the municipality prior to annexation.

(Emphasis ours.) Upon annexation, the City began providing garbage collection services as required by this section. By the annexation of the property in question, the county's franchise terminated and the police power of the City became operative. Just as "[c]orporations which receive franchises take the granted privileges subject to the police power of the state," 36 Am. Jur. 2d *Franchises* § 7 (1968), plaintiffs similarly received their franchises subject to the police power of the City.

To illustrate this, defendant relies on *Taylor v. Bowen*, 272 N.C. 726, 158 S.E. 2d 837 (1968), which is analogous. In *Taylor*, a portion of Cumberland County was annexed by the City of Fayetteville, and the issue was whether the county retained zoning authority over that property. This Court held that the zoning authority ended upon the annexation, on the basis that zoning regulations (like solid waste regulations) are an exercise of the police power and by their very nature cannot be bartered away by contract or lost in any other manner. Also informative is the case of *Metropolitan Services, Inc. v. Spokane*, 32 Wash. App. 714, 649 P. 2d 642 (1982), where a portion of territory covered by a state permit authorizing private companies to provide garbage and refuse service was annexed by the city, resulting in cancellation of the permit. In its opinion, the court stated:

> We do not find a constitutional taking here. The issuance of [state certificate number] G-39 was at all times subject to the prior constitutional right of the City to exercise its police power and its statutory right of annexation. Therefore, when a portion of the territory covered by G-39 was annexed in 1967, a constitutional taking did not occur.

Id. at 719-20, 649 P. 2d at 645.

In *Calcasieu Sanitation Service v. City of Lake Charles*, 118 So. 2d 179 (La. App. 1960), a case virtually indistinguishable on its facts from those before us, the plaintiff had an exclusive franchise for the operation of a garbage pickup service within certain areas of the parish outside the city limits of Lake Charles. Portions of this franchise area were annexed by the city. Plaintiff brought suit claiming that the city was interfering with its exclusive right to afford garbage service. The Louisiana Court of Appeals held that the franchise was subject to subsequent events such as annexation; that the parish could grant a franchise in territories outside of cities only; and it denied any recovery. In its opinion, the court stated:

> The city furnishes free garbage service to the residents of the annexed areas, as it does to all its other residents, under its legal obligation to do so set forth by LSA-R.S. 33:179 . . . As our learned trial brother stated, "the contract was entered into [by the plaintiff] subject to the right of the city and the inhabitants to annex portions of the area in-

> cluded in the garbage district," and the contract is thus subject in the respect noted to the legal effects resulting from such annexation.

118 So. 2d at 180. The court rejected plaintiff's allegation that following implementation by the city of its own garbage collection program for its residents, the plaintiff was "no longer allowed" to continue providing such services to the newly annexed areas. Although the city's actions may have destroyed the plaintiff's practical ability to retain or obtain paying customers, the court concluded that:

> Perhaps a different question would be involved if the city actually hindered the plaintiff by prohibitory ordinance or discriminatory licensing from continuing to afford garbage-disposal within the affected area to those residents still desiring it from the plaintiff; and our decision expressly does not pass upon the situation that would thus be presented.

Id. at 181. In this case, as in *Calcasieu*, the City has done nothing to prohibit the plaintiffs from carrying on their collection of solid waste. No ordinance has been passed preventing them from doing so, and they are free to compete with the City on that endeavor if they so choose.

We hold, then, given the limited territorial jurisdiction of the Forsyth County ordinance, that the plaintiffs' franchises were not protected from the City's actions and therefore did not survive annexation as to those areas which became part of the City.

Even assuming arguendo that plaintiffs' franchises survived annexation, and we hold they did not, the word "commercially" as used in N.C.G.S. 153A-136 (endowing a county with authority to "[g]rant a franchise to one or more persons for the exclusive right to *commercially* collect or dispose of solid wastes within all or a defined portion of the county and prohibit any other person from *commercially* collecting or disposing of solid wastes in that area" (emphases ours)) leads to the conclusion that a commercial service franchise does not provide protection to the holder against government service which would compete with it.

It is generally accepted that a governmental agency is not precluded from competing with its franchisee despite the fact the value of the franchise is diminished or destroyed by such competi-

tion. *See, e.g., Helena Water Works Co. v. Helena*, 195 U.S. 383, 49 L.Ed. 245 (1904); *Power Co. v. Elizabeth City*, 188 N.C. 278, 124 S.E. 611 (1924); *Mountain v. Pinellas County*, 152 So. 2d 745 (Fla. Dist. Ct. App. 1963). Such competition does not result in a taking or injuring of the franchisee's property without due process of law. The case of *Larson v. South Dakota*, 278 U.S. 429, 73 L.Ed. 441 (1929), is instructive on this point. In *Larson*, county commissioners granted an exclusive ferry franchise, with a provision that no other ferry should be operated within two miles of the franchise. The state then proceeded, with legal authority, to build a free bridge across the river within two miles of the ferry landing. The Court held that the franchise was not violated and that the franchisee was not entitled to compensation, on the principle that "public grants are to be strictly construed, that nothing passes to the grantee by implication." *Id.* at 435, 73 L.Ed. at 445. *See Charles River Bridge v. Warren Bridge et al.*, 36 U.S. 420, 9 L.Ed. 773 (1837).

A survey of United States Supreme Court cases involving the question of "takings" supports our position. In *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 73 L.Ed. 2d 868 (1982), the Court reviewed and discussed an array of its cases dealing with governmental takings of private property. Citing frequently to its opinion in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 57 L.Ed. 2d 631 (1978), in which the Court surveyed the general principles governing the takings clause of the United States Constitution, the Court reiterated its finding that " '[a] "taking" may more readily be found when the interference with property can be characterized as a physical invasion by government than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.' " 458 U.S. at 426, 73 L.Ed. 2d at 876 (citation omitted). The Court recognized the distinction between cases involving a permanent physical occupation and cases involving governmental action outside a person's property which results in consequential damages. The Court noted, "A taking has always been found only in the former situation." *Id.* at 428, 73 L.Ed. 2d at 877. "More recent cases confirm the distinction between a permanent physical occupation, a physical invasion short of an occupation, and a regulation that merely restricts the use of property." *Id.* at 430, 73 L.Ed. 2d at 879. Finally, the Court

restated the factors, originally enunciated in *Penn Central, supra*, to be considered in determining the existence of a taking:

> [R]esolving whether public action works a taking is ordinarily an ad hoc inquiry in which several factors are particularly significant—the economic impact of the regulation, the extent to which it interferes with investment-backed expectations, and the character of the governmental action.

458 U.S. at 432, 73 L.Ed. 2d at 880.

In the case before us, the actions of the City were not of such character as to require compensation. The City did not confiscate any real or personal property of the franchisees. The City has not issued any private franchise, nor has the City directed that any of its new citizens must allow the City to collect the garbage in question. The City did not unlawfully extend governmental service, and it did not directly interfere with the franchisees' property.

The franchisees in this case have no absolute rights with respect to their franchises. All rights are limited by neighboring rights, and when the rights of these franchisees are considered in light of the rights of the public through the City of Winston-Salem, the franchisees' rights are subject to the rights of these others. The City, by exercising its duty, has not impinged upon or violated any of the rights of the franchisees. Furthermore, not every damage to private property by the government is subject to compensation. We conclude, then, that plaintiffs have no compensable injury. Accordingly, the decision of the Court of Appeals is

Reversed.

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

STATE OF NORTH CAROLINA v. OTTO WITHERS, JR.

No. 287A83

(Filed 28 August 1984)

1. **Criminal Law § 77— statement by victim—objection sustained—absence of prejudicial error**

In a prosecution for first degree murder and assault with a deadly weapon with intent to kill, any error by the trial judge in sustaining the State's objection to testimony by defendant's sister that the assault victim stated shortly after the shootings that they were accidental was not prejudicial to defendant considering the equivocal nature of the trial judge's ruling, the fact that the jury was never instructed to disregard evidence of the victim's references to the shootings as an accident, and the fact that the trial judge later instructed in his recapitulation of the evidence that the jury could consider the victim's statements in their deliberations.

2. **Criminal Law § 138— sentencing hearing for first degree murder—imposition of sentence for assault—failure to hold second sentencing hearing**

In a prosecution wherein defendant was convicted of first degree murder and assault with a deadly weapon with intent to kill, and the trial court conducted a sentencing hearing to determine defendant's punishment for first degree murder, the trial court did not err in failing to conduct a second sentencing hearing pertaining only to defendant's conviction of assault with a deadly weapon with intent to kill before imposing a sentence on that charge. G.S. 15A-1334.

3. **Criminal Law § 138— prior convictions—not elements of crimes charged—use as aggravating factors**

In a prosecution for first degree murder and assault with a deadly weapon with intent to kill, defendant's prior convictions of first degree murder and assault with intent to commit rape were not used to establish elements of the crimes charged and could be used as factors in aggravation of defendant's current conviction of assault with a deadly weapon with intent to kill where the prior offenses were relevant to establish defendant's parole status, and defendant's fear that his parole would be revoked rather than the offenses themselves was used as evidence to support the elements of premeditation and deliberation and intent to kill.

4. **Criminal Law § 135.3; Jury § 7.11— first degree murder—death qualification of jury—constitutionality**

The procedure established in G.S. 15A-2000(a)(2) for "death-qualifying" a jury prior to the guilt phase of the trial and requiring the same jury to hear both the guilt and penalty phases of the trial is constitutional.

APPEAL by defendant from *Gaines, Judge*, at the 14 February 1983 Schedule A Criminal Session of MECKLENBURG County Superior Court.

Defendant was arrested on 5 July 1982 pursuant to warrants charging the first-degree murder of Roberta Hartsoe and assault with a deadly weapon with intent to kill Kathryn Hartsoe. These offenses were alleged to have been committed on 4 July 1982. On 16 August 1982, defendant was indicted for these crimes by the Mecklenburg County grand jury. He entered a plea of not guilty to each offense.

Kathryn Hartsoe, the mother of the deceased and defendant's financee at the time of the crimes, was the principal witness for the prosecution. She testified that she met defendant in Hickory, North Carolina in 1981. At that time she was married and lived with her husband and four children in Newton, North Carolina. She and her husband soon separated and Kathryn began to date defendant. When defendant was transferred by his employer to Charlotte in December, 1981, Kathryn and two of her children, Chris and Roberta, moved to Charlotte with him. The other Hartsoe children remained in Newton with their father.

Kathryn testified that in March, 1982, she went to a doctor complaining of nervousness and inability to sleep. She stated that she was nervous because of her impending divorce from her husband, pressure from her family to marry defendant, and commuting each day from Charlotte to Hickory to her work. The doctor prescribed an antidepressant, Activan, to help Kathryn relax.

On 24 June 1982, twelve-year-old Roberta told her mother that defendant had been "messing with her." When Kathryn confronted defendant with Roberta's accusations, he admitted asking Roberta to get in bed with him on several occasions and fondling her. Defendant apologized, saying that he was weak and he would make it up to Kathryn. Kathryn stated that this sexual misconduct became a daily topic of conversation between her and defendant, but that she made no report to the police at that time because she was still trying to decide whether she would marry defendant.

On 4 July 1982, the date the shootings occurred, Kathryn drove her son to Denver, North Carolina to meet his father. Roberta remained at home because she was being punished. On the way to Denver, Kathryn stopped to telephone home. She testified that defendant told her Roberta was being unruly and that she could hear her daughter yelling in the background.

When Kathryn returned from Denver, the apartment was empty and there was a note on the door from defendant. In the note, defendant explained that Roberta had run out of the house and that he assumed she had fled to her great-grandfather's house. He said that he had gone there to look for her. Kathryn testified that after reading the note, she called her grandfather's residence and defendant answered the phone. He suggested that Kathryn come for Roberta. Kathryn agreed and brought Roberta back to the apartment.

Defendant came home shortly thereafter. He told Kathryn that he and Roberta had been arguing and that during the argument, Roberta told him she wished he had been killed. As Kathryn listened to defendant's account of the argument, she became hysterical and took two nerve pills to calm down.

Kathryn testified that she slept fitfully during the afternoon and upon awakening, she observed defendant standing beside her pointing a gun at her head. He said something about not wanting his family to be humiliated and then fired the gun twice. One shot grazed her ear and the other bullet lodged in the bed. Defendant then said he was going to shoot Roberta and himself. Kathryn tried to follow as he left the room but she was unable to walk. As she stood leaning on the dresser in her bedroom, she heard Roberta moan. Defendant reentered the bedroom, pushed Kathryn back down on the bed and said, "Everything is going to be all right. We are going to live together forever after." He then shot himself and dropped the gun to the floor.

Kathryn testified that she kicked the gun under the bed and struggled to Roberta's room. She found her daughter lying face down on the floor. When Roberta did not move or respond, Kathryn ran to the telephone and dialed the emergency number to report the shooting. As she hung up the phone, defendant entered the room, asked her who she had spoken to and fell to the floor. At that moment, rescue personnel arrived and in response to their inquiry as to who did the shooting, Kathryn pointed to defendant. Kathryn and defendant were carried to a local hospital where defendant immediately underwent surgery.

Dr. Jeffrey Runge attended Kathryn in the emergency room. He stated that she appeared calm and that she made no inquiry

as to her daughter's condition. After cleaning and dressing Kathryn's superficial wound, Dr. Runge released her.

The State also presented the testimony of Dr. Hobart Wood, who performed the autopsy on Roberta. He testified that she had been shot twice in the back and stated that in his opinion, Roberta's death was caused by a bullet which penetrated her heart.

The police had also responded to Kathryn's emergency call. Officer Michael F. Warren stated that when he arrived, he noticed that Kathryn had been drinking. After the victims were removed from the apartment, the officers found a small handgun under the bed in the master bedroom. No fingerprints were found on the gun.

Roger Thompson, a firearms expert with the Charlotte Police Department, stated that he examined and tested the gun. In his opinion, each of the bullets removed from Roberta's body had been fired from the gun found in the master bedroom.

Finally, the State presented the testimony of Nebraska Massey, defendant's parole officer. Massey testified that defendant was paroled in November, 1979, after serving thirteen years of a life sentence imposed in 1966 upon his conviction of first-degree murder. Massey stated that defendant's parole would have been automatically revoked if he was convicted of any crime other than a minor traffic violation. He also stated that defendant was an exemplary parolee and that he had last visited with him on 2 July 1982.

Defendant offered the testimony of Dr. John Edward Humphrey, Dr. Humphrey, a psychiatrist, testified as to the side effects associated with the drug Activan, which Kathryn Hartsoe was taking on 4 July 1982 for anxiety. He stated that the drug is a central nervous system depressant and that, when combined with alcohol, the depressant effect becomes more intense and "people can really get fairly intoxicated pretty quickly and can slur their speech and stumble around and have physical symptoms like that."

Delores Withers, defendant's sister, also testified on her brother's behalf. She stated that Kathryn called her on 4 July immediately after the shooting. Delores hurried to the apartment and arrived there in time to speak briefly with Kathryn while she

was in the ambulance. Delores stated that she followed the emergency vehicles to the hospital. Upon her arrival there, she was informed by a nurse that Kathryn wanted to see her. Delores said that she located Kathryn in the emergency room and talked with her for a while. She remembered that Kathryn wanted to know how defendant was, whether defendant had mentioned her and if he still loved her. Delores testified that Kathryn apologized for what had happened.

Defendant's mother, Johnnie Mae Withers, testified that Kathryn also called her sometime on 4 July. She stated that Kathryn said she still loved defendant and wanted to visit him. She gave Mrs. Withers her telephone number in Newton and asked that she tell defendant to call her.

The jury returned verdicts of guilty of first-degree murder and assault with a deadly weapon with intent to kill.

The trial court conducted a sentencing hearing before the same jury following the first-degree murder conviction pursuant to G.S. 15A-2000 *et seq.* The jury found that the aggravating circumstances were insufficient to outweigh the mitigating circumstances and recommended that defendant be sentenced to life imprisonment for the murder of Roberta Hartsoe.[1]

The trial court imposed a sentence of life imprisonment on the first-degree murder conviction. Defendant also received a ten-year sentence on the conviction of assault with a deadly weapon with intent to kill, to run consecutively with the life sentence.

Defendant appealed the first-degree murder conviction to this Court as a matter of right pursuant to G.S. 7A-27(a). On 30 December 1983, we allowed defendant's motion to bypass the Court of Appeals on the conviction of assault with a deadly weapon with intent to kill.

1. The jury found beyond a reasonable doubt that two aggravating circumstances existed: (1) that defendant had been previously convicted of a felony involving the use or threat of violence to the person, and (2) that this murder was part of a course of conduct in which defendant engaged and which included the commission by him of other crimes of violence against another person or persons. G.S. 15A-2000 (e)(3) and (11). The jury did not specify which of the ten mitigating circumstances they found to exist.

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

Adam Stein, Appellate Defender, by Lorinzo L. Joyner, Assistant Appellate Defender, for defendant-appellant.

BRANCH, Chief Justice.

[1] By his first assignment of error, defendant contends he is entitled to a new trial because of the trial judge's exclusion of certain testimony offered by defendant's sister, Delores Withers.

Delores testified that she arrived at her brother's apartment shortly after the shooting incidents on 4 July. She stated that Kathryn Hartsoe remarked to her at that time and again at the hospital that the shooting was an accident. She further testified as follows:

> Q. When Kathryn kept saying it was an accident, did she say who she was referring to?
>
> A. She did not.
>
> Q. Was she talking about anybody just previous to that?
>
> A. She was talking about my brother. She asked me how was he doing, and she kept saying "Well, it was an accident" and I didn't question her as to what she meant. I assumed, I was assuming the wrong thing, that she was speaking of her husband. I thought that they had come in and shot them all up. That is what I thought when she kept saying it was an accident.
>
> Q. But she had been talking about Otto right before she made that statement?
>
> Mr. Reeves: Well, objection to the whole line of questioning.
>
> The Court: Sustained.
>
> Mr. Reeves: Move to strike all of it, Your Honor.
>
> The Court: Well, you know, well, Objection Sustained.

Defendant argues that sustaining the State's objection to the "whole line of questioning" was prejudicial error, although he concedes that had the State's objection been directed to Delores'

final answer in which she "assumed" who Kathryn was referring to, it would have been properly sustained.

We note initially that it is entirely unclear whether the trial judge in fact sustained the State's objection to the "whole line of questioning," or whether he intended to rule only on the testimony dealing with Delores' speculation as to what Kathryn meant when she spoke of the "accident." The trial judge never clearly ordered the evidence stricken, nor did he instruct the jury to disregard any portion of the testimony referring to Kathryn's characterization of the incident as an "accident." In fact, in his recapitulation of the evidence during final instructions to the jury, the trial judge stated unequivocally that the jury could consider Delores' testimony that Ms. Hartsoe said the shooting was an accident.

Considering the equivocal nature of the trial judge's ruling, the fact that the jury was never instructed to disregard evidence of Kathryn's references to the shootings as an accident, and that the trial judge later instructed in his recapitulation of the evidence that the jury could consider Kathryn's statements in their deliberations, we are of the opinion that any error by the trial judge in sustaining the State's objection to Delores Withers' testimony was not prejudicial to defendant. This assignment is overruled.

[2] Defendant next contends that the sentence imposed upon his conviction of assault with a deadly weapon with intent to kill was imposed in violation of G.S. 15A-1334.

Upon defendant's conviction of first-degree murder, the trial court conducted a sentencing hearing as required by G.S. 15A-2000 *et seq.*, to determine defendant's punishment. During this hearing, both the State and defendant presented evidence pertaining to issues relevant to sentencing. This included testimony concerning defendant's prior convictions, his behavior while confined in prison and while on parole and his previous work experience. Defendant also offered testimony relating to his prior family history. After considering the evidence presented at this hearing, the jury recommended that defendant be sentenced to life imprisonment for the first-degree murder of Roberta Hartsoe. Immediately after imposing a sentence of life imprisonment on the first-degree murder conviction and without conducting a sec-

ond sentencing hearing, the trial judge sentenced defendant to ten years' imprisonment on his conviction of assault with a deadly weapon with intent to kill. He found as aggravating factors pursuant to G.S. 15A-1340.4(a)(1)o that defendant had two prior convictions for criminal offenses punishable by more than 60 days' confinement, to wit, a prior conviction for first-degree murder in 1966 and a conviction of assault with intent to commit rape in 1968.

Defendant takes the position that G.S. 15A-1334 required the trial judge to conduct a second sentencing hearing before imposing a sentence upon defendant's conviction for assault with a deadly weapon with intent to kill. General Statute 15A-1334 requires the trial court to conduct a sentencing hearing on all felonies other than capital felonies with each party having the right to present relevant evidence with full opportunity for cross-examination. The defendant must also be given the opportunity to make a statement if he so desires.

We are not persuaded by defendant's argument that he is entitled to a new sentencing hearing on the assault conviction for failure of the trial judge to conduct a sentencing hearing limited only to this crime. We are convinced that the full sentencing hearing before the judge and jury on the first-degree murder charge was sufficient to afford defendant all that he was entitled to under G.S. 15A-1334, particularly where, as here, defense counsel did not object to the failure to conduct a second hearing at trial. The two crimes with which defendant was here charged were committed contemporaneously and therefore all evidence adduced at the sentencing hearing on the first-degree murder conviction pertaining to factors in aggravation or mitigation was equally applicable to the assault conviction. It would be a monumental waste of judicial time and energy to require the trial judge to conduct a second hearing wherein exactly the same evidence would again be presented.

We hold that the trial judge did not err in failing to conduct a second sentencing hearing pertaining only to defendant's conviction of assault with a deadly weapon with intent to kill. The record plainly supports the trial judge's finding in aggravation that defendant had previously been convicted of two offenses punishable by more than 60 days' confinement. The judge there-

fore acted within his discretion in imposing the maximum sentence for defendant's commission of this crime. *See State v. Ahearn*, 307 N.C. 584, 300 S.E. 2d 689 (1983).

[3] By this same assignment of error, defendant argues that it was error for the trial judge to use the prior convictions of first-degree murder and assault with intent to commit rape as factors in aggravation of his current conviction for assault with a deadly weapon with intent to kill. He argues that under the factual circumstances of this case, the use of these prior convictions to aggravate the assault charge violated the statutory mandate that "[e]vidence necessary to prove an element of the offense may not be used to prove any factor in aggravation, ..." G.S. 15A-1340.4(a)(1).

At trial, the prosecution presented evidence that defendant had been accused of engaging in sexual misconduct with Roberta Hartsoe. There was further evidence that defendant was fearful that if this misconduct were revealed to the police, his parole would be revoked. The State therefore theorized that defendant murdered Roberta Hartsoe and attempted to kill Kathryn because he was afraid they would initiate prosecution and he would lose his parole status.

From this, defendant argues that evidence of his prior convictions was admitted to prove intent to kill in the assault charge and premeditation and deliberation in the first-degree murder charge, and therefore this same evidence could not be used to aggravate the sentence received upon his conviction of felonious assault.

We simply do not agree with defendant's assertion that his prior convictions were used to establish an element of the crimes charged in the instant case. It is true the State argued that defendant's fear of losing his parole status was relevant to the issues of premeditation and deliberation and formation of the intent to kill. The prior convictions were therefore admitted to show why defendant was on parole and what would happen if his parole were revoked. Although the earlier offenses were relevant to establishing defendant's parole status, it was defendant's fear that his parole would be revoked and not the earlier offenses themselves which was used as evidence to support the elements

of premeditation and deliberation and intent to kill. This assignment is overruled.

[4] Finally, defendant contends that the procedure established in G.S. 15A-2000(a)(2) for "death-qualifying" a jury prior to the guilt phase of the trial and requiring the same jury to hear both the guilt and penalty phases of the trial is unconstitutional. We have consistently rejected this contention and are not persuaded by the arguments advanced by defendant that our prior decisions on this issue are erroneous. Therefore, on the authority of *State v. Hinson*, 310 N.C. 245, 311 S.E. 2d 256 (1984) and *State v. Williams*, 305 N.C. 656, 292 S.E. 2d 243, *cert. denied*, 456 U.S. 932 (1982), *reh'g denied*, 459 U.S. 1189 (1983), this assignment is dismissed.

Defendant received a fair trial free of prejudicial error.

No error.

IN THE MATTER OF: CHRISTIE LYNN BALLARD

No. 485A83

(Filed 28 August 1984)

1. **Parent and Child § 1.6— termination of parental rights—consideration of prior adjudication of neglect**

Evidence of neglect by a parent prior to losing custody of a child, including a prior adjudication of neglect, may be admitted and considered by the trial court in subsequent proceedings to terminate parental rights on the ground of neglect. The trial court must also consider any evidence of changed conditions in light of the evidence of prior neglect and the probability of a repetition of neglect.

2. **Parent and Child § 1.6— termination of parental rights—neglect—prior adjudication not determinative**

The trial court in a proceeding to terminate parental rights on the ground of neglect erred in treating a prior adjudication of neglect as determinative on the ultimate issue before it and in failing to make an independent determination of whether neglect authorizing termination of respondent's parental rights existed at the time of the termination hearing. G.S. 7A-289.32(2).

3. **Parental Rights § 1.6— termination for failure to pay costs of child care—finding of ability to pay**

The trial court erred in terminating respondent's parental rights under G.S. 7A-289.32(4) for failing to pay a reasonable portion of the cost of care for her child without finding that respondent has the ability to pay support.

In re Ballard

APPEAL of right under N.C.G.S. 7A-30(2) from the decision of a divided panel of the Court of Appeals, 63 N.C. App. 580, 306 S.E. 2d 150 (1983), affirming the order of *Judge William G. Jones* entered June 22, 1982, in District Court, MECKLENBURG County. Heard in the Supreme Court December 14, 1983.

Ruff, Bond, Cobb, Wade and McNair, by Moses Luski and William H. McNair, for petitioner appellee, Mecklenburg County Department of Social Services.

Robert D. McDonnell, as Guardian ad Litem for Christie Lynn Ballard, appellee.

Richard F. Harris, III, for respondent appellant, Sandra Ballard Ard.

MITCHELL, Justice.

This appeal arises from an order of the District Court, Mecklenburg County, ordering the parental rights of the respondent appellant terminated on the ground that she had neglected her child and on the separate ground that she had failed to pay a reasonable portion of the cost of care for the child for a continuous period of six months after it had been placed in the custody of the county department of social services. N.C.G.S. 7A-289.32(2) and (4). The respondent mother contends *inter alia* on appeal that the trial court erred by terminating her parental rights on the ground of failure to pay a reasonable portion of the costs of care for the child, since the trial court failed to determine specifically that the respondent had the ability to pay. She also contends that the trial court erred by admitting into evidence a prior order involving the same child which determined the child to be neglected and awarded custody to the Mecklenburg County Department of Social Services. For errors committed, we reverse the decision of the Court of Appeals which affirmed the order of the trial court.

The Mecklenburg County Department of Social Services (hereinafter "DSS") filed a juvenile petition on December 3, 1980, and an amended petition dated December 8, 1980, alleging that Christie Lynn Ballard was neglected and dependent. DSS assumed custody of Christie under a nonsecure custody order on December 3, 1980. A hearing was held before District Court

Judge Walter H. Bennett on January 5, 1981. On January 23, 1981, Judge Bennett entered an order adjudging the child to be a neglected and dependent child. The January 23 order included the following specific findings of fact:

. . . .

5. The mother is approximately 20 years old, has had no regular place to live since the birth of her child, and has always lived with other people.

. . . .

7. The mother recently spoke to Ms. Bullins of putting the child in an orphanage after Christmas, 1980. In June of 1980 the mother called the Department of Social Services and stated that she could not take care of the child and requested that said child either be placed in foster care or adopted. At the five-day hearing in this matter held December 8, 1980 [the mother], prior to the hearing, indicated to Mrs. Johnson that she was not able at the present time to care for this child.

8. In prior conversations with Mrs. Johnson, [the mother] admitted that in the last two years she had been leaving her child with anyone who would take her; that in November, 1980, she left the child at Dot Simpson's house, knowing said house had no heat; that she has had no permanent place to live since the birth of the child; that she has not been regularly employed since the birth of the child.

9. [The mother] was informed by Mrs. Johnson as to the availability of AFDC aid and encouraged by Mrs. Johnson to apply for such aid. Mrs. Johnson told [the mother] that she would assist [her] in obtaining such aid provided that [she] contacted her. [The mother] never applied for such aid and consequently did not receive any AFDC funds in November, 1980.

10. There was very little clothing for the child when she was picked up at the Bullins' residence by Mrs. Johnson pursuant to an immediate custody order issued by this Court. Subsequently, DSS has had to issue an emergency clothing check to the child in order to suitably clothe the child.

11. Ms. Ballard is currently working at the Classy Kitten, a topless lounge on East Morehead Street, Charlotte, North Carolina.

On December 9, 1981, DSS petitioned to terminate the parental rights of Russell Carlton and the respondent appellant, Sandra Ballard Ard. After a hearing in District Court, Judge William G. Jones entered an order on June 22, 1982 terminating the parental rights of Carlton and the respondent appellant Sandra Ballard Ard. The order of June 22 contained the following findings and conclusions:

. . . .

2. That shortly after the birth of the child, to wit in January, 1979, the Department of Social Services received a referral concerning the care which said child was receiving from her parents.

3. That additional referrals were received by the Department of Social Services; and in December of 1980 an immediate custody order was issued by this Court and the child was placed in the custody of the Department of Social Services.

4. That an adjudicatory hearing upon the petition alleging the child to be a neglected and dependent child was held by this Court on January 5, 1981, and extensive findings of fact were made by the Honorable Judge Walter H. Bennett, Jr., Judge Presiding; and that Judge Bennett found Christie Lynn Ballard to be a neglected child by virtue of the failure of the mother to properly care for said child; and that no appeal from the decision of Judge Walter H. Bennett, Jr. was taken.

5. That subsequent to the child coming into the care of the Department of Social Services, the mother, Sandra Elaine Ballard, entered, on June 8, 1981, into a parent/agency agreement with the Department of Social Services pursuant to the order of February 25, 1981, in which, among other things, she agreed to pay support of $8.00 a week for the child, to maintain steady employment and a stable residence; but that subsequent to June 8, 1981 (the date of the agreement), the respondent has had and lost at least three separate part time

jobs and has changed her residence six or seven times. Mrs. Ard was unable to work in January and February, 1982, because of medical problems.

6. That progress was made by Sandra Ard from time to time toward regaining custody of her child; and, in particular, progress became evident in July, 1981, when Sandra Ballard married Mr. Ard; but that in August, 1981, shortly after she was told that a temporary placement of Christie with her mother was going to be recommended by the Department of Social Services, Sandra Ard had a fight with her husband, went to Florida with another man and stayed there almost a month; and that again in February, 1982, Sandra Ard was advised by the Department of Social Services that because her situation had stabilized to a degree, a temporary placement would be recommended to begin on or about March 5, 1982; but that within a few days after being told that her child might be returned on a temporary basis, Sandra Ard again had a fight with her husband and left the residence of her in-laws and husband where she had been living since their marriage, and the placement of Christie with her was therefore never made.

7. That Christie Lynn Ballard has been in the custody of the Department of Social Services continuously since December of 1980 and the mother has worked from time to time and has paid absolutely no support for the child in the almost year and a half the child has been in the custody of the petitioner; and that neither has the respondent Russell Carlton paid any support whatever for the child, nor has he made any contact with the Department of Social Services concerning the child's condition and well-being.

8. That the mother of said child, Sandra Ballard Ard, has throughout the life of this child evidenced a propensity to let other things come before the care and responsibility of her child; and this child has been in foster care almost a year and a half during her three and one-half years of life; and this child is in need of permanent placement and a stable home, which this court is convinced cannot be provided by either respondent, Russell Carlton or Sandra Elaine Ballard Ard.

. . . .

10. That this Court adopts the findings and facts contained in the order of Judge Walter H. Bennett, Jr. dated January 23, 1981, and further adopts the conclusion of the Court that Sandra Elaine Ballard Ard neglected the child prior to her coming into the custody of the Department of Social Services.

. . . .

12. That based upon the foregoing, this Court concludes as a matter of law that grounds for termination of the parental rights of the mother, Sandra Elaine Ballard Ard, exist under the provisions of G.S. Sec. 7A-289.32(2) and (4); and with respect to Mr. Carlton under G.S. Sec. 7A(2), (4) and (6); and the Court further concludes that the best interests of Christie Lynn Ballard require that this Court terminate the parental rights of Sandra Elaine Ballard Ard and Russell Carlton with respect to said child.

The respondent Sandra Ballard Ard appealed to the Court of Appeals from the June 22, 1982 order of the trial court. The Court of Appeals affirmed with a dissenting opinion by Judge Wells. By reason of the dissent, the respondent appellant appealed to this Court as a matter of right under N.C.G.S. 7A-30(2).

[1] The respondent appellant assigns as error the trial court's determination that her parental rights should be terminated by reason of her neglect of the child. N.C.G.S. 7A-289.32(2). She first contends that the trial court erred during the hearing on the petition to terminate her parental rights by admitting into evidence over her objection the order of Judge Bennett entered on January 23, 1981, which determined that the respondent's child was a neglected and dependent child. We do not agree.

In the recent case of *In re Moore*, 306 N.C. 394, 293 S.E. 2d 127 (1982), *appeal dismissed*, 459 U.S. 1139 (1983), a majority of this Court indicated, despite a vigorous dissent, that in ruling upon a petition for termination of parental rights for neglect, the trial court may consider neglect of the child by its parents which occurred before the entry of a previous order taking custody from them. This is so even though the parents have not had custody of the child from the time of the prior custody order until the time of the termination proceeding. Therefore, a prior adjudication of

neglect may be admitted and considered by the trial court in ruling upon a later petition to terminate parental rights on the ground of neglect. However, the sufficiency of such a prior adjudication of neglect standing alone to support a termination of parental rights will be unlikely when the parents have been deprived of custody for any significant period before the termination proceeding. *See In re Barron*, 268 Minn. 48, 53, 127 N.W. 2d 702, 706 (1964).

We find persuasive the reasoning of the Court of Appeals of Indiana that:

> In most termination cases, as in this case, the children have been removed from the parents' custody before the termination hearing. It would be impossible to show that the children were currently neglected by their parents under these circumstances. To hold the State to such a burden of proof would make termination of parental rights impossible. We agree that the parents' fitness to care for their children should be determined as of the time of the hearing. The trial court must consider evidence of changed conditions. However, this evidence of changed conditions must be considered in light of the history of neglect by the parents and the probability of a repetition of neglect.

In re Wardship of Bender, 170 Ind. App. 274, 285, 352 N.E. 2d 797, 804 (1976). We conclude that the same reasoning applies to termination proceedings for neglect brought under North Carolina law.

Certainly, termination of parental rights for neglect may not be based solely on conditions which existed in the distant past but no longer exist. *Id.* But to require that termination of parental rights be based only upon evidence of events occurring after a prior adjudication of neglect which resulted in removal of the child from the custody of the parents would make it almost impossible to terminate parental rights on the ground of neglect. We do not believe that the legislature intended any such result when it enacted N.C.G.S. 7A-289.32(2) and 7A-517(21). *See generally, e.g., In re Moore*, 306 N.C. 394, 293 S.E. 2d 127 (1982); *In re Graham*, 63 N.C. App. 146, 303 S.E. 2d 624, *disc. rev. denied*, 309 N.C. 320, 307 S.E. 2d 170 (1983).

We hold that evidence of neglect by a parent prior to losing custody of a child—including an adjudication of such neglect—is admissible in subsequent proceedings to terminate parental rights. The trial court must also consider any evidence of changed conditions in light of the evidence of prior neglect and the probability of a repetition of neglect. *In re Wardship of Bender*, 170 Ind. App. at 285, 352 N.E. 2d at 804. The determinative factors must be the best interests of the child and the fitness of the parent to care for the child *at the time of the termination proceeding*. Therefore, the trial court did not err in admitting the prior order of Judge Bennett adjudging the child to be neglected as evidence of neglect to be considered in the termination proceeding in the present case.

[2] The respondent appellant next contends in support of this assignment of error that the trial court erroneously treated the prior adjudication of neglect standing alone as binding upon it and as determinative on the issue of neglect at the time of the termination proceeding. The respondent's contention in this regard has merit.

The parties before us have strenuously debated whether the prior adjudication of neglect in the nonsecure custody order entered by Judge Bennett on January 23, 1981 was binding on the trial court during the termination hearing by reason of the doctrine of *res judicata* or the doctrine of collateral estoppel. *See generally, e.g., Settle v. Beasley*, 309 N.C. 616, 308 S.E. 2d 288 (1983); *King v. Grindstaff*, 284 N.C. 348, 200 S.E. 2d 799 (1973); *In re Wilkerson*, 57 N.C. App. 63, 291 S.E. 2d 182 (1982). We find it unnecessary to resolve these issues.

Assuming *arguendo* that, under either theory, a prior adjudication of neglect is binding upon the trial court in a later termination proceeding, no prejudice to the parents will result if the termination hearing is properly conducted. *See In re Wilkerson*, 57 N.C. App. at 69-70, 291 S.E. 2d at 186. Both the existence of the condition of neglect and its degree are by nature subject to change. Thus, an adjudication that a child was neglected on a particular prior day does not bind the trial court with regard to the issues before it at the time of a later termination hearing, i.e., the then existing best interests of the child and fitness of the parent(s) to care for it in light of all evidence of neglect and the probability of a repetition of neglect.

During a proceeding to terminate parental rights, the trial court must admit and consider evidence, find facts, make conclusions and resolve the ultimate issue of whether neglect authorizing termination of parental rights under N.C.G.S. 7A-289.32(2) and 7A-517(21) is present at that time. N.C.G.S. 7A-289.30(d). The petitioner seeking termination bears the burden of showing by clear, cogent and convincing evidence that such neglect exists at the time of the termination proceeding. N.C.G.S. 7A-289.30(e); *Santosky v. Kramer*, 455 U.S. 745 (1982). *See In re Montgomery*, 311 N.C. 101, 316 S.E. 2d 246 (1984) (There is no difference in the "clear and convincing evidence" test of *Santosky* and the "clear, cogent, and convincing evidence" test of the statute.). As the answer to this ultimate question must be based upon the then existing best interests of the child and fitness of the parent(s) to care for it in light of any evidence of neglect and the probability of a repetition of neglect, the trial court must admit and consider all evidence of relevant circumstances or events which existed or occurred *either before or after* the prior adjudication of neglect. Since parents in such situations have a full opportunity to present all evidence favorable to them relating to all relevant periods before and after the prior adjudication of neglect, the application of the doctrine of *res judicata* or the doctrine of collateral estoppel to the prior adjudication could not prejudice them. *See In re Wilkerson*, 57 N.C. App. at 69-70, 291 S.E. 2d at 186.

In the case before us, the trial court took evidence during the hearing on the petition to terminate parental rights. It is apparent from a comparison of that evidence with the termination order, however, that the trial court treated the prior adjudication of neglect as determinative on the ultimate issue before it and failed to make an independent determination of whether neglect authorizing termination of the respondent's parental rights existed at the time of the termination hearing. For this reason, that part of the opinion of the Court of Appeals affirming the trial court's order terminating the respondent's parental rights under N.C.G.S. 7A-289.32(2) for neglect must be reversed.

[3] The respondent next assigns as error that portion of the trial court's order terminating her parental rights under N.C.G.S. 7A-289.32(4) for failing to pay a reasonable portion of the cost of care for the child. A finding that a parent has ability to pay sup-

port is essential to termination for nonsupport on this ground. *See In re Clark*, 303 N.C. 592, 281 S.E. 2d 47 (1981). No such finding was made in this case. Therefore, that part of the opinion of the Court of Appeals affirming the action of the trial court in terminating the respondent's parental rights on this ground also must be reversed.

The respondent appellant mother has brought forward other assignments of error. Our disposition of the foregoing issues makes it unnecessary for us to consider or discuss those assignments.

The decision of the Court of Appeals affirming the order of the trial court entered June 22, 1982 terminating the parental rights of the respondent appellant Sandra Ballard Ard is reversed. The case is remanded to that Court with instructions to vacate the order of the trial court and to further remand the case to the District Court, Mecklenburg County, for further proceedings not inconsistent with this opinion.

Reversed and remanded.

C. E. SAMPLE, T/A SAMPLE CONSTRUCTION COMPANY v. PATRICK H. MORGAN AND WIFE, IRENE S. MORGAN

No. 116A84

(Filed 28 August 1984)

1. **Contracts § 6.1— licensed contractor—recovery to amount authorized by license**

A licensed general contractor is entitled to recover only up to the amount authorized by his license, which in this case was $125,000. The decision of *Helms v. Dawkins*, 32 N.C. App. 453 (1977) and cases cited therein are overruled to the extent that they hold that a contractor who constructs a project the value of which exceeds the amount of his license may not recover in *any* amount for the owner's breach of contract, or for the value of the work and services furnished or materials supplied under the contract on a theory of unjust enrichment.

2. **Rules of Civil Procedure §§ 15.1, 56— amendment alleging affirmative defense—amendment deemed made for summary judgment hearing**

The trial judge did not abuse his discretion in allowing a formal amendment of defendant's answer to allege the affirmative defense of lack of proper

licensing of plaintiff general contractor after the trial judge had denied defendant's motion for summary judgment where the issue was already squarely before the court upon plaintiff's own admission, and thus for all practical purposes defendant's answer may be deemed amended to reflect the affirmative defense of lack of proper licensing as of the time the case was before the court on the motion for summary judgment.

PLAINTIFF appeals from a decision of the Court of Appeals, 66 N.C. App. 338, 311 S.E. 2d 47 (1984), one judge dissenting, affirming a judgment entered by *Allsbrook, J.*, at the 20 September 1982 Civil Session of Superior Court, CURRITUCK County. Plaintiff's petition for discretionary review as to an issue not addressed in the dissenting opinion, filed pursuant to Rule 16(b) of the North Carolina Rules of Appellate Procedure, was granted on 3 April 1984.

The principal issue on appeal to this Court is whether a building contractor, licensed pursuant to Chapter 87 of the North Carolina General Statutes, is entitled to recover on his contract when the final cost of the structure that he has contracted to build exceeds the limit allowed by his license. Plaintiff also assigns as error the trial court's granting defendants' motion to amend their answer to raise the affirmative defense of lack of proper licensing. We hold that under the facts as presented a licensed building contractor is entitled to recover up to the amount for which he is licensed to contract. We further hold that the trial judge did not abuse his discretion in granting defendants' motion to amend their answer to reflect the affirmative defense of lack of proper licensing.

For the reasons set forth below, we modify the decision of the Court of Appeals and remand the case to that court for further remand to the trial court for entry of judgment in accordance with our decision.

O. C. Abbott, attorney for plaintiff-appellant.

Trimpi, Thompson & Nash, by C. Everett Thompson for defendant-appellees.

MEYER, Justice.

The record discloses the following facts pertinent to the resolution of the issues presented:

By complaint filed 15 January 1981, plaintiff, a licensed building contractor, alleged that he and defendants entered into a contract for the purpose of building a residential dwelling for defendants; that the total cost of the building was $139,998.90; that defendants had paid plaintiff the sum of $120,331.82; and that defendants had refused to pay the balance due in the amount of $19,667.08.

In their answer, filed 27 January 1981, defendants admitted entering into a contract with the plaintiff for the purpose of building a residential dwelling; that the cost of the dwelling was $139,998.90; and that plaintiff had been paid $120,331.82. Defendants denied owing plaintiff any amount. Defendants amended their complaint on 13 February 1981, substituting for the original sum of $120,331.82 the new sum of $121,114.61, representing the amount they had admitted paying to the plaintiff.

On 1 October 1981 defendants moved for summary judgment. In response to defendants' motion, plaintiff submitted affidavits disclosing *inter alia* that he had a general contractor's license limited to $125,000.00 on any single project; that the original estimated cost of the project was $115,967.81; that during the course of construction, defendants requested certain modifications totalling an additional cost of $24,075.97; and that defendants purchased some of these materials, although they were charged to plaintiff's account, and that he had no control over the prices paid for them. On 24 May 1982, the trial judge denied defendants' motion for summary judgment.

Finally, on 26 August 1982, defendants moved to amend their answer alleging:

> 1. That pursuant to N.C.G.S. § 87-1, et seq., the plaintiff is not entitled to recover any sums of money from the defendants in that the plaintiff was not properly licensed to construct a project as alleged in the complaint in that plaintiff was licensed as a general contractor only up to a cost of $125,000.00 and the defendants plead this as a bar to plaintiff's claim.
>
> 2. That plaintiff is barred on its claim and plaintiff's claim is void and unenforceable on account of the statute of frauds.

The case was tried before a jury. Following presentation of the plaintiff's evidence and again at the close of all the evidence, defendants moved for "dismissal" pursuant to Rule 50 of the North Carolina Rules of Civil Procedure,[1] arguing that plaintiff had shown by his own evidence that "he was licensed [as a general contractor] for $125,000.00" and that "the cost of the undertaking exceeded the statutory amount in that plaintiff's (sic) claimed his undertaking was in excess of $130,000.00." The trial judge reserved ruling on the motions and submitted the case to the jury. The jury returned a verdict in favor of the plaintiff in the amount of $11,000.00. Defendants moved for judgment notwithstanding the verdict and this motion was granted. From this judgment, plaintiff appealed to the Court of Appeals. That court affirmed the judgment below, holding that "a contractor who violates statutory licensing requirements may not enforce a construction contract against an owner." 66 N.C. App. at 340, 311 S.E. 2d at 48. The Court of Appeals then concluded, "On this record plaintiff cannot collect more than $125,000.00 on his contract with defendants." *Id.*

Judge Eagles, in his dissenting opinion, took the position that "a licensed general contractor has complied with Chapter 87 when the contractor is licensed throughout the negotiation, contracting and construction process, the estimated construction cost under the original contract is within the dollar limits of his license, and any subsequent variations from the plans and specifications of the original contract are at the initiation of the other party and are merely acquiesced in by the contractor." *Id.* at 341, 311 S.E. 2d at 48.

Plaintiff contends that the trial judge erred in granting defendants' motion for judgment n.o.v., thereby barring his recovery of an amount in excess of what he had already received. Plaintiff's general contractor's license is limited to the amount of $125,000.00 on any single project. The jury awarded plaintiff

1. Plaintiff acknowledges that "our courts have held that it is permissable [sic] for motions made under Rule 41(b) at the close of plaintiff's evidence in jury trials to be treated as motions for directed verdict under Rule 50(a)." *See Creasman v. Savings & Loan Assoc.*, 279 N.C. 361, 183 S.E. 2d 115 (1971), *cert. denied*, 405 U.S. 977 (1972). We therefore find no merit to plaintiffs' contention that defendants' motion for judgment notwithstanding the verdict should not have been entertained upon defendants' failure to properly move for directed verdict.

$11,000.00 which, together with the amount he had been paid, would total an amount well in excess of the $125,000.00 limit on his license.[2]

Defendants take the position that plaintiff is barred from recovery of *any* amount on his claim.

In support of his position, plaintiff would have us consider, as did Judge Eagles in his dissenting opinion, the following facts: plaintiff's original estimate, after negotiations with defendants, was $115,000.00, a figure well within the plaintiff's authorized license limit. Although plaintiff acquiesced in defendants' requested additions and changes made during the course of the construction, which additions and changes substantially increased the cost of the structure, plaintiff took no part in defendants' decision to modify the original plans. Thus, argues plaintiff, he should not be required to bear the costs of modifications which inured solely to the benefit of the defendants and which were incurred solely as a result of their request for variations of the original plan.

Plaintiff's arguments are persuasive. However, our interpretation of Chapter 87, its purpose and underlying policy, together with our recent decision in *Brady v. Fulghum*, 309 N.C. 580, 308 S.E. 2d 327 (1983), dictates our rejection of the arguments of both parties.

G.S. § 87-10, provides in pertinent part:

> [T]he holder of an unlimited license shall be entitled to engage in the business of general contracting in North Carolina unlimited as to the value of any single project, the holder of an intermediate license shall be entitled to engage in the practice of general contracting in North Carolina but shall not be entitled to engage therein with respect to any single project of a value in excess of four hundred twenty-five thousand dollars ($425,000), the holder of a limited license shall be entitled to engage in the practice of general contracting in North Carolina but the holder shall not be entitled to engage therein with respect to any single project of a value in excess of one hundred twenty-five thousand dollars ($125,000) and

2. We are unable to determine from the record whether plaintiff has been paid $120,331.82, as alleged in his complaint, or $121,114.61, as reflected in defendants' amended answer.

the license certificate shall be classified as hereinafter set forth.

* * *

The Board shall conduct an examination, either oral or written, of all applicants for license to ascertain the ability of the applicant to make a practical application of his knowledge of the profession of contracting, *under the classification contained in the application*, and to ascertain the qualifications of the applicant in reading plans and specifications, knowledge of estimating costs, construction, ethics and other similar matters pertaining to the contracting business and knowledge of the applicant as to the responsibilities of a contractor to the public and of the requirements of the laws of the State of North Carolina relating to contractors, construction and liens. If the results of the examination of the applicant shall be satisfactory to the Board, then the Board shall issue to the applicant a certificate to engage as a general contractor in the State of North Carolina, *as provided in said certificate*, ... (Emphasis added.)

N.C. Gen. Stat. § 87-10 (1981) (amended 1982).

[1] Clearly the statute contemplates a differing level of expertise for those applying for and receiving a license in the three enumerated categories. In enacting this statute, the legislature reasonably determined that as the cost of a structure increased, there would be additional demands of expertise and responsibilities from the contractor. To permit a general contractor to recover amounts in excess of the allowable limit of his license would vitiate the intended purpose of this statute: to protect the public from incompetent builders. We therefore hold that a general contractor is entitled to recover only up to that amount authorized by his license. In the present case plaintiff is entitled to recover from the defendants an amount not to exceed $125,000.00.

In so holding we reject defendants' position that a contractor who constructs a project, the value of which exceeds the amount of his license, may not recover in *any* amount for the owner's breach of contract, or for the value of the work and services furnished or materials supplied under the contract on a theory of un-

just enrichment. To the extent that *Helms v. Dawkins*, 32 N.C. App. 453, 232 S.E. 2d 710 (1977) and cases cited therein so hold, those cases are overruled. Nor do we believe, as defendants contend, that our holding today is inconsistent with the rationale or result in *Brady v. Fulghum*, 309 N.C. 580, 308 S.E. 2d 327. In that case we expressly rejected the doctrine of "substantial compliance" with the general contractor's licensing statute. The substantial compliance doctrine essentially favored an equitable result following a case by case analysis. In *Brady* we elected to adopt a "bright line" rule, requiring strict compliance with the licensing provisions of G.S. § 87-1, *et seq.*, "[i]n recognition of the essential illegality of an unlicensed contractor's entering into a construction contract for which a license is required. . . ." *Id.* at 585, 308 S.E. 2d at 331. Likewise, by today's holding we have rejected plaintiff's argument that he is entitled to full recovery because he substantially complied with the Chapter 87 licensing requirements. Our decision in *Brady*, however, does not support defendants' contention that since the value of the building exceeded the limit of plaintiff's license, his claim is barred by Chapter 87. The issue we addressed in *Brady* concerned *unlicensed* contractors who *enter into construction contracts for which a license is required.* Here the plaintiff held a valid contractor's license *and* entered into a contract to build a structure which under the contract he was authorized by his license to undertake. In short, until plaintiff exceeded the allowable limit of his license, he was not acting in violation of G.S. § 87-10.

[2] Plaintiff contends that the trial judge erred in granting defendants' motion to amend their answer to allege the affirmative defense of lack of proper licensing. The motion was filed 26 August 1982, approximately 19 months after defendants had filed their answer. Plaintiff argues that the delay in filing the motion to amend was without justification in that defendants knew, at least as early as February 1981, shortly after their answer was filed, that plaintiff's license limited him to an undertaking of $125,000.00 on any single project.

Indeed, the record discloses that on 15 October 1981 plaintiff, in response to defendants' motion for summary judgment, filed an affidavit which reads as follows:

H. M. McCown, being first duly sworn, deposes and says:

1. That he is custodian of the records of the North Carolina Licensing Board for General Contractors, a State agency with the responsibility for licensing general contractors in accordance with N.C.G.S. 87-1, *et seq.*

2. That said Board is required by law to maintain a list of those persons who are duly licensed as general contractors in the State of North Carolina.

3. That according to said records, C. E. Sample Construction Company, Elizabeth City, North Carolina, was granted a license (No. 9228) on October 25, 1977, with a classification of Building Contractor and limitation of Limited (up to $125,000 on any single project).

4. All licenses expire on the thirty-first day of December of each year and renewals may be effective any time during the month of January.

5. That according to said records, C. E. Sample Construction Company renewed their license for the years 1978, 1979, 1980 and 1981.

This 17th day of February, 1981.

s/ H. M. McCown

(Sworn to this 17th day of February 1981.)

Furthermore, plaintiff submitted on 3 November 1981, again in response to defendants' motion for summary judgment, the following affidavit:

C. E. SAMPLE, being first duly sworn, deposes and says:

1. That he is a general contractor and has been licensed for at least four (4) years. That he had a general contractor's license limited up to $125,000.00 on any single project.

2. That he met with the defendants in August, 1979, and gave them an estimated cost of time and materials plus 10%, according to the plans and specifications shown to him, said estimate being in the amount of $115,967.81.

3. That at that time, it was contemplated that he would purchase the materials and furnish the labor.

4. That after the construction work began, the defendants requested changes in the plans and materials that went into the construction of the home. Some of the changes are as follows: carpet, wallpaper, vinyl, all bathroom fixtures, faucet, gold commode handles, 3 inch crown molding, roof shingles, broken tile on three porches, brick, white mortar, washing machine, dryer, built in double oven, refrigerator, light fixtures, cabinet hardware, cuppola, weather vane, doorlocks, dead bolts, paneling in den, beams in den, mantle in living room, chair railing, inside doors, outside doors, burglar alarm and attachments, screen wire porches, wallpaper mural, and counter top.

5. That he did not purchase some of these materials nor could he control the prices paid for the same.

6. That the total extras were an additional cost of $24,075.97.

This the 30th day of October, 1981.

s/ C. E. SAMPLE

(SWORN TO, this the 30th day of October, 1981.)

Thus, although defendants had neglected to plead the licensing defense at the time the motion for summary judgment was heard in May 1982, the issue was squarely before the court upon plaintiff's own admission.

In *Bank v. Gillespie*, 291 N.C. 303, 306, 230 S.E. 2d 375, 377 (1976), we held that "unpleaded defenses, when raised by the evidence, should be considered in resolving a motion for summary judgment," although "it is the better practice to require a formal amendment to the pleadings." In reaching this decision, Justice Branch (now Chief Justice) noted that:

> Earlier cases took the view that evidence offered at a hearing on a motion for summary judgment must be supported by allegations in the pleadings. *Cudahy Packing Co. v. U. S.*, 37 F. Supp. 563. The later cases hold that, in light of the policy favoring liberality in the amendment of the pleadings, "[e]*ither the answer should be deemed amended to conform to the proof offered by the affidavits or a formal amendment permitted*, the affidavits considered, and the mo-

> tion for summary judgment decided under the usual rule pertaining to the adjudication of summary judgment motions." 6 Moore's Federal Practice ¶ 56.11[3] (2d Ed. 1976). *See Rossiter v. Vogel*, 134 F. 2d 908; *Bergren v. Davis*, 287 F. Supp. 52. Chapter 1A, Rules of Civil Procedure.

Id. (Emphasis added.) *See Whitten v. AMC/Jeep, Inc.*, 292 N.C. 84, 231 S.E. 2d 891 (1977); *Mangum v. Surles*, 281 N.C. 91, 187 S.E. 2d 697 (1972); *see also Barrett, Robert & Woods v. Armi*, 59 N.C. App. 134, 296 S.E. 2d 10, *disc. rev. denied*, 307 N.C. 269 (1982) (holding that the trial court erred in rejecting defendant's defense that plaintiff was barred from recovering under a construction contract because plaintiff was not licensed as a general contractor during the majority of the construction period on the ground that the defense was not properly raised where the defense was raised for the first time in defendant's motion for summary judgment, since unpleaded affirmative defenses are deemed to be part of the pleadings when such defenses are raised in a hearing on a motion for summary judgment).

Thus, for all practical purposes, defendants' answer may be deemed amended to reflect the affirmative defense of lack of proper licensing as of the time the case was before the court on the motion for summary judgment. We therefore find no abuse of discretion in the trial judge's subsequent decision to allow a formal amendment following the hearing on the motion for summary judgment.

We deem it unnecessary to address defendants' cross assignment of error that the trial judge erred in denying their motion for summary judgment.

The case is remanded to the Court of Appeals for further remand to the Superior Court, Currituck County, for entry of judgment in an amount representing the difference between what plaintiff has been paid and $125,000.00.

Modified and remanded.

STATE OF NORTH CAROLINA BY AND THROUGH ITS NEW BERN CHILD SUPPORT AGENCY, EX REL., SADIE W. LEWIS v. JAMES DANIEL LEWIS

No. 391PA83

(Filed 28 August 1984)

Judgments § 44; Parent and Child § 9— conviction for refusal to support children—paternity issue in civil action—collateral estoppel

Defendant's criminal conviction under G.S. 14-322 for the willful neglect of and refusal to support his minor children collaterally estopped him from relitigating the issue of paternity in a subsequent civil action by the State for indemnification of its payments of support to defendant's children and for a continuing order of support by defendant since defendant's conviction under G.S. 14-322 necessarily required a finding that he was the father of the minor children, and the State in the civil action was identical to or in privity with the State in the prior criminal action.

ON defendant's petition for discretionary review of a decision by the Court of Appeals, 63 N.C. App. 98, 303 S.E. 2d 627 (1983), affirming, in part, an order of *Judge H. Horton Rountree* presiding in the CARTERET County District Court.

Rufus L. Edmisten, Attorney General, by Lemuel W. Hinton and Clifton H. Duke, Assistant Attorneys General; Charles H. Turner, Jr. for the state.

Mason and Phillips, P.A., by L. Patten Mason for defendant appellant.

EXUM, Justice.

The issue raised in this appeal is whether defendant's criminal conviction for the willful neglect of and refusal to support his minor children estops him from relitigating the issue of paternity in a subsequent civil action. We hold the doctrine of collateral estoppel bars defendant from relitigating the paternity issue and affirm the judgment of the Court of Appeals.

I.

In 1976 defendant, James Daniel Lewis, was charged under N.C. Gen. Stat. § 14-322 with the willful neglect of and refusal to support his four minor children, then ages sixteen, fourteen, ten and seven. After a nonjury trial upon defendant's plea of not guilty, Judge J. W. Roberts found defendant guilty. On 27 April

1976 Judge Roberts entered judgment against defendant, ordering him to pay $50 to the clerk of the superior court for the use and benefit of Sadie Lewis, the children's mother, and court costs, and placing defendant on probation for five years on the condition that he remain gainfully employed full time and pay $45 per week to the clerk's office for the support of his children.[1]

On 15 October 1976 Sadie Lewis instituted a civil action against defendant for divorce from bed and board, custody of four children, and child support. When defendant failed to answer, a default judgment was entered against him which provided, among other things, that he pay $75 per week as child support. A show cause order was subsequently entered requiring defendant to appear and explain why he should not be held in contempt for failure to comply with the terms of the default judgment. Defendant successfully moved to vacate the default judgment due to a failure of service of process. Defendant then filed an answer, alleging that he was not the father of the four children and requesting blood grouping tests.

On 14 January 1981 the state, through its New Bern Child Support Agency, filed the complaint which initiated the present case. The state sought indemnification for public assistance which it had paid for the support of the two youngest minor children allegedly born to defendant and Sadie Lewis and an order directing defendant to provide continuing support.[2] Defendant answered the state's complaint and alleged that he was not the father of these two minor children, requested blood grouping tests, and counterclaimed for reimbursement of child support payments he previously had paid the state. The state moved to dismiss defendant's counterclaim for failure to state a claim upon which relief can be granted and requested the court to deny defendant's motion for blood grouping tests. The state contended that defendant's prior conviction for willful neglect of and refusal to support these children estopped him from denying paternity.

1. Although the judgment itself does not expressly specify that these $45 per week payments were for the children's support, it is clear from the nature of the proceeding, and indeed a subsequent proceeding brought to enforce the judgment, that the payments were ordered for the children's support.

2. When defendant was convicted for failure to support his children in 1976, four minor children were involved. Two of these children had reached the age of majority by 1981 when the instant action was begun.

After a hearing on this motion, the trial court held that defendant was estopped from denying paternity of the two minor children, dismissed defendant's counterclaim, dismissed the state's claim for back support, and ordered defendant to pay $22.50 each week for the support of the two minor children.

Both parties appealed. The Court of Appeals affirmed the dismissal of defendant's counterclaims and the denial of the defendant's request for blood grouping tests.[3] We allowed defendant's petition for discretionary review on 3 November 1983.

II.

We must decide whether defendant is estopped from raising the issue of paternity in this civil action by his prior conviction under N.C. Gen. Stat. § 14-322 for willful neglect of and refusal to support the same children whose paternity he now questions. A determination of this issue involves both the notions of *res judicata* and collateral estoppel. We have previously defined these terms as follows:

> *Res judicata* deals with the effect of a former judgment in favor of a party upon a subsequent attempt by the other party to relitigate the same cause of action. In *Masters v. Dunstan*, 256 N.C. 520, 124 S.E. 2d 574 (1962), this Court stated:
>
> > '"It is fundamental that a final judgment, rendered on the merits, by a court of competent jurisdiction, is conclusive of rights, questions and facts in issue, as to the parties and privies, in all other actions involving the same matter." *Bryant v. Shields*, 220 N.C. 628, 18 S.E. 2d 157. ". . . [W]hen a fact has been agreed upon or decided in a court of record, neither of the parties shall be allowed to call it in question, and have it tried over again at any time thereafter, so long as the judgment or decree stands unreversed." *Humphrey v. Faison*, 247 N.C. 127, 100 S.E. 2d 524, citing and quoting *Armfield v. Moore*, 44 N.C. 157.

3. The Court of Appeals also vacated the trial court's dismissal of the state's claim for past public assistance paid and its order which directed defendant to make weekly child support payments. The validity of these determinations was neither briefed nor argued by the parties and is not before us.

> 'An estoppel by judgment arises when there has been a final judgment or decree, necessarily determining a fact, question or right in issue, rendered by a court of record and of competent jurisdiction, and there is a later suit involving an issue as to the identical fact, question or right theretofore determined, and involving identical parties or parties in privity with a party or parties to the prior suit. *Cannon v. Cannon*, 223 N.C. 664, 28 S.E. 2d 240; *Distributing Co. v. Carraway*, 196 N.C. 58, 144 S.E. 535.'

King v. Grindstaff, 284 N.C. 348, 355, 200 S.E. 2d 799, 804-05 (1973). Essentially the doctrine of *res judicata* provides that a final adjudication on the merits in a prior suit bars a subsequent, identical cause of action between the same parties or their privies. *Commissioner v. Sunnen*, 333 U.S. 591, 597 (1948). Similarly, the doctrine of collateral estoppel operates to bar the relitigation of issues previously determined. It constitutes a much more narrow application of the principle of *res judicata*. *Id.* at 597-98. Collateral estoppel provides that

> the judgment in the prior action operates as an estoppel, not as to matters which might have been litigated and determined, but 'only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered.' *Cromwell v. Sac County* [94 U.S. 351, 353 (1876)]. . . . Since the cause of action involved in the second proceeding is not swallowed by the judgment in the prior suit, the parties are free to litigate points which were not at issue in the first proceeding, even though such points might have been tendered and decided at that time. But matters which were actually litigated and determined in the first proceeding cannot later be relitigated. Once a party has fought out a matter in litigation with the other party, he cannot later renew that duel.

Id. at 598.

Thus *res judicata* generally precludes relitigation of claims or actions. Collateral estoppel operates to preclude the parties or their privies in a former action from relitigating in a subsequent action issues necessarily determined in the former action. *Settle v. Beasley*, 309 N.C. 616, 619, 308 S.E. 2d 288, 290 (1983).

For defendant to be collaterally estopped from relitigating the issue of paternity, then, two elements must exist: (1) The issue of paternity must necessarily have been determined previously and (2) the parties to that prior action must be identical or privies to the parties in the instant case. We consider both points seriatim.

Defendant contends that a conviction under section 14-322 does not necessitate a finding that he was the father of the minor children. This position is untenable.

Section 14-322 provides, in pertinent part:

> (d) Any parent who shall willfully neglect or refuse to provide adequate support for that parent's child, whether natural or adopted, and whether or not the parent abandons the child, shall be guilty of a misdemeanor and upon conviction shall be punished according to subsection (f). Willful neglect or refusal to provide adequate support of a child shall constitute a continuing offense and shall not be barred by any statute of limitations until the youngest living child of the parent shall reach the age of 18 years.

In order to obtain a conviction under this provision, the state must prove three elements beyond a reasonable doubt: (1) that the defendant was the father of the children; (2) that the defendant failed to provide the children with adequate support; and (3) that such failure was willful.

It is well established in North Carolina that a defendant cannot be convicted of a crime unless the evidence adequately sustains every constituent element of the offense charged. *State v. McCoy*, 303 N.C. 1, 24, 277 S.E. 2d 515, 532 (1981); *State v. Ferguson*, 191 N.C. 668, 670, 132 S.E. 664, 665 (1926); *State v. Crook*, 189 N.C. 545, 546, 127 S.E. 579, 580 (1925). Judge Roberts heard the evidence and found defendant guilty of the willful failure to support his minor children. This verdict necessitated a finding, express or implied, that defendant was the father of the minor children. As we noted in *Tidwell v. Booker*, 290 N.C. 98, 110, 225 S.E. 2d 816, 823 (1976),

> This Court has said on numerous occasions that the question of paternity is 'incidental to the prosecution for the crime of nonsupport.' *State v. Green* [277 N.C. 188, 193, 176

> S.E. 2d 756, 760 (1970)]; *State v. Robinson* [236 N.C. 408, 411, 72 S.E. 2d 857, 859 (1952)]; *State v. Summerlin*, 224 N.C. 178 [, 180], 29 S.E. 2d 462 [, 463] (1944). The question of paternity is 'incidental' to the criminal offense alleged only in the sense that proof of paternity is not proof of wilful nonsupport of the child. An affirmative answer to the question of paternity is, however, an indispensable prerequisite to the defendant's conviction on the criminal charge.

Defendant's conviction under section 14-322 necessarily required a finding that he was the father of Sadie Lewis's children. Thus the first necessary element for the application of collateral estoppel is satisfied.

Defendant further contends that the state in this action is not identical to or in privity with the state in the prior criminal action. We find this argument feckless.

The state prosecuted the prior criminal action for nonsupport, just as it instituted the present civil action for indemnification of its payments of support to defendant's children and for a continuing order of support by defendant. The state was not a nominal party in the criminal action; it is likewise not a nominal party in this action. In both cases the state pursued its interest in having a parent financially support his children. Thus the state occupies identical positions in both the criminal action for nonsupport and the current civil action for indemnification and continued support.

Defendant relies almost exclusively on *Tidwell* and *Settle*. We find both cases distinguishable.

In *Tidwell*, Booker, the defendant, was convicted in 1963 of the willful nonsupport of illegitimate children, with the trial court finding as a fact that Booker admitted that he was the father of the illegitimate children. Booker's six-month sentence was suspended upon the condition that he pay a certain sum each week for the support of his child. Booker did not appeal. He made eleven payments over a period of two years. On 9 October 1974 the mother of the child instituted an action to (1) have Booker declared the biological father of the minor child; (2) require Booker to pay a lump sum for child support which she had previously paid; and (3) require Booker to make future, periodic child

support payments. Booker filed an answer in which he denied paternity. The trial court, at a hearing on the defenses, found that Booker's 1963 conviction had finally adjudicated the issue of paternity and denied Booker the right to relitigate that issue.

We reversed, holding that collateral estoppel did not apply because the parties to the criminal and civil proceedings were neither the same nor in privity. 290 N.C. at 110-14, 225 S.E. 2d at 823-26. The state and the mother were not in privity in *Tidwell*, unlike the positions occupied by the state herein. *Tidwell* is inapplicable to the present case.

In *Settle*, the Johnston County Child Support Agency, on behalf and in the name of the mother, sued Beasley for child support. The trial court concluded that Beasley was not the child's father. No appeal was taken from this judgment.

Subsequently the minor child, through his guardian, sued Beasley, alleging that he was the child's father. Beasley answered and denied paternity. The trial court allowed Beasley's motion for summary judgment on the theory that the minor child was in privity with his mother, the plaintiff in the prior civil action. The child was thereby estopped from relitigating the issue of paternity.

We reversed, holding that no privity existed between the mother-plaintiff in the prior action and the child-plaintiff in the latter action. The prior action, brought by the state agency in the name of the mother, was an action for the state's benefit in an attempt to recoup money which it paid for the support of the child. In the latter action, the child was seeking support in his own right. The interests of the two plaintiffs were separate and distinct, preventing privity from existing between them. 309 N.C. at 619-23, 308 S.E. 2d at 290-92. In the absence of privity, collateral estoppel did not prevent the child from litigating the paternity issue in his own right.

Unlike *Tidwell* and *Settle*, the parties here are identical or at least in privity. Here the state instituted a criminal action against defendant for nonsupport and succeeded. Five years later, the state again brought suit, this time in the form of a civil action against defendant for reimbursement of public assistance paid for the support of his two children and for an order directing defend-

ant to provide continued support. The state herein is the same party which challenged defendant in the prior suit, pursuing its same financial interest in securing support payments by a parent for his children in both actions.

Since the issue of defendant's paternity has been necessarily determined in the prior criminal action and since the parties to that prior criminal action are the same as or in privity with the parties to this civil action, collateral estoppel applies. Accordingly, defendant is estopped from relitigating the issue of paternity which was necessarily adjudicated and resolved adversely to him in the 1976 criminal action. Therefore the decision of the Court of Appeals is

Affirmed.

STATE OF NORTH CAROLINA v. WILLIAM RAY RIDDLE

No. 84PA84

(Filed 28 August 1984)

1. Criminal Law § 102.7— prosecutor's jury argument—no expression of personal beliefs

The prosecutor's argument as to what defendant's witnesses might have testified if he had not saved a State's witness for rebuttal did not constitute an improper expression of the prosecutor's personal beliefs as to the credibility of the witnesses where the prosecutor did not refer to anything defendant's witnesses said and did not argue that defendant's witnesses would change their stories after hearing the State's witness.

2. Criminal Law § 46.1— argument concerning flight—supporting evidence

The prosecutor's jury argument that defendant disappeared from McDowell County after a burglary was supported by evidence that three deputy sheriffs spent a couple of weeks looking for defendant after the crime was committed, and that they checked the neighborhood, going to all the houses and talking with the people, but they did not see defendant during that period.

3. Criminal Law § 134.4— youthful offender—sufficiency of no benefit finding

Although the trial judge used the phrase "regular committed youthful offender" instead of "regular youthful offender" in the judgment and commitment form, it is clear that the trial judge did not sentence defendant as a committed youthful offender where he found that defendant would not benefit as a committed youthful offender and he failed to check the block which would have ordered the sentence to be served as a committed youthful offender.

APPEAL of right pursuant to N.C.G.S. 7A-30(2) from the decision of a divided panel of the Court of Appeals, 66 N.C. App. 60, 310 S.E. 2d 396 (1984), which found no error in the judgment entered by *Thornburg, J.*, at the 29 November 1982 session of Superior Court, MCDOWELL County. Heard in the Supreme Court 12 June 1984.

Rufus L. Edmisten, Attorney General, by Guy A. Hamlin, Assistant Attorney General, for the State.

C. Frank Goldsmith, Jr. for defendant.

MARTIN, Justice.

This case comes before us upon two issues. For their resolution, only a short summary of the evidence is required.

On 21 July 1982 at about 4:30 a.m., Howard Lee Hollifield discovered an intruder in his bedroom. When Hollifield turned on a light, the intruder ran. Although Hollifield followed the intruder, he was unable to capture him and did not see him again. Hollifield's wallet was missing after the intruder left. He described the intruder to the officers as six feet tall, weighing 130 to 140 pounds, skinny or slender build, thin-faced with dark brown hair, dressed in Levi's, possibly tennis shoes, without a shirt, and wearing a red headband. Later Hollifield identified defendant in a photographic lineup.

Although defendant did not testify, he presented evidence of alibi. This evidence indicated that defendant was at a house next to the Hollifield residence until about 2:30 a.m., when he went home. A woman who lives in the home of defendant and his mother testified that she saw him asleep in a chair when she left for work about 4:00 a.m. She also saw defendant in the kitchen about 2:00 a.m. Other witnesses also corroborated defendant's alibi.

The State in rebuttal offered Maxine Teague, a neighbor, who said that at about 3:30 a.m. she and her husband saw a car leave defendant's home, go a short distance, and heard the motor cut off. About one-half hour later, the car restarted and returned to the Riddle residence.

The jury found defendant guilty of burglary in the second degree. Following the decision by a divided panel of the Court of

Appeals, this Court allowed discretionary review on the additional question of the validity of the judgment entered against defendant.

[1] We discuss first the issue raised by the dissent in the Court of Appeals. Defendant argues that the trial court erred in allowing the solicitor to assert his personal beliefs to the jury as to the credibility of the witnesses. The solicitor's argument, in part, follows:

> Now, in a case like this, ladies and gentlemen, when you decide who you'll believe and that's a simple question before the jury. I think it is important you look at the character of the individuals that you're asked to believe and the life style and any criminal convictions, if that be the case. . . .
>
> . . . .
>
> Mr. (sic) Teague took the stand and you will recall her testimony, she talked about how the car left here sometime the next around quarter of 4 and went down this road and stayed about 45 minutes and then she heard it return to the house. She said 45 minutes later. That would be right at 4:30. Mrs. Teague was an extremely important witness. The reason I didn't put Mrs. Teague on this morning is that I knew that if I put Mrs. Teague on, this line of six witnesses they put on would explain that away too.
>
> MR. GOLDSMITH: Objection to that. I would like His Honor out here.
>
> (JUDGE COMES BACK ON THE BENCH.)
>
> MR. GOLDSMITH: Your Honor, I objected to Mr. Leonard's arguing on the grounds he was injecting his personal opinion as to the veracity of witnesses. I heard him, him say or understood him to say that the reason he didn't put on Mrs. Teague this morning was because if he did our witnesses would come in and change their stories to conform with what she said.
>
> COURT: Sustained. You won't consider that portion of the Solicitor's argument at any point in your deliberations, members of the jury. I was on the phone trying to correct a problem in my own district, so I will be out here.

MR. LEONARD: Members of the jury, you will recall that this morning I put on testimony relating to the headband and defendant's witnesses took the stand and they said, "Oh, yes, Barry Hensley had on a headband." In light of that, I waited to put the other witness on and I submit to you that if I had put Mrs. Teague on this morning, in all likelihood the evidence would be, "Oh, yes, Barry Hensley was driving that car that night."

MR. GOLDSMITH: Objection.

COURT: Overruled.

Or somebody would say, "Oh, yes, I took the car about quarter 'til 4 in the morning just exactly like that lady said I took the car and went down this road and on down here several miles to visit some friend of mine." I submit to you, members of the jury, that that would have been covered also.

. . . .

If this man was righteous and didn't commit this crime, why did he disappear from McDowell County—

MR. GOLDSMITH: Objection.

COURT: Overruled.

There's not one bit of explanation for that. They've put on six witnesses and not one of those witnesses went on the stand and said, "Oh, he was there all the time."

Defendant argues that the foregoing statements constitute expressions by the solicitor of his personal beliefs as to the credibility of the witnesses. "[T]he prosecutor may not determine matters of credibility and announce the result in open court—that is the jury's prerogative. The district attorney's private opinion that defendant's witness Leonard was lying 'was a step out of bounds.' " *State v. Locklear*, 294 N.C. 210, 218, 241 S.E. 2d 65, 70 (1978).

We disagree with defendant's characterization of the prosecutor's argument. The prosecutor was not referring to anything defendant's witnesses said, but was arguing what they might have testified if he had not saved his witness for rebuttal. This is not a case such as *Locklear, supra*, in which the prosecutor is

arguing that the defendant's witnesses have lied or that he does not believe them. Nor did he argue that defendant's witnesses would *change* their stories after hearing the State's witness. When a prosecutor becomes abusive and injects his personal views and opinions into the argument before the jury, he violates the rules of fair debate, and it becomes the duty of the trial judge to intervene to stop improper argument. *State v. Smith*, 279 N.C. 163, 181 S.E. 2d 458 (1971). Such is not the case here. We do not perceive that the solicitor's argument unfairly prejudiced the jury against defendant. *See State v. Miller*, 271 N.C. 646, 157 S.E. 2d 335 (1967). We note that the judge was not in the courtroom when the first objection was made. He did not hear the argument or ask that it be read by the reporter but sustained the objection based upon the statement of defendant's counsel. Thereafter he remained in the courtroom and heard the remainder of the challenged argument. This explains why he overruled the second objection.

[2] Defendant also contends that the State's argument was improper in asserting that defendant disappeared from McDowell County after the crime. The evidence discloses that deputy sheriffs Fineburg, Cline, and Edwards spent a "couple of weeks" looking for defendant after the crime was committed. They checked the neighborhood, going to all the houses and talking with the people. They did not see defendant during that period. Defendant turned himself in for probation violation on 6 August 1982 and was thereafter arrested for the burglary charge on 10 September 1982.

This evidence is sufficient to support the State's argument that defendant disappeared after the crime was committed.

Argument of counsel must be left largely to the control and discretion of the trial judge, and counsel must be allowed wide latitude in their arguments which are warranted by the evidence and are not calculated to mislead or prejudice the jury. *State v. Adcock*, 310 N.C. 1, 310 S.E. 2d 587 (1984). We find no prejudicial error in the challenged argument.

[3] We turn now to the question of the validity of the judgment entered. In the judgment and commitment form, the trial judge ordered that "the defendant be imprisoned [f]or a term of: 14 years as a regular committed youthful offender. The Court finds

that he would not benefit as a committed youthful offender." The judgment also contains the following:

(check all that apply)

☐ The defendant shall serve as a committed youthful offender (CYO) pursuant to G.S. Chapter 148 Article 3B.

The trial judge did not check this block.

Defendant argues that the judgment is ambiguous and void. While it is true that ambiguity in a "no benefit" finding creates error in the judgment, *State v. Bracey*, 303 N.C. 112, 277 S.E. 2d 390 (1981), here the no benefit finding by the trial judge is not ambiguous. Although the trial judge used the phrase "regular committed youthful offender" instead of "regular youthful offender," he immediately found that defendant would not benefit as a committed youthful offender. This is a clear and plain no benefit finding manifesting that defendant was not sentenced as a committed youthful offender. The judge further demonstrated his no benefit finding by not checking the block that would have ordered the sentence to be served as a committed youthful offender. It is clear that the trial judge did not sentence defendant as a committed youthful offender and that he fully complied with the terms and intent of N.C.G.S. 15A-1340.4(a) and 148-49.14. Defendant's assignment of error is overruled.

Affirmed.

STATE OF NORTH CAROLINA v. DENNIS KYLE WOOD

No. 539A83

(Filed 28 August 1984)

1. Rape and Allied Offenses § 5— rape of child—indefinite date of offense

The State's evidence was sufficient to convict defendant of first-degree rape, although the nine-year-old victim was unable to testify with certainty as to the date of the offense, where the trial court instructed the jury that, in light of defendant's evidence of alibi, the State would be required to prove that the offense occurred on or about 18 April as alleged in the indictment, and defendant's alibi defense was not affected by the State's inability to prove conclusively that the offense occurred on 18 April.

2. Rape and Allied Offenses § 6.1— rape of child—failure to submit attempt to rape

There was sufficient evidence of penetration to support defendant's conviction of rape of a nine-year-old child, and the trial court's failure to submit the lesser included offense of attempt to commit first-degree rape did not constitute plain error.

3. Rape and Allied Offenses § 4— rape of child and indecent liberties—admissibility of sexually explicit magazines

In a prosecution for first-degree rape of a child and taking indecent liberties with two children, sexually explicit magazines discovered in a search of defendant's property were competent to illustrate the testimony of the investigating officers who conducted the search and to corroborate the testimony of the victims that defendant showed them pictures in the magazines prior to committing the offenses. While it may not have been necessary for the State to introduce all of the 100 magazines, this fact alone does not constitute error sufficiently prejudicial to warrant granting defendant a new trial.

BEFORE *Burroughs, J.*, at the 20 June 1983 Criminal Session of Superior Court, TRANSYLVANIA County, defendant was convicted of first degree rape and two counts of taking indecent liberties with a minor. Defendant appeals of right from a life sentence imposed for his conviction of first degree rape. Motion to bypass the Court of Appeals on two concurrent three year sentences imposed for taking indecent liberties was allowed 9 February 1984. This case was heard in the Supreme Court on 8 May 1984.

The victims, to whom we will refer as Jennifer and "J.B.," were both nine years old at the time of the alleged offenses. Both girls testified that in the spring of 1982 they had gone to the defendant's house to do chores for him, in return for which they would be paid. After cleaning the house, they went outside where defendant took photographs of them with his polaroid camera. He then told them to go into a nearby shed. He locked the door on the outside and crawled into the shed through an opening in the back. He told them to undress and lie on a mattress in the shed. While they posed according to his instructions, he photographed them. Defendant, having removed his pants, then posed over one of the girls, ejaculating on her chest, while the second girl was told to take a photograph. The girls' recollection of the events was reasonably detailed and consistent. Defendant warned the girls that if they told their parents he would be in serious trouble

with the police. J.B. had been to defendant's home prior to this incident. The defendant had taken her into his bedroom, ordered her to undress, told her how to pose, took photographs of her, and had sexual intercourse with her.

Jennifer's mother testified that she had taken her daughter to defendant's house to clean on the Sunday of Memorial Day weekend, May 31. Defendant was a neighbor whom she had met through J.B.'s parents.

J.B.'s parents testified that the defendant had been a friend of theirs for several years. He had given J.B. a bicycle for her birthday in November, 1982. Shortly before Christmas, the defendant accompanied the family to Asheville. During the trip, according to J.B.'s testimony, defendant placed his hand on her knee and she responded by slapping him. Words were exchanged. Later defendant informed J.B.'s parents that he was taking the bicycle back. When J.B.'s mother questioned her about the incident, J.B. became upset and informed her mother about the incidents that had occurred the previous spring. J.B.'s mother telephoned Jennifer's mother and Jennifer corroborated J.B.'s account of what had happened. Defendant was subsequently arrested and charged.

Defendant testified on his own behalf. He admitted asking the girls to come to his home to clean and work in his greenhouse on 16 May. While there, he took photographs of them with his dog. He denied taking them into the shed, telling them to undress and photographing them. He presented an alibi witness for Memorial Day weekend. His aunt testified that defendant was with her that weekend in Jackson County.

Defendant's eighty-two year old father testified that he and his son were in Jackson County on Memorial Day weekend. He recalled J.B. and Jennifer visiting on some other occasion. They cleaned the house and went outside to have their photographs taken with the dog. He was working in the kitchen all day and watched them continuously. At no time did the girls go into the shed. In fact, Mr. Wood testified that he kept the key to the shed with his car keys in his pocket during the entire day. The girls testified that although they remembered defendant's father being home while they were there, he was asleep. When the police arrived to search defendant's home in January, they found the key

to the shed, contrary to defendant's testimony, hanging on a hook in the kitchen. Mr. Wood testified that defendant was at home with him on 18 April. He also testified that whenever J.B. came to the house, she was always accompanied by her brother. J.B. denied that her brother was with her when she came with Jennifer or on the day she was raped.

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

Appellate Defender Adam Stein by Assistant Appellate Defender Lorinzo L. Joyner, for the defendant-appellant.

COPELAND, Justice.

[1] Defendant first contends that the evidence was insufficient to convict him of first degree rape inasmuch as the State failed to prove that the rape occurred on 18 April as alleged in the indictment.

Defendant correctly points out that the victim, a nine-year-old child, was unable to testify with certainty as to the date of the offense. She testified that it was on a weekend sometime prior to the Memorial Day weekend offenses and that she was still in school. We have stated repeatedly that in the interests of justice and recognizing that young children cannot be expected to be exact regarding times and dates, a child's uncertainty as to time or date upon which the offense charged was committed goes to the weight rather than the admissibility of the evidence. *State v. Effler*, 309 N.C. 742, 309 S.E. 2d 203 (1983); *State v. King*, 256 N.C. 236, 123 S.E. 2d 486 (1962). *See: State v. Sills*, 311 N.C. 370, 317 S.E. 2d 379 (1984). Nonsuit may not be allowed on the ground that the State's evidence fails to fix any definite time for the offense where there is sufficient evidence that defendant committed each essential act of the offense. *Id.*

We do not have here a situation wherein defendant's alibi defense was affected by the State's inability to prove conclusively that the offense occurred on 18 April. *State v. Whittemore*, 255 N.C. 583, 122 S.E. 2d 396 (1961). *See: State v. Christopher*, 307 N.C. 645, 300 S.E. 2d 381 (1983). Following the presentation of evidence, the trial judge ruled and later instructed the jury that in light of the defendant's evidence of an alibi, the State would be

held to prove that the offense occurred on or about 18 April. Having been given the benefit of this instruction and an opportunity to present alibi evidence for 18 April, which evidence the jury chose to disbelieve, defendant appears to be arguing that these circumstances now require conclusive proof that the offense occurred on 18 April, proof not normally necessary and not normally possible where the victim is a child. We reject this argument. To force the State to admit of a date certain in order to accommodate defendant's alibi evidence, and then by convoluted reasoning to suggest that failure to prove the offense occurred on that specific date is fatal to the State's case, would clearly frustrate the State's efforts to convict on sex related offenses involving young children. This assignment of error is overruled.

[2] Defendant next contends that the trial judge erred in failing to submit the lesser included offense of attempt to commit first degree rape. He alleges that the evidence was inconclusive as to the element of penetration. Defendant failed to request the instructions at trial and therefore concedes that our review is limited to finding plain error. *See: State v. Odom*, 307 N.C. 655, 300 S.E. 2d 375 (1983).

We deem it unnecessary to reiterate the evidence presented at trial which was offered to prove the crime of first degree rape. Our careful reading of the transcript, including the testimony of the victim and the examining physician, discloses that there was sufficient evidence of penetration to support defendant's conviction. *See: State v. Stanley*, 310 N.C. 353, 312 S.E. 2d 482 (1984); *State v. Flippin*, 280 N.C. 682, 186 S.E. 2d 917 (1972); *State v. Sneeden*, 274 N.C. 498, 164 S.E. 2d 190 (1968); *State v. Whittemore*, 255 N.C. 583, 122 S.E. 2d 396. Furthermore, defendant denied having any sexual relationship with the victim, thereby failing to raise the issue of penetration at trial. Defendant did not request an instruction on the lesser included offense of attempt to commit rape. We find no plain error in the trial judge's failure to so instruct. The assignment of error is overruled.

[3] Defendant's final assignment of error concerns the introduction into evidence of sexually explicit magazines discovered as the result of a search of defendant's property. The magazines were admitted for the sole purpose of illustrating the testimony of the investigating officers who conducted the search. Defendant ar-

gues that the prejudicial effect of this evidence outweighed any probative value it may have had. He specifically objects to the number of magazines, more than one hundred, which were offered and viewed by the jury.

Not only were the magazines properly admitted for purposes of illustrating the testimony of the witness, *see*: 1 Brandis on N.C. Evidence § 34 (1982), but the evidence was relevant to corroborate the testimony of the victims. 1 Brandis on N.C. Evidence § 49 (1982) and cases cited thereunder. Both girls testified that defendant showed them pictures in the magazines prior to committing the offenses. Thus, limiting the evidence for purposes of illustration was favorable to the defendant. While it may not have been necessary for the State to introduce all the magazines, this fact alone does not constitute error sufficiently prejudicial to warrant granting defendant a new trial. This trial was free of prejudicial error.

No error.

STATE OF NORTH CAROLINA)
)
v.) ORDER
)
WILLIAM HENRY JOINES)

No. 108P84

(Filed 8 August 1984)

THIS matter is before the Court for consideration of defendant's Petition for Certiorari. The Petition seeks an order of this Court amending our former order entered herein on 9 July 1984, 311 N.C. 398, by which we reversed the opinion of the Court of Appeals and remanded the case to that court for further remand to the Superior Court, Dare County, for reinstatement of the original judgment entered against the defendant. Petitioner prays that this Court amend the remand portion of its order to remand the case to the Court of Appeals for consideration of issues preserved for review but not addressed by the Court of Appeals in the opinion rendered by that court and reported at 66 N.C. App. 459.

We find merit in defendant's petition and thus allow the petition for the purpose of amending the second paragraph of the special order entered by this Court on 9 July 1984 relating to the remand of the case to the Court of Appeals to read as follows:

> The decision of the Court of Appeals awarding defendant a new trial is REVERSED, and the case is remanded to that court for consideration of those issues properly preserved for review on their merits.

By order of the Court in Conference, this 8th day of August, 1984.

MEYER, J.
For the Court

W. R. ALLEN AND WIFE ANNETTE ALLEN

v.

ROY LEE DUVALL, MELBA JEAN DUVALL, AND CHARLIE BYRD DUVALL

ORDER

No. 437PA83

(Filed 27 August 1984)

UPON consideration of the defendants' petition filed in this matter for a rehearing pursuant to Appellate Rule 31, the following order was entered and is hereby certified to the North Carolina Court of Appeals:

> "Defendants' petition to rehear is allowed for the sole purpose of entering this order. The Clerk of Superior Court, Haywood County, is hereby directed to deduct the sum of $2,000.00 from the judgment of $4,674.87 entered in this cause by the Honorable Lacy H. Thornburg on 5 February 1982. This sum of $2,000.00 represents surveyor's fees which were disallowed by the North Carolina Court of Appeals in

their opinion in this cause filed 19 July 1983. Upon discretionary review by this Court, this issue was not before the Court.

By order of the Court in conference this the 27th day of August 1984.

FRYE, J.
For the Court"

STATE OF NORTH CAROLINA)
)
v.) ORDER
)
MASON ALEXANDER KNIGHT)

No. 107P84

(Filed 28 August 1984)

UPON consideration of the Attorney General's petition filed in this matter for a writ of certiorari to the North Carolina Court of Appeals to review its decision reported at 65 N.C. App. 595, the petition is allowed for the sole purpose of entering the following order which is hereby certified to the North Carolina Court of Appeals:

In its decision to award defendant a new trial, the Court of Appeals applied the rule enunciated in *State v. Grier*, 307 N.C. 628, 300 S.E. 2d 351 (1983), retroactively since defendant's trial commenced 20 September 1982. In *State v. Williams*, 311 N.C. 395, 317 S.E. 2d 396 (No. 78A84, filed 6 July 1984), this Court held that the rule enunciated in *Grier* applies to only those cases whose *trial commenced* after the certification date of *Grier*, that date being 28 March 1983. Since defendant's trial commenced 20 September 1982, approximately six months prior to the certification date in *Grier*, the rule of inadmissibility of polygraph enunciated in *Grier* does not apply to defendant's case.

The decision of the Court of Appeals awarding defendant a new trial is VACATED, and the case is remanded to that court for reconsideration in light of our decision in *State v. Williams*.

By order of the Court in Conference, this the 28th day of August 1984.

FRYE, J.
For the Court

STATE OF NORTH CAROLINA	)	
	)	
v.	)	ORDER
	)	
WILLIE LEE O'NEAL	)	

No. 171P84

(Filed 28 August 1984)

UPON consideration of the Attorney General's notice of appeal from the North Carolina Court of Appeals, filed in this matter pursuant to G.S. 7A-30, and the Defendant's motion to dismiss the appeal for lack of substantial constitutional question and upon consideration of the Attorney General's petition for discretionary review of the decision of the North Carolina Court of Appeals, pursuant to G.S. 7A-31, the following order was entered and is hereby certified to the North Carolina Court of Appeals: Defendant's motion to dismiss the appeal is

"Allowed by order of the Court in conference, this the 28th day of August 1984."

The Attorney General's petition for discretionary review is allowed for the sole purpose of entering the following order:

"The Court of Appeals held that defendant was entitled to a new trial at which defendant 'can at most be convicted of voluntary manslaughter.' The Court of Appeals then remanded the case to the trial court for a new trial limited to the

issue of whether defendant used excessive force in the commission of the homicide.

The opinion of the Court of Appeals is modified to provide that defendant shall be entitled to a new trial on the question of his guilt or innocence of voluntary manslaughter. As modified, the decision of the Court of Appeals is affirmed and this cause is remanded to that court for proceedings not inconsistent with this Order.

By order of the Court in conference, this the 28th day of August 1984.

FRYE, J.
For the Court"

IN THE MATTER OF)
A PETITION OF THE NORTH)
CAROLINA STATE BAR RE:)
) ORDER
THE ESTABLISHMENT OF A)
CLIENT SECURITY FUND)

(Filed 29 August 1984)

THE North Carolina State Bar, authorized by Chapter 84 of the North Carolina General Statutes to license, supervise and discipline attorneys, has petitioned this Court to establish, in the exercise of its inherent power, a Client Security Fund for the protection of clients against misuse of property entrusted by them to attorneys. It has come to the Court's attention that misuse of client's property by a few North Carolina attorneys is a problem which is bringing public disrespect upon the legal profession, the courts, and the administration of justice.

The Court has diligently studied the petition of the North Carolina State Bar, has caused the petition to be publicized among the members of the profession, has given opportunity for those opposed to the petition to so advise the Court, and has considered the views of those attorneys who have expressed their

opposition. The Court is of the opinion that it is now necessary to grant the petition of the North Carolina State Bar and to order the establishment of a Client Security Fund so as better to protect the public and to promote the public's confidence in the legal profession, the courts, and the administration of justice.

NOW, THEREFORE, in the exercise of its inherent power to supervise and regulate the conduct of attorneys in this state, the Supreme Court of North Carolina does hereby ORDER, ADJUDGE AND DECREE:

1. A Client Security Fund is hereby established. Each active member of the North Carolina State Bar as of 1 December 1984 shall pay the sum of $50.00 on or before 1 January 1985 and a like sum on or before 1 January of each year thereafter. The money shall be paid to the North Carolina State Bar and shall be placed by it in the Client Security Fund.

2. The Client Security Fund shall be administered by the North Carolina State Bar under rules and regulations adopted by it. Such rules and regulations, and any amendments thereto, shall not be effective until approved by this Court.

3. The North Carolina State Bar shall submit annually a report to this Court accounting for all monies collected and expended in the administration of the Client Security Fund.

4. To insure collection of payments due to the Client Security Fund by each attorney, the North Carolina State Bar is hereby empowered to use the same powers and procedures used to collect the dues provided for in Chapter 84 of the General Statutes of North Carolina.

5. Jurisdiction over the actions of the North Carolina State Bar in administering the Client Security Fund shall remain with this Court for the entry of future orders when and as necessary to accomplish the purposes of the Client Security Fund.

Done by the Court in Conference this 29th day of August 1984.

FRYE, J.
For the Court

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

ACKERMAN v. ACKERMAN

No. 222P84.

Case below: 67 N.C. App. 562.

Petition by defendant (Joseph Julian Ackerman) for discretionary review under G.S. 7A-31 denied 28 August 1984.

AMERICAN TOURS, INC. v. LIBERTY MUTUAL INS. CO.

No. 373PA84.

Case below: 68 N.C. App. 668.

Petition by defendant (Insurance Company) for discretionary review under G.S. 7A-31 allowed 28 August 1984.

ASHLEY v. DELP

No. 379P84.

Case below: 69 N.C. App. 177.

Petition by defendant (Hobart Delp) for discretionary review under G.S. 7A-31 denied 28 August 1984.

BAMBERG v. BAMBERG

No. 210P84.

Case below: 67 N.C. App. 763.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 28 August 1984.

BEARD v. PEMBAUR

No. 277P84.

Case below: 68 N.C. App. 52.

Petition by defendant for writ of certiorari to North Carolina Court of Appeals denied 28 August 1984.

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

BERNARD v. CENTRAL CAROLINA TRUCK SALES

No. 295P84.

Case below: 68 N.C. App. 228.

Petition by defendant (Truck Sales) for discretionary review under G.S. 7A-31 denied 28 August 1984.

BLOW v. SHAUGHNESSY

No. 261P84.

Case below: 68 N.C. App. 1.

Petition by several defendants for discretionary review under G.S. 7A-31 denied 28 August 1984.

CANTRELL v. LIBERTY LIFE INS. CO.

No. 367P84.

Case below: 68 N.C. App. 651.

Petition by defendant for discretionary review under G.S. 7A-31 denied 28 August 1984.

CARTER v. CARR

No. 256PA84.

Case below: 68 N.C. App. 23.

Petition by plaintiff for discretionary review under G.S. 7A-31 allowed 28 August 1984 with review limited to the question of whether the trial court erred by disallowing the testimony of plaintiff's husband concerning statements allegedly made to him by Dr. Canipe.

CAUBLE v. CITY OF ASHEVILLE

No. 150PA84.

Case below: 66 N.C. App. 537.

Petition by plaintiff for discretionary review under G.S. 7A-31 allowed 28 August 1984. Motion by defendant to dismiss appeal for lack of substantial constitutional question denied 28 August 1984.

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

CENTURY COMMUNICATIONS v. HOUSING AUTH. OF WILSON

No. 368PA84.

Case below: 68 N.C. App. 563.

Petition by defendant for discretionary review under G.S. 7A-31 allowed 28 August 1984.

CLELAND v. CRUMPLER

No. 304P84.

Case below: 68 N.C. App. 353.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 28 August 1984.

COLE v. DUKE POWER CO.

No. 296P84.

Case below: 68 N.C. App. 159.

Petition by defendant for discretionary review under G.S. 7A-31 denied 28 August 1984.

CONNOR HOMES CORP. v. GRAHAM

No. 22P84.

Case below: 65 N.C. App. 622.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 28 August 1984.

CONRAD INDUSTRIES v. SONDEREGGER

No. 419P84.

Case below: 69 N.C. App. 159.

Petition by defendants for discretionary review under G.S. 7A-31 denied 28 August 1984.

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

COOKE v. TOWN OF RICH SQUARE

No. 37P84.

Case below: 65 N.C. App. 606.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 28 August 1984. Notice of appeal dismissed 28 August 1984.

CRAVEN v. JONES

No. 129P84.

Case below: 66 N.C. App. 377.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 28 August 1984.

CRUMPLER v. STEWART

No. 333P84.

Case below: 68 N.C. App. 788.

Petition by defendant for discretionary review under G.S. 7A-31 denied 28 August 1984.

DAVIS v. NC MUTUAL LIFE INS. CO.

No. 455P84.

Case below: 69 N.C. App. 339.

Petition by defendant for writ of certiorari to North Carolina Court of Appeals denied 10 August 1984.

DENTON v. SOUTH MOUNTAIN PULPWOOD

No. 425P84.

Case below: 69 N.C. App. 366.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 28 August 1984.

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

DOUB v. DOUB

No. 364PA84.

Case below: 68 N.C. App. 718.

Petition by defendant for discretionary review under G.S. 7A-31 allowed 28 August 1984.

DOUGLAS v. PARKS

No. 334P84.

Case below: 68 N.C. App. 496.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 28 August 1984.

EASON v. GOULD, INC.

No. 276PA84.

Case below: 66 N.C. App. 260.

Petition by defendant for discretionary review under G.S. 7A-31 allowed 28 August 1984.

ELLIOTT v. DUKE UNIVERSITY

No. 159P84.

Case below: 66 N.C. App. 590.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 28 August 1984.

FIBER INDUSTRIES, INC. v. SALEM CARPET MILLS, INC.

No. 374P84.

Case below: 68 N.C. App. 690.

Petition by defendant for discretionary review under G.S. 7A-31 denied 28 August 1984.

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

FLINN v. LAUGHINGHOUSE

No. 321P84.

Case below: 68 N.C. App. 476.

Petition by defendant for discretionary review under G.S. 7A-31 denied 28 August 1984. Motion to dismiss appeal for lack of substantial constitutional question allowed 28 August 1984.

GREEN v. AETNA CASUALTY & SURETY

No. 299P84.

Case below: 68 N.C. App. 357.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 28 August 1984.

HAMILTON v. MERCY HOSPITAL

No. 381P84.

Case below: 68 N.C. App. 563.

Petition by defendant (Hospital) for discretionary review under G.S. 7A-31 denied 28 August 1984.

HOUSE v. STOKES

No. 421P84.

Case below: 66 N.C. App. 636.

Petition by defendants for writ of certiorari to North Carolina Court of Appeals denied 28 August 1984.

HUDSON v. ALL STAR MILLS

No. 338P84.

Case below: 68 N.C. App. 447.

Petition by plaintiffs for discretionary review under G.S. 7A-31 denied 28 August 1984.

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

HUFF v. CHRISMON

No. 362P84.

Case below: 68 N.C. App. 525.

Petition by defendant for discretionary review under G.S. 7A-31 denied 28 August 1984.

HUNTER v. ALCOHOLIC BEVERAGE CONTROL COMM.

No. 325P84.

Case below 68 N.C. App. 638.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 28 August 1984. Motion by ABC Commission to dismiss appeal for lack of substantial constitutional question allowed 28 August 1984.

IN RE CLARK v. JONES

No. 228P84.

Case below: 67 N.C. App. 516.

Petition by plaintiffs for discretionary review under G.S. 7A-31 denied 28 August 1984.

IN RE DANIELS

No. 224P84.

Case below: 67 N.C. App. 533.

Petition by propounder for discretionary review under G.S. 7A-31 denied 28 August 1984.

IN RE DeLANCY

No. 262P84.

Case below: 67 N.C. App. 647.

Petition by DeLancy for discretionary review under G.S. 7A-31 denied 28 August 1984. Motion by State Board of Dental Examiners to dismiss appeal for lack of significant public interest allowed 28 August 1984.

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

IN RE DENIAL OF REQUEST OF HUMANA HOSPITAL CORP.

No. 294P84.

Case below: 68 N.C. App. 162.

Petition by Humana for discretionary review under G.S. 7A-31 denied 28 August 1984. Motion by Wake County Hospital and HCA to dismiss appeal for lack of substantial constitutional question allowed 28 August 1984.

IN RE LEGITIMATION OF LOCKLEAR

No. 157PA84.

Case below: 66 N.C. App. 722.

Petition by Earl Jones for discretionary review under G.S. 7A-31 allowed 28 August 1984. Motion by Attorney General to dismiss appeal for lack of substantial constitutional question denied 28 August 1984.

IN RE WATKINS v. MILLIKEN

No. 319P84.

Case below: 68 N.C. App. 357.

Petition by defendant (Milliken & Company) for discretionary review under G.S. 7A-31 denied 28 August 1984.

INGLE v. ALLEN

No. 416P84.

Case below: 69 N.C. App. 192.

Petition by defendant for discretionary review under G.S. 7A-31 denied 28 August 1984.

INGRAM v. CRAVEN

No. 310P84.

Case below: 68 N.C. App. 502.

Petition by plaintiffs for discretionary review under G.S. 7A-31 denied 28 August 1984.

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

JENKINS v. WHEELER

No. 393P84.

Case below: 69 N.C. App. 140.

Petition by defendant (James L. Wilson) for discretionary review under G.S. 7A-31 denied 28 August 1984.

KILPATRICK v. UNIVERSITY MALL; BADGETT v. UNIVERSITY MALL

No. 378P84.

Case below: 68 N.C. App. 629.

Petition by plaintiffs for discretionary review under G.S. 7A-31 denied 28 August 1984.

KING v. HILL & GREEN

No. 315P84.

Case below: 68 N.C. App. 788.

Petition by defendant (Hill) for discretionary review under G.S. 7A-31 denied 28 August 1984.

KRAEMER v. MOORE

No. 220P84.

Case below: 67 N.C. App. 505.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 28 August 1984.

LaGASSE v. GARDNER

No. 371P84.

Case below: 68 N.C. App. 563.

Petition by defendant for discretionary review under G.S. 7A-31 denied 28 August 1984.

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

LEGGETT v. THOMAS & HOWARD CO., INC.

No. 353P84.

Case below: 68 N.C. App. 310.

Petition by defendant for discretionary review under G.S. 7A-31 denied 28 August 1984.

LEITNER v. LEITNER

No. 409P84.

Case below: 69 N.C. App. 177.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 28 August 1984.

LOWDER v. DOBY

No. 335P84.

Case below: 68 N.C. App. 491.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 28 August 1984.

LOWDER v. LOWDER

No. 336P84.

Case below: 68 N.C. App. 505.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 28 August 1984.

LYNCH v. HAZELWOOD

No. 327PA84.

Case below: 68 N.C. App. 357.

Petition by plaintiff for discretionary review under G.S. 7A-31 allowed 28 August 1984.

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

McMANUS v. GAMBILL

No. 349P84.

Case below: 68 N.C. App. 563.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 28 August 1984.

MARTIN v. HARTFORD ACCIDENT AND INDEMNITY CO.

No. 341P84.

Case below: 68 N.C. App. 534.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 28 August 1984.

MAYER v. MAYER

No. 149P84.

Case below: 66 N.C. App. 522.

Petition by defendant for discretionary review under G.S. 7A-31 denied 28 August 1984.

MILLER v. RUTH'S OF NORTH CAROLINA, INC.

No. 238P84.

Case below: 68 N.C. App. 40.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 28 August 1984.

MITCHELL v. PARKER

No. 309P84.

Case below: 68 N.C. App. 458.

Petitions by defendants (Hall and Parker) for discretionary review under G.S. 7A-31 denied 28 August 1984.

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

MOORE v. BEACON INS. CO.

No. 375P84.

Case below: 69 N.C. App. 339.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 28 August 1984.

MORETZ v. NORTHWESTERN BANK

No. 202P84.

Case below: 67 N.C. App. 312.

Petition by defendant for discretionary review under G.S. 7A-31 denied 28 August 1984.

NATIONWIDE MUT. FIRE INS. CO. v. ALLEN

No. 255P84.

Case below: 68 N.C. App. 184.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 28 August 1984.

OATES v. JAG, INC.

No. 124PA84.

Case below: 66 N.C. App. 244.

Petition by plaintiff for discretionary review under G.S. 7A-31 allowed 28 August 1984.

PARKS v. PERRY

No. 308P84.

Case below: 68 N.C. App. 202.

Petition by defendants (Godwin and Hospital) for discretionary review under G.S. 7A-31 denied 28 August 1984.

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

POE v. ACME BUILDERS

No. 422P84.

Case below: 69 N.C. App. 147.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 28 August 1984.

PRESBYTERIAN HOSPITAL v. McCARTHA

No. 83P84.

Case below: 66 N.C. App. 177.

Plaintiff's petition for reconsideration is allowed 28 August 1984. That portion of the Court's order of 6 July 1984, 311 N.C. 403, which regards plaintiff's petition for discretionary review is hereby amended as follows:

> Allowed with review limited to the question of whether the doctrine of necessities should be applied to this case if the plaintiff (1) can or (2) cannot establish that the wife was the supporting spouse at the time the medical services were furnished. Briefs and argument will be limited accordingly.

RAYMER v. RAYMER

No. 322P84.

Case below: 68 N.C. App. 788.

Petition by defendant for discretionary review under G.S. 7A-31 denied 28 August 1984.

ROBINSON v. KING

No. 280P84.

Case below: 68 N.C. App. 86.

Petition by several defendants for discretionary review under G.S. 7A-31 denied 28 August 1984.

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

RUSTAD v. RUSTAD

No. 243P84.

Case below: 68 N.C. App. 58.

Petition by defendant for discretionary review under G.S. 7A-31 denied 28 August 1984.

SCHELL v. COLEMAN

No. 615P83.

Case below: 65 N.C. App. 91.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 28 August 1984. Motion by defendant to dismiss appeal for lack of substantial constitutional question allowed 28 August 1984.

SIMMONS v. BROADNAX

No. 382P84.

Case below: 68 N.C. App. 564.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 28 August 1984.

STATE v. ATAEI-KACHUEI

No. 300P84.

Case below: 68 N.C. App. 209.

Petition by Attorney General for discretionary review under G.S. 7A-31 denied 28 August 1984.

STATE v. ATKINSON

No. 329P84.

Case below: 68 N.C. App. 357.

Petition by defendant for discretionary review under G.S. 7A-31 denied 28 August 1984. Motion by Attorney General to dismiss appeal for lack of substantial constitutional question allowed 28 August 1984.

STATE v. BANKS

No. 176P84.

Case below: 67 N.C. App. 358.

Petition by defendant for discretionary review under G.S. 7A-31 denied 28 August 1984. Motion by Attorney General to dismiss appeal for lack of substantial constitutional question allowed 28 August 1984.

STATE v. BENNETT

No. 234P84.

Case below: 67 N.C. App. 407.

Petition by defendant for discretionary review under G.S. 7A-31 denied 28 August 1984.

STATE v. BRADLEY

No. 182P84.

Case below: 67 N.C. App. 81.

Petition by defendant for discretionary review under G.S. 7A-31 denied 28 August 1984.

STATE v. BROWN

No. 195P84.

Case below: 67 N.C. App. 223.

Petition by defendant for discretionary review under G.S. 7A-31 denied 28 August 1984. Motion by Attorney General to dismiss appeal for lack of substantial constitutional question allowed 28 August 1984.

STATE v. CREASON

No. 386PA84.

Case below: 68 N.C. App. 599.

Petition by Attorney General for discretionary review under G.S. 7A-31 allowed 28 August 1984. Petition by defendant for writ of certiorari to North Carolina Court of Appeals allowed 28 August 1984.

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

STATE v. DAVIS

No. 394P84.

Case below: 66 N.C. App. 137.

Petition by defendant for writ of certiorari to North Carolina Court of Appeals denied 28 August 1984.

STATE v. ELLIOTT

No. 408P84.

Case below: 69 N.C. App. 89.

Petition by defendant for discretionary review under G.S. 7A-31 denied 28 August 1984. Motion by Attorney General to dismiss appeal for lack of substantial constitutional question allowed 28 August 1984.

STATE v. FOWLER

No. 348P84.

Case below: 68 N.C. App. 564.

Petition by defendant for discretionary review under G.S. 7A-31 denied 28 August 1984.

STATE v. GARY

No. 326P84.

Case below: 68 N.C. App. 357.

Petition by defendant for discretionary review under G.S. 7A-31 denied 28 August 1984.

STATE v. GOFORTH

No. 301P84.

Case below: 67 N.C. App. 537.

Petition by defendant for writ of certiorari to North Carolina Court of Appeals denied 28 August 1984.

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

STATE v. GOODEN

No. 36P84.

Case below: 65 N.C. App. 669.

Petition by Attorney General for discretionary review under G.S. 7A-31 denied 28 August 1984.

STATE v. HOCKADAY

No. 387P84.

Case below: 68 N.C. App. 564.

Petition by defendant for discretionary review under G.S. 7A-31 denied 28 August 1984.

STATE v. JEFFERSON

No. 388P84.

Case below: 68 N.C. App. 725.

Petition by defendant for discretionary review under G.S. 7A-31 denied 28 August 1984. Motion by Attorney General to dismiss appeal for lack of substantial constitutional question allowed 28 August 1984.

STATE v. JENRETTE

No. 384P84.

Case below: 68 N.C. App. 564.

Petition by Attorney General for discretionary review under G.S. 7A-31 denied 28 August 1984.

STATE v. LEWIS

No. 287P84.

Case below: 58 N.C. App. 348.

Petition by defendant for writ of certiorari to North Carolina Court of Appeals denied 28 August 1984.

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

STATE v. McQUAIG

No. 428P84.

Case below: 69 N.C. App. 178.

Petition by defendant for discretionary review under G.S. 7A-31 denied 28 August 1984.

STATE v. MEADOWS

No. 313P84.

Case below: 68 N.C. App. 357.

Petition by defendant for discretionary review under G.S. 7A-31 denied 28 August 1984.

STATE v. MYERS and STATE v. GARRIS

No. 397P84.

Case below: 61 N.C. App. 554.

Petition by defendant (Garris) for writ of certiorari to North Carolina Court of Appeals denied 28 August 1984.

STATE v. ROGERS

No. 451P84.

Case below: 68 N.C. App. 358.

Petition by defendant for writ of certiorari to North Carolina Court of Appeals and petition for temporary stay denied 9 August 1984.

STATE v. STEDMAN

No. 247P84.

Case below: 67 N.C. App. 197.

Petition by defendant for writ of certiorari to North Carolina Court of Appeals denied 28 August 1984.

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

STATE v. TURNER

No. 118P84.

Case below: 66 N.C. App. 203.

Petition by defendant for discretionary review under G.S. 7A-31 denied 28 August 1984.

STATE v. WARREN

No. 191A84.

Case below: 67 N.C. App. 337.

Petition by defendant for discretionary review under G.S. 7A-31 allowed as to additional issues 27 July 1984.

STATE v. WILSON

No. 233P84.

Case below: 67 N.C. App. 562.

Petition by defendant for discretionary review under G.S. 7A-31 denied 28 August 1984. Motion by Attorney General to dismiss appeal for lack of significant public interest allowed 28 August 1984.

STATE v. YARN

No. 443P84.

Case below: 67 N.C. App. 325.

Petition by defendant for writ of certiorari to North Carolina Court of Appeals denied 28 August 1984.

STONE v. LYNCH, SEC. OF REVENUE

No. 340PA84.

Case below: 68 N.C. App. 441.

Petition by defendant for discretionary review under G.S. 7A-31 allowed 28 August 1984.

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

TETTERTON v. LONG MFG. CO.

No. 260PA84.

Case below: 67 N.C. App. 628.

Petition by plaintiff for discretionary review under G.S. 7A-31 allowed 28 August 1984.

WARD v. TAYLOR

No. 297P84.

Case below: 68 N.C. App. 74.

Petition by plaintiffs for discretionary review under G.S. 7A-31 denied 28 August 1984.

WHEDON v. WHEDON

No. 354PA84.

Case below: 68 N.C. App. 191.

Petition by defendant for discretionary review under G.S. 7A-31 allowed 28 August 1984 with review limited to the question of whether the trial judge properly dismissed the motion for counsel fees without prejudice.

WILDER v. SQUIRES

No. 312P84.

Case below: 68 N.C. App. 310.

Petition by defendant (Squires) for discretionary review under G.S. 7A-31 denied 28 August 1984.

WILLIAMS v. SMITH

No. 273P84.

Case below: 68 N.C. App. 71.

Petition by plaintiff for writ of certiorari to North Carolina Court of Appeals denied 28 August 1984.

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

WILLIS v. RUSSELL

No. 314P84.

Case below: 68 N.C. App. 424.

Petition by defendant for discretionary review under G.S. 7A-31 denied 28 August 1984.

WISE v. LAUGHRIDGE

No. 172P84.

Case below: 66 N.C. App. 378.

Petition by plaintiffs for discretionary review under G.S. 7A-31 denied 28 August 1984.

APPENDIXES

AMENDMENT NORTH CAROLINA
SUPREME COURT LIBRARY RULES

AMENDMENT TO GENERAL RULES
OF PRACTICE FOR THE SUPERIOR
AND DISTRICT COURTS

EXTENSION OF ORDER CONCERNING
ELECTRONIC MEDIA AND STILL PHOTOGRAPHY
IN PUBLIC JUDICIAL PROCEEDINGS

AMENDMENT REGARDING
CLIENT SECURITY FUND

AMENDMENT TO RULES OF PROCEDURE
OF CLIENT SECURITY FUND

AMENDMENT
NORTH CAROLINA SUPREME COURT
LIBRARY RULES

Pursuant to Section 7A-13(d) of the General Statutes of North Carolina, the following amendment to the Supreme Court Library Rules as promulgated December 20, 1967 (275 N.C. 729) and amended November 28, 1972 (281 N.C. 772), April 14, 1975 (286 N.C. 731), July 24, 1980 (299 N.C. 745), July 19, 1982 (305 N.C. 784), and November 8, 1983 (309 N.C. 829) has been approved by the Library Committee and hereby is promulgated:

Section 1. Appendix I, Official Register, State of North Carolina, is amended by the following addition:

(11) The State President of the Department of Community Colleges.

Section 2. This amendment shall become effective June 21, 1984.

This the 21st day of June, 1984.

Frances H. Hall
Librarian

APPROVED:
James G. Exum, Jr.
Chairman, For the Library Committee

AMENDMENT TO GENERAL RULES OF PRACTICE FOR THE SUPERIOR AND DISTRICT COURTS

Pursuant to authority of G.S. 7A-34, Rule 6 of the General Rules of Practice for the Superior and District Courts is hereby amended to add a new fourth paragraph as follows:

> "The court in civil matters, on its motion or upon motion by a party, may in its discretion order that argument of any motion be accomplished by means of a telephone conference without requiring counsel to appear in court in person. Upon motion of any party, the court may order such argument to be recorded in such manner as the court shall direct. The court may direct which party shall pay the costs of the telephone calls. Conduct of counsel during such arguments may be subject to punishment as for direct criminal contempt of court."

This amendment shall be effective on and after the first day of January 1985 and shall be promulgated by the publication in the Advance Sheets of the Supreme Court and the Court of Appeals.

By order of the Court in Conference, this 28th day of August, 1984.

FRYE, J.
For the Court

IN THE GENERAL COURT OF JUSTICE
SUPREME COURT OF NORTH CAROLINA

ORDER

The ORDER CONCERNING ELECTRONIC MEDIA AND STILL PHOTOGRAPHY COVERAGE OF PUBLIC JUDICIAL PROCEEDINGS, adopted by this Court 21 September 1982, as amended 10 November 1982, is hereby extended through and including 31 December 1984.

This order shall be published in the advance sheets of the Supreme Court and of the Court of Appeals.

ADOPTED BY THE COURT IN CONFERENCE this first day of October 1984.

FRYE, J.
For the Court

AMENDMENT REGARDING CLIENT SECURITY FUND

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 quarterly meeting on April 13, 1984.

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 and 307 NC 718 be and the same is hereby amended by adding a new section to read as follows:

1. Pursuant to an Order of the North Carolina Supreme Court (hereinafter called the "Court") there is hereby established under the supervision of the Council of the North Carolina State Bar, a Board of Trustees to be known as Client Security Fund Board of Trustees (hereinafter called the "Board"). The function of the Board shall be to receive, manage and disburse such funds as may, from time to time, be appropriated to it as required by the Court, or voluntarily contributed to or otherwise received by it, as hereinafter provided. The purpose of the Board shall be to pay all or any part of said funds, as it deems appropriate, in reimbursement of losses caused by embezzlement, wrongful taking or conversion of monies or other property, hereinafter called "dishonest conduct," by members of the North Carolina State Bar who practice in North Carolina.

2. The Board shall consist of five members appointed by the President (subject to the approval by the Council), for terms as follows: one for one year, one for two years, one for three years, one for four years and one for five years. After the initial appointments, each subsequent appointment shall be for a term of five years. No appointee who has served a full term of five years shall be eligible for re-appointment to the Board until one year after the termination of his or her last term. Vacancies shall be filled by appointments by the President of the North Carolina State Bar for the unexpired term.

3. The Board shall be authorized, beginning January 1, 1985, to consider applications for reimbursement of losses which arise thereafter and which are caused by the dishonest conduct of any member of the North Carolina State Bar, who was acting either as an attorney or in a fiduciary capacity customary to the private practice of law in the matter in which such losses arose, but only to the extent to which these losses are not bonded or otherwise

covered or protected, and provided that the claimant has exhausted all civil remedies against the attorney or his or her estate and as provided by the Rules of the Board.

The Board shall investigate such applications as come to its attention. The Board shall be authorized and empowered to reject or allow such applications in whole or in part to the extent that funds are available to it. The Board shall have complete discretion to determine the order and manner of payment of approved applications. All such payments shall be a matter of grace and not of right and no person shall have any right in the Client Security Fund as a third party beneficiary or otherwise. No attorney shall be compensated by the Board for prosecuting an application before the Board.

4. The Council of the North Carolina State Bar is authorized, subject to approval of the Court, to promulgate Regulations and Rules of Procedure for the Board for the management of its funds and affairs, for the presentation of applications and their processing, for the payment of claims that are allowed, and for the subrogation or assignment of the rights of any reimbursed applicant.

5. All sums received by the Board of Trustees shall be held by the Treasurer of the North Carolina State Bar in a separate account known as Client Security Fund, subject to the written direction of the Board under Board rules.

6. The Board may use or employ the Client Security Fund for any of the following purposes within the scope of the Board's objectives as heretofore outlined:

(a) To make reimbursements on approved applications as herein provided.

(b) To purchase insurance to cover such losses in whole or in part as is deemed appropriate.

(c) To invest such portions of the Fund as may not be needed currently to reimburse losses, in such investments as are permitted to fiduciaries by The General Statutes of North Carolina.

(d) To pay the administrative expenses of the Board, including employment of Counsel to prosecute subrogation claims.

7. All applications and proceedings prior to final order of the Board shall be treated by the Board as confidential unless the applicant and attorney whose alleged conduct predicates the application request that the matter be made public.

8. The Board shall provide a full report of its activities at least annually to the Court and to the Council of the North Carolina State Bar, and shall make such other reports of its activities and give such publicity to its activities as the Court or Council may direct.

9. This Client Security Fund may be modified or abolished by the Court. In the event of abolition, all assets of the Client Security Fund shall be disbursed by Orders of the Court.

10. The Board with the authorization of the Council shall, in the name of the North Carolina State Bar, enforce any claims which the Board may have for restitution, subrogation, or otherwise, and may employ and compensate consultants, agents, legal counsel and other such employees as it deems necessary and appropriate.

RULES OF PROCEDURE

CLIENT SECURITY FUND OF NORTH CAROLINA STATE BAR

I. DEFINITIONS

For the purpose of these Rules of Procedure, the following definitions shall apply:

1. The "Board" shall mean the Client Security Fund Board of Trustees.
2. The "Fund" shall mean the Client Security Fund of the North Carolina State Bar.
3. An "attorney" shall mean one who, at the time of the act complained of, was licensed by the North Carolina State Bar. The fact that the act complained of took place outside the State of North Carolina does not necessarily mean that the attorney was not engaged in the practice of law in North Carolina.
4. "Applicant" shall mean a person who has suffered a reimbursable loss because of the dishonest conduct of an attorney and has filed an application for reimbursement.
5. "Dishonest conduct" shall mean wrongful acts committed by an attorney against an applicant in the manner of embezzlement, the wrongful taking or conversion of monies or other property.

6. "Reimbursable losses":

(a) "Reimbursable losses" are only those losses of money or other property which meet all of the following tests:

(i) The dishonest conduct which occasioned the loss occurred on or after January 1, 1985.

(ii) The loss was caused by the dishonest conduct of an attorney acting either as an attorney or in a fiduciary capacity customary to the private practice of law in the matter in which the loss arose as set out in No. 3 of DEFINITIONS above.

(iii) The applicant has exhausted all civil remedies against the attorney or his estate and has complied with these Rules.

(b) The following shall be excluded from "reimbursable losses":

(i) Losses of spouses, children, parents, grandparents, siblings, partners, associates and employees of attorney(s) causing the losses.

(ii) Losses covered by any bond, surety agreement, or insurance contract to the extent covered thereby.

(iii) Losses which have been otherwise received from or paid by or on behalf of the attorney who committed the dishonest conduct.

II. APPLICATIONS FOR REIMBURSEMENT

1. The Board shall prepare a Form of Application for Reimbursement which shall require the following minimum information:

(a) The name and address of the applicant.

(b) The name and address of the attorney who engaged in the dishonest conduct.

(c) The amount of the alleged loss for which application is made.

(d) The date or period of time during which the alleged loss was incurred.

(e) A general statement of facts relative to the application.

(f) Verification by the applicant.

(g) All supporting documents, including:

(i) Copies of all court proceedings against the attorney.

(ii) Copies of all documents showing any reimbursement or receipt of funds in payment of any portion of the loss.

2. The application shall contain the following statement in boldface type:

"IN ESTABLISHING THE CLIENT SECURITY FUND PURSUANT TO ORDER OF THE SUPREME COURT OF NORTH CAROLINA, THE NORTH CAROLINA STATE BAR DID NOT CREATE NOR ACKNOWLEDGE ANY LEGAL RESPONSIBILITY FOR THE ACTS OF INDIVIDUAL ATTORNEYS IN THE PRACTICE OF LAW. ALL REIMBURSEMENTS OF LOSSES FROM THE CLIENT SECURITY FUND SHALL BE A MATTER OF GRACE IN THE SOLE DISCRETION OF THE BOARD ADMINISTERING THE FUND AND NOT A MATTER OF RIGHT. NO APPLICANT OR MEMBER OF THE PUBLIC SHALL HAVE ANY RIGHT IN THE CLIENT SECURITY FUND AS A THIRD PARTY BENEFICIARY OR OTHERWISE."

3. An application shall be filed in the office of the North Carolina State Bar by being addressed to the central office of the North Carolina State Bar in Raleigh, North Carolina, attention Client Security Fund Board, and shall forthwith be transmitted by such office to the Chairman of the Board.

III. PROCESSING APPLICATIONS

1. The Board shall cause reasonable investigation of any applications filed with the North Carolina State Bar and transmitted to the Chairman of the Board.

2. The Chairman shall cause each such application to be sent to a member of the Board or other member of the North Carolina State Bar for investigation and report. A copy of the application shall be served upon or sent by registered mail to the last known address of the attorney who it is claimed committed the dishonest act. Wherever possible, the member to whom such application is referred shall practice in the county wherein the alleged defalcating attorney practiced.

3. A member to whom an application is referred for investigation shall conduct such investigation in such manner as he or she deems necessary and desirable in order to determine whether the application is for a reimbursable loss and in order to guide and advise the Board in determining the extent, if any, to which the application should be paid from the Fund.

4. A report from the member shall be submitted to the Chairman of the Board within a reasonable time. All such reports shall be strictly confidential.

5. The Board will conduct such investigation or review as it deems necessary or desirable in order to determine whether the application is for a reimbursable loss and to guide the Board in determining the extent, if any, to which the applicant should be reimbursed. After considering a report on an application, a Board member may request that testimony be presented concerning the application. In all cases, the alleged defalcating attorney or his personal representative will be given an opportunity to be heard by the Board if he so requests.

6. Of the amounts received by the Fund as annual assessments from members of the North Carolina State Bar, up to fifty percent (50%) of such annual amounts shall be available for disbursement for such applications until a corpus of $1,000,000.00 is created. Subject to the foregoing, the Board shall, in its discretion, determine the amount of loss, if any, for which the applicant should be reimbursed from the Fund. In making such determination, the Board shall consider, inter alia, the following:

   (a) The negligence, if any, of the applicant which contributed to the loss.

   (b) The comparative hardship which the applicant suffered because of the loss.

   (c) The total amount of reimbursable losses of applicants on account of any one attorney or association of attorneys.

   (d) The total amount of reimbursable losses in previous years for which total reimbursement has not been made and the total assets of the Fund.

(e) The total amount of insurance or other source of funds available to compensate the applicant for the loss.

7. The Board may, in its discretion, allow further reimbursement in any year of a reimbursable loss allowed by it in prior years with respect to a loss which has not been fully reimbursed.

8. No reimbursement shall be made to any applicant unless a report has been submitted to the members in accordance with Paragraph III, subparagraph 4, of these Rules of Procedure. No reimbursement shall be made to any applicant unless said reimbursement is approved by a majority vote of the entire Board at a duly held meeting at which a quorum is present.

9. No attorney shall be compensated by the Board for prosecuting an application before it.

10. An applicant may be advised of the status of the Board's consideration of his application and shall be advised of the final determination of the Board. The attorney's name shall not appear in any written communication to an applicant unless and until the Board has directed that a payment be made to the applicant.

11. All applications, proceedings, investigations, and reports involving applications for reimbursement shall be kept confidential until and unless the Board authorizes reimbursement to the applicant or the attorney who is involved requests that the matter be made public. All participants involved in the application, investigation or proceeding (including the applicant) shall conduct themselves so as to maintain the confidentiality of the application, investigation or proceeding. This provision shall not be construed to deny relevant information to disciplinary committees or to anyone else to whom the State Bar Council authorizes release of information.

12. The Board may, in its discretion, afford the applicant a reconsideration of his or her application; otherwise, such rejection is final and no further consideration shall be given by the Board to said application or another application upon the same alleged facts.

IV. SUBROGATION FOR REIMBURSEMENT MADE

In the event reimbursement is made to an applicant, the North Carolina State Bar shall be subrogated in said amount and may bring such action as is deemed advisable against the attorney, his assets or his estate. Such action may be brought either in the name of the applicant, or in the name of the North Carolina State Bar. The applicant shall be required to execute a "subrogation agreement" in this regard. Upon commencement of an action by the North Carolina State Bar pursuant to its subrogation rights, it shall advise the reimbursed applicant at his or her last known address. A reimbursed applicant may then join in such action to press an application for his or her loss in excess of the amount of the above reimbursement. Any amounts recovered from the attorney by the Board in excess of the amount to which the Fund is subrogated, less the Board's actual costs of such recovery, shall be paid to or retained by the claimant as the case may be.

Before receiving a payment from the Fund, the person who is to receive such payment or his legal representative shall execute and deliver to the Board a written agreement stating that in the event the reimbursed applicant or his or her estate should ever receive any restitution from the attorney or his estate, the reimbursed applicant agrees that the Fund shall be repaid up to the amount of the reimbursement from the Fund plus expenses.

V. BOARD MEETINGS

1. The Board shall meet from time to time upon call of the Chairman, provided that the Chairman shall call a meeting at any reasonable time at the request of at least two members of the Board.

2. The Chairman shall give the members not less than 15 days' written notice of the time and place of each regular meeting and shall give not less than 5 days' written notice of each special meeting. Notice of any meeting may be waived by a member either before or after the meeting.

3. A quorum at any meeting of the Board shall be three members. No action shall be taken by the Board in the absence of a quorum; but at any meeting any matter may be considered by the members present without the taking of any action with respect thereto.

4. Written minutes of each meeting shall be prepared and permanently maintained.

5. The Chairman shall be elected by a majority of the Board at its first meeting of each Bar year; his term shall extend until the first meeting of the Board in the following Bar year and until his successor is elected and qualified. Should a vacancy occur in the office of Chairman, such vacancy shall be filled in the manner of the original selection.

6. The fiscal year of the Board shall coincide with the fiscal year of the North Carolina State Bar.

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 are hereby approved by the Supreme Court of North Carolina.

This the 10th day of October, 1984.

JOSEPH BRANCH, Chief Justice
For the Court

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 10th day of October, 1984.

FRYE, J.
For the Court

AMENDMENT TO RULES OF PROCEDURE OF CLIENT SECURITY FUND

The following amendment to the Rules and Regulations of the Certificate of Organization of the North Carolina State Bar was duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on January 18, 1985.

BE IT RESOLVED by the Council of the North Carolina State Bar that Article VI, Section 5, 1., 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 718 and 311 NC 776 be and the same is hereby amended by rewriting rule 6(a)(iii) of the Rules of Procedure of the Client Security Fund to read as follows:

> (iii) That it appears to the Board that the applicant has exhausted all viable means to collect applicant's losses and has complied with these rules.

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 January 18, 1985.

Given over my hand and the Seal of the North Carolina State Bar, this the 11th day of February, 1985.

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 27th day of February, 1985.

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 27th day of February, 1985.

VAUGHN, J.
For the Court

ANALYTICAL INDEX

WORD AND PHRASE INDEX

ANALYTICAL INDEX

Titles and section numbers in this Index correspond with titles and section numbers in the N. C. Index 3d.

TOPICS COVERED IN THIS INDEX

APPEAL AND ERROR

§ 2. Review of Decision of Lower Court

In an appeal from a decision of the Court of Appeals where one judge dissented without filing a dissenting opinion, further review by appeal of right was precluded. *Walker Grading & Hauling v. S.R.F. Management Corp.*, 170.

Where all three judges of the Court of Appeals agreed that the action should have been dismissed but differed as to why dismissal was proper, there was no dissent so as to give plaintiff a right of appeal to the Supreme Court pursuant to G.S. 7A-30(2) although two concurring opinions were so labeled. *Harris v. Maready*, 536.

§ 20. Appellate Review of Nonappealable Interlocutory Orders by Certiorari

A denial of a petition for discretionary review does not constitute approval of the decision of the Court of Appeals, and the Supreme Court is not bound by precedents established by the Court of Appeals. *Northern Nat'l Life Ins. v. Miller Machine Co.*, 62.

§ 31. Exceptions and Assignments of Error to Charge

Where defendant did not take any exception to the jury instructions nor make any assignment of error to the jury charge as given, it was error for the Court of Appeals to consider the issue of the jury instructions. *Durham v. Quincy Mutual Fire Ins. Co.*, 361.

§ 69. Stare Decisis

The procedural issues in the present case are substantially different from those in a similar case reaching a different result before a different panel of the Court of Appeals, and the doctrine of stare decisis did not compel a different decision by this panel of the Court of Appeals. *Northern Nat'l Life Ins. v. Miller Machine Co.*, 62.

ATTORNEYS AT LAW

§ 5.1. Liability for Malpractice

The trial court did not err in refusing to dismiss an attorney malpractice action because the complaint contained allegations that plaintiff had been damaged in an amount exceeding five million dollars and that plaintiff was entitled to an award of the same amount for punitive damages. *Harris v. Maready*, 536.

AUTOMOBILES AND OTHER VEHICLES

§ 5. Sale and Transfer of Title to Vehicles

Provisions of the Uniform Commercial Code rather than the title transfer provisions of the Motor Vehicle Act governed the issue of whether the manufacturer of a recreational vehicle or the lender which financed the purchase of the vehicle from a dealer had the superior title or security interest in the vehicle after the dealer failed to pay the manufacturer for the vehicle. *American Clipper Corp. v. Howerton*, 151.

The prohibition of an additional American Motors Jeep franchise in the North Wilkesboro market area by the Commissioner of Motor Vehicles pursuant to G.S. 20-305(5) did not create a monopoly in violation of Art. I, § 34 of the N. C. Constitution. *American Motors Sales Corp. v. Peters*, 311.

The Commissioner of Motor Vehicles was not authorized to issue an injunction enjoining future practices of a motor vehicle manufacturer and its additional franchisee in a trade area. *Ibid.*

BASTARDS

§ 1. Elements of the Offense of Wilful Refusal to Support Illegitimate Child

Defendant's 1974 plea of guilty to a criminal charge of nonsupport of an illegitimate child did not bar an action by the Wilkes County Department of Social Services for child support. *Wilkes County v. Gentry*, 580.

BILLS OF DISCOVERY

§ 6. Compelling Discovery; Sanctions Available

The trial court did not err in failing to exclude defendant's oral statements to officers as a sanction for the State's failure to disclose them to defendant pursuant to defendant's request. *S. v. King*, 603.

The trial court did not abuse its discretion in denying defendant's motion for a mistrial made because the State failed to disclose his criminal record and defendant was cross-examined regarding a prior conviction. *Ibid.*

BROKERS AND FACTORS

§ 1. Nature and Essentials of Relationship

Although parties to a Real Estate Agent's Contract may include language providing for a commission if the efforts of the broker or agent prove to be an "indirect cause" of the sale, the "indirect cause" language in the agreement between plaintiffs and defendant was not significant since plaintiffs' recovery had to be based on the theory that they would be the procuring cause of the sale. *Brown v. Fulford*, 205.

§ 6.1. What Constitutes Procuring Cause of Purchase

In an action for a real estate commission, plaintiffs met their burden of raising a genuine issue of material fact as to whether plaintiff Brown's efforts constituted "the initiating act which [was] the procuring cause of the sale ultimately made." *Brown v. Fulford*, 205.

BURGLARY AND UNLAWFUL BREAKINGS

§ 5. Sufficiency of Evidence

The evidence supported a verdict finding defendant guilty of first degree burglary on a theory of constructive breaking by procuring and using another person to open the door. *S. v. Smith*, 145.

CANCELLATION AND RESCISSION OF INSTRUMENTS

§ 2.2. Presumptive Fraud

In an action to set aside a deed conveying plaintiffs' family home to defendant, the evidence established that a confidential relationship existed between plaintiffs and defendant at the time the deed was executed, and the trial court erred in failing to apply the law applicable to confidential relationships to defendant's actions. *Curl v. Key*, 259.

CONSPIRACY

§ 5.1. Admissibility of Acts and Statements of Coconspirators

The acts and statements of defendant's coconspirator were properly admitted into evidence. *S. v. Bell*, 131.

CONSPIRACY — Continued

§ 6. Sufficiency of Evidence

The evidence was sufficient to support defendant's conviction of conspiracy to commit sexual assaults. *S. v. Bell*, 131.

CONSTITUTIONAL LAW

§ 28. Due Process and Equal Protection Generally in Criminal Proceedings

The prosecution of defendant for first degree murder was not barred on the ground that he was arbitrarily selected for trial under our capital sentencing statute. *S. v. King*, 603.

A defendant tried for first degree murder was not denied equal protection by the district attorney's exercise of discretion in determining who would be prosecuted for first degree murder and thereby be subject to the death penalty. *S. v. Wilson*, 117.

The district attorney could properly consider the wishes of the victim's family as one factor in determining which defendants would be prosecuted for first degree murder. *Ibid.*

The district attorney's lack of written guidelines for determining who would be prosecuted for first degree murder did not violate defendant's right to equal protection of the laws. *Ibid.*

§ 29. Fairness of Pretrial Identification Procedures

Defendant waived his right to contest admissibility of evidence gathered as a result of a nontestimonial identification order where he did not move to suppress prior to trial. *S. v. Maccia*, 222.

§ 30. Discovery

The trial judge properly exercised his discretion in permitting the State to introduce into evidence certain photographs and in refusing to admit either photographic or physical evidence of a clump of hair found at the crime scene where defense counsel was informed of the existence of the evidence shortly after the district attorney. *S. v. Taylor*, 266.

In a prosecution for first-degree murder, the trial court fully complied with the mandates of State v. Hardy and G.S. 15A-904(a) in ruling on defendant's motion requesting an *in camera* inspection of the evidence in the State's possession. *S. v. Goldman*, 338.

In a prosecution for first-degree murder, it was not evident from the record or from defendant's brief that there was a violation of the discovery provisions concerning production of statements made by defendant. *S. v. Gardner*, 489.

§ 31. Affording the Accused the Basic Essentials for Defense

The trial court did not err in the denial of an indigent defendant's request for the appointment of a private investigator at State expense. *S. v. Wilson*, 117.

The trial judge did not abuse his discretion in denying defendant's motion for funds to hire a private investigator. *S. v. Goldman*, 338.

The trial judge did not abuse his discretion in failing to appoint a private investigator for defendant. *S. v. Gardner*, 489.

The trial judge correctly denied defendant's motion for funds to pay for additional psychiatric testing. *Ibid.*

CONTRACTS

§ 6.1. Contracts by Unlicensed Contractors or Businesses

A licensed general contractor is entitled to recover only up to the amount authorized by his license. *Sample v. Morgan*, 717.

Plaintiff's work in clearing and grading land for agricultural purposes did not bring it within the provisions of a statute requiring a general contractor to have a license. *Walker Grading & Hauling v. S.R.F. Management Corp.*, 170.

CORPORATIONS

§ 25. Contracts and Notes

A corporate assignor was bound by its assignment of an installment sale contract even though it was signed only by the corporation's president and was not attested or countersigned by the corporation's secretary or assistant secretary. *American Clipper Corp. v. Howerton*, 151.

CRIMINAL LAW

§ 15.1. Pretrial Publicity as Ground for Change of Venue

The trial court did not abuse its discretion in denying defendant's motion for a change of venue or in the alternative a special venire, and for an individual *voir dire* of the jury on the grounds of "undue prejudicial and inflammatory publicity concerning the defendant and matters inadmissible at trial." *S. v. White*, 238.

In a prosecution for first-degree murder, defendant failed to show the trial court abused its discretion in failing to grant his motion for a change of venue. *S. v. Gardner*, 489.

§ 22. Arraignment and Pleas Generally

The prosecution of defendant for first degree murder was not barred on the ground that he was arraigned generally for "murder" and not specifically for first degree murder. *S. v. King*, 603.

§ 32.1. Burden of Proof; Effect of Presumptions

An officer's references to the "crime scene" did not deprive defendant of the presumption of innocence and were not prejudicial. *S. v. Whitley*, 656.

§ 33.3. Evidence as to Collateral Matters

Although a knife found in the glove compartment of a car used in the crimes of kidnapping, attempted rape and sexual offense was neither used nor displayed during the crimes and bore only slight relevance thereto, its admission into evidence was not prejudicial error. *S. v. Bell*, 131.

Testimony in a rape case by a social worker that she had filed a child abuse petition after investigating the facts of the case was harmless error. *S. v. Sills*, 370.

§ 34.7. Admissibility of Evidence of Other Offenses to Show Motive and Common Scheme

Testimony that defendant shot the victim's current boyfriend before he went to the victim's house and shot her was relevant to show motive and common scheme. *S. v. King*, 603.

§ 34.8. Admissibility of Evidence of Other Offenses to Show Common Plan or Scheme

Testimony by a child rape victim that defendant had engaged in sexual intercourse with her on a date prior to the incident for which defendant was on trial was competent to show a common plan or scheme. *S. v. Sills*, 370.

CRIMINAL LAW — Continued

§ 42.4. Identification of Weapon and Connection with Crime

In a prosecution for first-degree murder, evidence that defendant possessed a weapon similar to that used in the murders shortly after the murders occurred was relevant evidence. *S. v. Gardner*, 489.

§ 42.6. Chain of Custody

A knife found in the glove compartment of a car during an inventory search was not inadmissible on the ground that the State could not show an unbroken chain of custody because the inventory search was not conducted until after the car had remained in a garage overnight. *S. v. Bell*, 131.

The State established a sufficient chain of custody of a "rape kit" to prove that samples in the kit examined by an SBI serologist were those placed in the kit by the examining physician so that the kit and an analysis of its samples were properly admitted into evidence. *S. v. Campbell*, 386.

Testimony concerning tests performed on weapons and other items was properly admitted where the State established a sufficient chain of custody of all the items and showed that there was no material change in their condition. *S. v. King*, 603.

§ 46.1. Competency and Sufficiency of Evidence of Flight

The prosecutor's jury argument that defendant disappeared from the county after a burglary was supported by the evidence. *S. v. Riddle*, 734.

§ 50.1. Admissibility of Expert Opinion Testimony

The admission of expert testimony that, based on 1979 statistics, less than 6½ percent of man-made textile fibers produced in the U.S. have rayon in them, if erroneous, was not prejudicial to defendant. *S. v. Foust*, 351.

§ 61.2. Competency of Footprint Evidence

Defendant waived his right to contest admissibility of evidence gathered as a result of a nontestimonial identification order where he did not move to suppress prior to trial. *S. v. Maccia*, 222.

§ 62. Lie Detector Tests

Where the trial of defendant was concluded prior to the certification of the Supreme Court's decision in State v. Grier, the Court of Appeals erroneously applied the new rules set forth in Grier to the case *sub judice*, and the case must be remanded to that court with instructions to hear the case on its merits. *S. v. Williams*, 395.

§ 66.9. Suggestiveness of Identification Procedure

The uncontested findings of a trial judge concerning identification of defendant were amply supported by the evidence and the findings in turn supported the trial court's conclusion that the pretrial procedures were not impermissibly suggestive. *S. v. Gardner*, 489.

§ 66.20. Findings of Court on Voir Dire to Determine Admissibility of Identification

The trial court's findings on *voir dire* to determine the competency and admissibility of the prosecuting witness' in-court identification were conclusive on appeal. *S. v. White*, 258.

CRIMINAL LAW — Continued

§ 70. Tape Recordings

The trial court erred in allowing into evidence a transcription of a detective's taped interview with a prosecution witness where the State failed to lay a proper foundation for its admissibility. *S. v. Toomer*, 183.

§ 73. Hearsay Testimony in General

Testimony by a witness concerning a statement of a coconspirator of defendant's was admissible against defendant as an exception to the hearsay rule where the statements were made in the course of the conspiracy and in furtherance thereof. *S. v. Maynard*, 1.

An assistant district attorney's testimony that a murder victim had stated to her "that he would give truthful testimony in cases involving criminal charges against" defendant was not inadmissible hearsay since there was a reasonable probability that the victim's statement to the witness was truthful. *Ibid.*

§ 73.1. Admission of Hearsay as Harmless Error

Testimony by an assistant district attorney that a detective told her that information provided by a State's witness "could only have been obtained by someone who actually participated in the break in or who was in a position to know about the break in" was inadmissible hearsay, but the admission of such testimony was not prejudicial error in this case. *S. v. Maynard*, 1.

Assuming that a physician's testimony that a child rape victim's natural father told him that "the girl had told him that this (rape) is what happened, that it had happened frequently" was inadmissible hearsay within hearsay, the admission of such testimony was harmless error. *S. v. Sills*, 370.

§ 73.2. Statements not Within Hearsay Rule

Testimony by decedent's wife that decedent had told her to go into the house and lock the door was not inadmissible hearsay and was admissible to explain the wife's subsequent conduct. *S. v. Whitley*, 656.

Testimony by a witness that decedent had asked him to come by her house was competent to explain the witness's subsequent conduct. *S. v. Walden*, 667.

Testimony that after the victim was fatally shot by defendant, the witness heard a voice say, "I guess you're satisfied now, ain't you M----- F-----?" was not inadmissible hearsay. *Ibid.*

§ 73.3. Hearsay Statements Showing State of Mind

A detective's statements concerning theft complaints filed with his department were not inadmissible hearsay where the testimony was not offered to show the truth of the matters asserted but to show that a report had been filed of complaints concerning stolen property and to explain the detective's subsequent conduct. *S. v. Maynard*, 1.

§ 73.4. Hearsay Statement as Part of Res Gestae

Statements by a murder victim tending to show that she did not want defendant in her home were admissible as part of the res gestae and to show the victim's state of mind. *S. v. Walden*, 667.

§ 75.1. Confession; Effect of Defendant Being in Custody or Under Arrest

Defendant's confession was properly not suppressed as "the fruit of the poisonous tree." *S. v. Gardner*, 489.

CRIMINAL LAW — Continued

§ 75.2. Confession; Effect of Promises, Threats, or Other Statements of Officers

The trial court properly found that defendant's statement was made freely, voluntarily and after knowingly waiving his *Miranda* rights. *S. v. Gardner*, 489.

§ 75.4. Confessions Obtained in Absence of Counsel

Defendant's confession made after he had previously invoked his right to counsel during custodial interrogation was admissible where the evidence supported the trial court's conclusions that defendant initiated the conversation with the officer which resulted in the inculpatory statement and that defendant knowingly and intelligently waived his previously invoked right to counsel. *S. v. Jenkins*, 194.

§ 75.12. Use of Confession Obtained in Violation of Defendant's Constitutional Rights

Defendant's voluntary statement elicited in violation of his *Miranda* rights could be used on cross-examination to impeach defendant's testimony. *S. v. King*, 603.

§ 75.16. Defendant's Capacity to Confess or Waive Rights; Minority

Defendant could not raise on appeal the issue of failure to suppress his confession because he was not advised of his right as a juvenile to have his parents present during interrogation where such issue was not raised in the trial court. *S. v. Jenkins*, 194.

§ 77. Admissions and Declarations of Persons Other than Defendant

Any error by the trial judge in sustaining the State's objection to testimony by defendant's sister that a felonious assault victim stated shortly after the shootings that they were accidental was not prejudicial to defendant. *S. v. Withers*, 699.

§ 77.1. Admissions and Declarations of Defendant

A statement made by defendant that he was fleeing to New Jersey rather than "turning himself in" was competent as an admission. *S. v. Walden*, 667.

§ 77.3. Admission and Declaration of Codefendant

The extrajudicial statement of a nontestifying codefendant that "I told him I was with some guys, but that I didn't rob anyone, they did," clearly implicated defendant in a robbery, and its admission violated defendant's right to confront the witnesses against him. *S. v. Gonzalez*, 80.

§ 84. Evidence Obtained by Unlawful Means

Defendant waived his right to seek suppression of evidence seized pursuant to a search warrant on the ground that the deputy clerk who issued the warrant was not neutral where defendant failed to file an affidavit with the motion to suppress and failed to specify his source of information or the basis for his belief as required by G.S. 15A-977(a). *S. v. Holloway*, 573.

§ 86.5. Impeachment of Defendant; Questions as to Specific Prior Acts

In a prosecution for first-degree murder, the trial court properly allowed the prosecutor to cross-examine defendant concerning his alleged participation in an unrelated murder. *S. v. Gardner*, 489.

§ 86.8. Credibility of State's Witnesses

Defense counsel should have been permitted to ask a State's witness on cross-examination whether he had obtained money by passing forged checks, but the exclusion of such testimony was not prejudicial error. *S. v. Wilson*, 117.

CRIMINAL LAW — Continued

§ 87. Direct Examination of Witnesses

Hypnotically refreshed testimony is too unreliable to be used as evidence in judicial proceedings, but such rule will apply only to cases which have not been finally determined on direct appeal as of the certification date of this decision. *S. v. Peoples*, 515.

A person who has been hypnotized may testify as to facts which he related before the hypnotic session. *Ibid.*

§ 88.2. Questions and Conduct Impermissible on Cross Examination

There was no abuse of discretion in a trial court's limiting defendant's cross-examination of a State's witness concerning whether the witness was living alone after her husband had left the marital home. *S. v. Maynard*, 1.

§ 89.3. Prior Consistent Statements of Witness as Corroboration

The trial court did not err in permitting an officer to read into evidence a prior statement of a witness to corroborate his testimony where the court stopped the officer's testimony upon objection and excluded noncorroborative portions. *S. v. Wilson*, 117.

§ 89.4. Prior Inconsistent Statements of Witness

The pretrial statement of a defense witness was properly admitted on rebuttal for impeachment purposes. *S. v. Whitley*, 656.

§ 95.1. Admission of Evidence Competent for Restricted Purpose; Request for Limiting Instruction

Defendant waived his right to object to being cross-examined concerning prior acts with a woman other than the rape victim where he did not request a limiting instruction and where the prosecutor subsequently returned to the subject without objection from the defendant. *S. v. Maccia*, 222.

§ 96. Withdrawal of Evidence

The admission of incompetent testimony by three witnesses concerning the character and arrest record of a defendant who did not testify was not prejudicial error where the court sustained objections thereto and gave curative instructions. *S. v. Wilson*, 117.

§ 97.1. No Abuse of Discretion In Permitting Additional Evidence

The trial judge acted well within his discretion in permitting a detective to be recalled and questioned to corroborate testimony of other witnesses. *S. v. Goldman*, 338.

§ 99.2. Court's Expression of Opinion; Question During Trial

The trial court did not express an opinion on the evidence by an inquiry to the jury, immediately before defendant testified, concerning whether it would prefer to reconvene on Saturday or the following Monday. *S. v. King*, 603.

§ 99.3. Court's Expression of Opinion; Remarks in Connection with Admission of Evidence

The trial court did not express an opinion in instructing the jury that it could "look at the weapon, if you like, and use the hammer to cock it, if you desire." *S. v. Walden*, 667.

CRIMINAL LAW – Continued

§ 102. Argument and Conduct of Counsel

The prosecuting attorney's closing arguments in a first degree murder case were not grossly improper and thus did not deprive the defendant of a fair and impartial trial. *S. v. Maynard*, 1.

There was nothing so grossly improper in the prosecutor's closing argument as to require the trial court to have taken corrective action on its own motion. *S. v. Hill*, 465; *S. v. Gardner*, 489.

§ 102.6. Particular Comments in Jury Argument

The prosecutor's jury argument during the sentencing phase of a first-degree murder case was not so grossly improper as to require the trial judge to act *ex mero motu*. *S. v. Maynard*, 1.

Although the prosecutor's jury argument concerning how the jury would respond to the witnesses, the victim, the community and society if the verdict was for less than first-degree murder is disapproved, it did not amount to such gross impropriety as to require the trial judge to act *ex mero motu*. *S. v. Boyd*, 408.

The prosecutor's statement of his personal opinion that the Bible may be "the very best law book we have got" was not grossly improper. *Ibid.*

§ 102.7. Prosecutor's Comment on Credibility of Witnesses

The prosecutor's argument as to what defendant's witnesses might have testified if he had not saved a State's witness for rebuttal did not constitute an improper expression of personal beliefs as to the credibility of the witnesses. *S. v. Riddle*, 734.

§ 102.8. Prosecutor's Comment on Failure to Testify

A prosecutor's challenge to defendant's evidence was not so grossly improper as to require the trial court's acting on its own initiative to instruct the jury that defendant had the right not to testify. *S. v. Hill*, 465.

Even if the prosecutor's argument to the jury, "That's something no one here can answer except the defendant," constituted an impermissible comment on defendant's failure to testify, it was not so extreme as to require the trial court *ex mero motu* to instruct the jury to disregard it. *S. v. Wilson*, 117.

The prosecutor did not improperly comment on defendant's failure to testify when he made repeated references to the fact that the evidence presented by the State was "uncontroverted" or "uncontradicted." *S. v. Foust*, 351.

§ 102.9. Prosecutor's Comment on Defendant's Character and Credibility

Comments made by the prosecutor in a sentencing hearing for first-degree murder which impugned the character of defendant and the credibility of defendant and his witnesses were based upon the evidence or inferences properly drawn therefrom. *S. v. Boyd*, 408.

§ 102.12. Prosecutor's Comment on Sentence or Punishment

The prosecutor's argument during the penalty phase of the trial which referred to the deterrent effect of the death penalty was not so egregious as to warrant *ex mero motu* action by the court. *S. v. Hill*, 465.

§ 111.1. Particular Miscellaneous Instructions

The trial court gave adequate identification instructions in a prosecution for robbery with a dangerous weapon. *S. v. Smith*, 287.

CRIMINAL LAW — Continued

§ 114.2. No Expression of Opinion by Court in Statement of Evidence or Contentions

There was no merit to defendant's contention that the trial court improperly expressed an opinion in its charge to the jury concerning defendant's first written statement. *S. v. Gardner*, 489.

§ 116. Charge on Failure of Defendant to Testify

When defendant testifies, the trial court is not required to instruct the jury upon request or otherwise that defendant cannot be compelled to testify. *S. v. Walden*, 667.

§ 126. Unanimity of Verdict

A defendant convicted of a first-degree sexual offense was not denied his right to a unanimous verdict by the court's instruction in the disjunctive that the jury should return a verdict of guilty if it found beyond a reasonable doubt, *inter alia*, that defendant engaged in "oral sex or anal sex with the victim." *S. v. Foust*, 351.

§ 134.1. Reference of Sentence to Offense; Ambiguity

Where defendant was convicted of assault with a deadly weapon, a misdemeanor, the maximum sentence for which is two years imprisonment, although the trial court sentenced the defendant to two years, it completed a felony sentencing form and the judgment must be vacated and remanded for resentencing. *S. v. Maccia*, 222.

§ 134.4. Sentence of Youthful Offender

The trial court erred in imposing an active sentence upon a sixteen-year-old defendant for second-degree murder without either sentencing defendant as a committed youthful offender or making a "no benefit" finding. *S. v. Michael*, 214.

Where the only error was the failure of the trial judge to make a "no benefit" finding in sentencing a youthful offender, resentencing is not required, and the case will be remanded to determine only whether defendant should serve the sentence imposed as a committed youthful offender. *Ibid.*

Although the trial judge used the phrase "regular committed youthful offender" in the judgment and commitment form, the judge did not sentence defendant as a committed youthful offender where he found that defendant would not benefit as a committed youthful offender and failed to check the block which would have ordered the sentence to be served as a committed youthful offender. *S. v. Riddle*, 734.

§ 135.3. Exclusion of Veniremen Opposed to Death Penalty

The purpose of the jury selection process in first-degree murder cases is to ascertain whether the beliefs a particular juror holds with respect to the imposition of the death penalty are such that he or she cannot, under any circumstances, vote to impose a sentence of death, and an understanding of the *process* under which this ultimate conclusion is reached should not affect one's *beliefs* as to whether he or she can, under any circumstances, vote to impose the death penalty. *S. v. Maynard*, 1.

Death qualifying a jury prior to the guilt phase does not result in a jury which is guilt and death prone. *S. v. Boyd*, 408.

Two jurors were not improperly excluded from the jury panel in a first-degree murder case in violation of the *Witherspoon* rule. *Ibid.*

CRIMINAL LAW – Continued

The procedure for death-qualifying a jury prior to the guilt phase of a first degree murder trial is constitutional. *S. v. Withers*, 699.

§ 135.4. Separate Sentencing Proceeding in Capital Case

The N.C. capital murder scheme does not unconstitutionally permit subjective discretion and discrimination in imposing the death penalty. *S. v. Maynard*, 1.

The prosecutor did not violate G.S. 84-14 or commit a gross impropriety in quoting a statement from *State v. Jarrette*, 284 N.C. 625, concerning the deterrent effect of a sentence of death although that case was overruled by a U.S. Supreme Court decision. *S. v. Boyd*, 408.

The North Carolina capital murder scheme does not unconstitutionally permit subjective discretion and discrimination in imposing the death penalty. *Ibid.*

§ 135.6. Separate Sentencing Proceeding; Competency of Evidence

The State, in rebuttal of defendant's evidence tending to show a lack of significant history of criminal activity, could introduce judgments of conviction showing that defendant had been charged with felonies but entered pleas of guilty of misdemeanors and evidence of the details of those crimes in order to show that defendant had a significant history of prior criminal activity. *S. v. Maynard*, 1.

An officer's testimony concerning defendant's misrepresentations to the court in a prior case that he possessed no weapons at his home was competent in rebuttal as bearing on defendant's good character. *Ibid.*

The trial court in a sentencing hearing for first-degree murder did not err in excluding testimony by a criminology professor concerning stressful life events and criminal homicide which tended to show that stressful events in defendant's life history typified that of a man likely to murder a family member or close friend. *S. v. Boyd*, 408.

§ 135.7. Separate Sentencing Proceeding; Instructions

The trial court did not err 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 sufficiently to justify imposition of the death penalty or in instructing the jury that it must return a verdict of death if it found the aggravating circumstances outweighed the mitigating circumstances. *S. v. Maynard*, 1.

The trial court's failure to inform the jury that they were required to reach a unanimous decision in their determination of mitigating factors was error favorable to defendant. *Ibid.*

The trial court did not err 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 sufficiently to call for the death penalty. *S. v. Boyd*, 408.

The trial court did not err in failing to instruct the jury that a sentence of life imprisonment would be imposed if the jury was deadlocked upon the proper sentence. *Ibid.*

§ 135.8. Aggravating Circumstances in Capital Case

The "especially heinous, atrocious or cruel" aggravating circumstance was not rendered unconstitutionally vague and overbroad by the Supreme Court's interpretation thereof in *State v. Oliver*, 302 N.C. 28. *S. v. Maynard*, 1.

CRIMINAL LAW — Continued

In a prosecution for first-degree murder, there was no error in the submission of the aggravating factor that the murder was committed for pecuniary gain. *S. v. Gardner*, 489.

The trial court committed prejudicial error by allowing the jury to consider defendant's prior adjudication as a youthful offender under the Alabama Youthful Offender Act as a prior "felony conviction." *S. v. Beal*, 555.

The "especially heinous, atrocious, or cruel" aggravating circumstance is not unconstitutionally vague. *S. v. Boyd*, 408.

In a prosecution for first-degree murder, there was no error in the submission of the aggravating factor that the murder was committed for pecuniary gain. *S. v. Gardner*, 489.

The trial court committed prejudicial error by allowing the jury to consider defendant's prior adjudication as a youthful offender under the Alabama Youthful Offender Act as a prior "felony conviction." *S. v. Beal*, 555.

§ 135.9. Mitigating Circumstances in Capital Case

A defendant in a sentencing hearing for first degree murder was not denied due process because the trial court placed the burden on him to prove mitigating circumstances by a preponderance of the evidence. *S. v. Maynard*, 1.

Defendant was not entitled to have the jury consider the grant of immunity by the State to a codefendant as a mitigating circumstance in a sentencing hearing for first degree murder. *Ibid.*

The trial court properly failed to give a peremptory instruction that defendant's age must be considered as a mitigating circumstance. *S. v. Gardner*, 489.

The prosecutor's argument in a sentencing hearing for first-degree murder that jury did not have to accord any weight to the mitigating factors it found to exist was not improper when taken in context. *S. v. Boyd*, 408.

The trial court did not err in instructing the jury that it could but was not compelled to answer each of the mitigating factors but was required only to indicate whether it found one or more mitigating factors to exist. *Ibid.*

The trial court's instruction in its final mandate in a sentencing hearing for first-degree murder that the jury "could" answer an issue as to a mitigating factor in defendant's favor was not plain error. *Ibid.*

The trial court did not err in using the term "loss of faculties" in its instructions on the mitigating circumstance as to whether defendant was under the influence of mental or emotional disturbance. *Ibid.*

Defendant was not denied due process because the trial court placed the burden on him to prove the mitigating circumstances by a preponderance of the evidence. *Ibid.*

The trial court properly failed to give a peremptory instruction that defendant's age must be considered as a mitigating circumstance. *S. v. Gardner*, 489.

§ 135.10. Review of Death Sentence

A sentence of death for a murder committed to prevent the victim from testifying against defendant in another criminal case was not disproportionate or excessive. *S. v. Maynard*, 1.

The death sentence imposed in a prosecution for first-degree murder was disproportionate. *S. v. Hill*, 465.

CRIMINAL LAW — Continued

In comparing a first-degree murder case to similar cases in which the death penalty was imposed, the Court could not find that the sentence of death in this case was disproportionate or excessive. *S. v. Gardner*, 489.

A sentence of death imposed upon defendant for first-degree murder of his former girl friend was not excessive or disproportionate where the victim was stabbed 37 times and suffered considerably prior to her death. *S. v. Boyd*, 408.

The death sentence imposed in a prosecution for first-degree murder was disproportionate. *S. v. Hill*, 465.

In comparing a first-degree murder case to similar cases in which the death penalty was imposed, the Court could not find that the sentence of death in this case was disproportionate or excessive. *S. v. Gardner*, 489.

§ 138. Severity of Sentence; Fair Sentencing Act

The trial court properly aggravated defendant's first-degree burglary sentence with the fact that he was armed with or used a deadly weapon at the time of the breaking and entering even though evidence of the use of a deadly weapon was necessary to prove an essential element of the joinable crime of first-degree sexual offense. G.S. 15A-1340.4(a)(1)o and G.S. 15A-1340.4(a)(1)i. *S. v. Toomer*, 184.

The trial court properly aggravated defendant's first-degree burglary sentence with the fact that he was armed with or used a deadly weapon at the time of the breaking and entering even though evidence of the use of a deadly weapon was necessary to prove an essential element of the joinable crime of first-degree sexual offense. G.S. 15A-1340.4(a)(1)o and G.S. 15A-1340.4(a)(1)i. *Ibid.*

In a prosecution in which defendant was convicted of the second-degree murder of his wife, the trial court properly considered that the offense was especially heinous, atrocious, or cruel where the evidence tended to show a total of ten bullets were fired into the victim's body; there was ample evidence that the victim was not killed by the first shots; she managed to move from room to room in the house leaving a trail of blood behind her, clearly undergoing fear and pain in the process; death was not instantaneous; and the evidence fully supported a finding that the victim suffered a degree of pain and psychological suffering not normally present in every murder. *S. v. Watson*, 252.

In a prosecution for the murder of defendant's wife, the trial court did not err in failing to find in mitigation that the defendant acted under strong provocation or that the relationship between the defendant and the victim was otherwise extenuating. *Ibid.*

There was no abuse of discretion in the trial judge sentencing defendant to life imprisonment where he weighed the aggravating factor that the murder was especially heinous, atrocious, or cruel, against two mitigating factors: that defendant voluntarily acknowledged wrongdoing, and that defendant was a person of good character. *Ibid.*

There was no error in the trial court's failure to find in mitigation that defendant was suffering from a mental condition significantly reducing his culpability where the evidence was both conflicting and inconclusive with respect to any connection between the murder and defendant's alleged mental problems accompanying military duty in Vietnam 15 years earlier. *Ibid.*

The evidence supported the aggravating circumstance that defendant induced others to participate in a robbery and conspiracy. *S. v. Payne*, 291.

In a prosecution for murder, the aggravating circumstance that the murder was especially heinous, atrocious, or cruel was supported by the evidence where

CRIMINAL LAW — Continued

the evidence tended to show that the victim was brutally beaten, kicked and "body slammed" into the floor; his injuries were extensive and he suffered continuous and extreme pain during the two and one-half months prior to his death. *Ibid.*

Where the trial court conducted a sentencing hearing to determine defendant's punishment for first degree murder, the court did not err in failing to conduct a second sentencing hearing pertaining only to defendant's conviction of assault with a deadly weapon with intent to kill before imposing a sentence on that charge. *S. v. Withers*, 699.

In a prosecution for first degree murder and assault with a deadly weapon with intent to kill, defendant's prior convictions of first degree murder and assault with intent to commit rape were not used to establish elements of the crimes charged and could be used as factors in aggravation of defendant's current conviction of assault with a deadly weapon with intent to kill. *Ibid.*

The evidence was insufficient to support a finding that defendant's second-degree sexual offense in which he committed anal intercourse was especially heinous, atrocious, or cruel. *S. v. Atkins*, 272.

The mere allegation by defendant that the trial judge failed to consider a statutory mitigating factor, when the evidence does not compel a finding that the factor was proved by a preponderance of the evidence, is insufficient to overcome the presumption that the judge complied with the statutory mandate that he "consider" each of the statutory aggravating and mitigating factors. *S. v. Michael*, 214.

In sentencing defendant for the second-degree murder of his father, the evidence did not compel the trial court to find as a mitigating circumstance that the relationship between defendant and his father was "otherwise extenuating." *Ibid.*

The evidence did not require the trial court to find as a mitigating factor that defendant voluntarily acknowledged wrongdoing to a law officer prior to arrest or at an early stage of the criminal process. *Ibid.*

§ 162. Objections, Exceptions, and Assignments of Error to Evidence

Defendant's counsel did not waive his right to object to the admissibility of a nontestifying codefendant's extrajudicial statement or invite the erroneous admission of the statement by failing to object before the statement was read to the jury where defendant's counsel did not have a reasonable amount of time to review the statement after it had allegedly been sanitized and before it was admitted. *S. v. Gonzalez*, 80.

§ 163. Exceptions and Assignments of Error to Charge

Defendant waived appellate review of instructions in a prosecution for first-degree sexual offenses by failing to object at trial, and no "plain error" appeared in the detailed explanation of the elements of first-degree sexual offense. *S. v. Moore*, 442.

§ 169.3. Error in Admission of Evidence Cured by Introduction of Other Evidence

Defendant waived his right to object to being cross-examined concerning prior acts with a woman other than the rape victim where he did not request a limiting instruction and where the prosecutor subsequently returned to the subject without objection from the defendant. *S. v. Maccia*, 222.

DECLARATORY JUDGMENT ACT

§ 4. Availability of Remedy in Particular Controversies

There was no justiciable controversy sufficient to invoke the court's jurisdiction under the Declaratory Judgment Act to determine whether the decision of plaintiff Board of Realtors to expel defendant, one of its members, until he repaid a deposit to prospective home buyers was lawful. *Gaston Bd. of Realtors v. Harrison*, 230.

Assuming that plaintiff Board of Realtor's Code of Ethics and bylaws constitute a contract with defendant member, such contract cannot form the basis for jurisdiction in an action for a declaratory judgment absent an actual controversy about rights and liabilities arising under the contract. *Ibid.*

DEEDS

§ 8.1. Sufficiency of Consideration

An alleged forbearance to bring a personal injury action against plaintiffs did not constitute consideration for the execution of a deed by plaintiffs to defendant where defendant did not release his claim against plaintiffs either orally or in writing. *Curl v. Key*, 259.

EASEMENTS

§ 4.1. Adequacy of Description of Easement

Language in a 1914 deed contained only a latent ambiguity and was sufficient to create two easements by reservation in two roads, and the use of the roads by plaintiff's predecessors in title, acquiesced in by defendant's predecessors in title, sufficiently located the roads on the ground. *Allen v. Duvall*, 245.

EMINENT DOMAIN

§ 2. Acts Constituting a Taking

An exclusive garbage collection franchise granted by a county does not remain effective in areas subsequently annexed by a city and thereby entitle the franchisees to compensation for a taking when the city begins providing its own garbage collection service in the newly annexed areas. *Stillings v. Winston-Salem*, 689.

EQUITY

§ 1.1. Nature of Equity and Maxims

The record did not disclose fraudulent acts by officials of UNC-CH in failing to disclose the availability of funds from a trust established to erect a building for the Carolina Playmakers so as to prohibit the University from seeking modification of the trust when a dramatic arts building was constructed solely with funds appropriated by the General Assembly. *Board of Trustees of UNC-CH v. Heirs of Prince*, 644.

EVIDENCE

§ 19. Evidence of Similar Facts and Transactions

The trial judge properly excluded evidence that about ten years prior to the fire relative to the appeal, plaintiff and his wife were separated and another fire loss occurred in property they jointly owned. *Durham v. Quincy Mutual Fire Ins. Co.*, 361.

FIDUCIARIES

§ 2. Evidence of Fiduciary Relationship

Plaintiffs did not acquire any interest in a secret process for the use of lactobacillus acidophilus in dairy products which they discovered while employed as professors and researchers by N. C. State University, and defendants owed no fiduciary duty to plaintiffs as a result of plaintiffs' confidential revelation to the University of the secret process which it already owned. *Speck v. N. C. Dairy Foundation*, 679.

GUARANTY

§ 1. Generally

The signing of a repurchase agreement with a bank by the maker of the equipment for which a loan was being made did not make the company's status either that of a co-surety or that of a guarantor. Rather, the "repurchase agreement" made the company a secondary, conditional obligor, and did not bar the company from maintaining an action against the individual defendants, who were unconditional obligors, for any amount due the company as assignee to the bank's loan and from foreclosing the deeds of trust in order to collect the amount. *Hofler v. Hill and Hofler v. Hill*, 325.

HOMICIDE

§ 12. Indictment

The State was not barred from prosecuting defendant for first degree murder because he was indicted under a general indictment for murder and the district attorney had not made a decision to prosecute for first degree murder at the time the indictment was submitted to the grand jury. *S. v. King*, 603.

§ 14. Presumptions from Use of Deadly Weapon

Previous holdings that the law implies that a killing was done with malice and unlawfully when defendant intentionally inflicted a wound upon a victim with a deadly weapon resulting in death are reaffirmed. *S. v. Maynard*, 1.

§ 15.4. Expert and Opinion Evidence

An officer's testimony that he knew a murder victim personally and attended the autopsy laid a sufficient foundation for the pathologist's testimony concerning the autopsy. *S. v. King*, 603.

§ 18.1. Particular Circumstances Showing Premeditation and Deliberation

In a prosecution for first-degree murder, there was sufficient evidence of premeditation and deliberation. *S. v. Hill*, 465.

§ 20.1. Photographs

Two photographs of the body of decedent lying on the floor were properly admitted for illustrative purposes. *S. v. Walden*, 667.

§ 21.5. Sufficiency of Evidence of Guilt of First Degree Murder

There was substantial evidence that defendant unlawfully killed his son with premeditation and deliberation so as to support his conviction of first degree murder. *S. v. Whitley*, 656.

The State's evidence was sufficient to support conviction of defendant for first-degree murder by shooting the victim with a shotgun. *S. v. Walden*, 667.

HOMICIDE — Continued

§ 21.7. Sufficiency of Evidence of Guilt of Second Degree Murder

The State's evidence was sufficient to support a finding that defendant's acts evidenced recklessness of consequences and a total disregard for human life so as to establish the malice necessary to support conviction of defendant of three counts of second-degree murder arising out of an automobile accident. *S. v. Snyder*, 391.

§ 30.2. Submission of Lesser Degrees of Crime; Manslaughter

The trial court in a first degree murder case did not err in refusing to submit involuntary manslaughter as a possible verdict. *S. v. Whitley*, 656.

§ 30.3. Submission of Lesser Degrees of Crime; Involuntary Manslaughter

The trial judge properly failed to instruct on involuntary manslaughter where there was no evidence of an unintentional discharge of the weapon. *S. v. Hill*, 465.

§ 31.3. Constitutionality of Death Penalty

A defendant tried for first degree murder was not denied equal protection by the district attorney's exercise of discretion in determining who would be prosecuted for first degree murder and thereby be subject to the death penalty. *S. v. Wilson*, 117.

The district attorney could properly consider the wishes of the victim's family as one factor in determining which defendants would be prosecuted for first degree murder. *Ibid.*

The district attorney's lack of written guidelines for determining who would be prosecuted for first degree murder did not violate defendant's right to equal protection of the laws. *Ibid.*

The prosecution of defendant for first degree murder was not barred on the ground that he was arbitrarily selected for trial under our capital sentencing statute. *S. v. King*, 603.

§ 32.1. Harmless Error

The jury verdict of guilty of first degree murder rendered harmless the failure to submit a possible verdict of manslaughter. *S. v. Whitley*, 656.

INDICTMENT AND WARRANT

§ 7.1. Formalities

Prior to final adjournment of a term of court, the trial judge has the inherent authority to reopen court following a recess or adjournment without the assistance of the sheriff. *S. v. Taylor*, 266.

§ 13.1. Discretionary Denial of Motion for Bill of Particulars

The trial court did not abuse its discretion in denying defendant's pretrial motion for a more definite bill of particulars providing the specific time and date of an alleged rape of a child. *S. v. Sills*, 370.

§ 17.2. Variance Between Averment and Proof; Time

There was no fatal variance between an indictment charging the rape of a child "on or about March 15, 1983" and evidence that the rape occurred on March 14. *S. v. Sills*, 370.

INFANTS

§ 6. Hearing for Award of Custody

In a review hearing of a temporary placement of a neglected child with her father, the trial court erred in using a "change of circumstances" standard and in failing to hear and consider the testimony of various witnesses tendered by the mother. *In re Shue*, 586.

In a review hearing of a temporary placement of a neglected child, the trial court did not have authority to make an award of permanent custody or to terminate its jurisdiction over the case. *Ibid.*

§ 17. Confessions

Defendant could not raise on appeal the issue of failure to suppress his confession because he was not advised of his right as a juvenile to have his parent present during interrogation where such issue was not raised in the trial court. *S. v. Jenkins*, 194.

INSURANCE

§ 122. Conditions of Fire Policy; Forfeiture

In an action on a fire insurance policy issued by defendant to plaintiff and his wife, the trial court did not err in excluding conjectural and remote evidence concerning plaintiff's wife's desire to have possession of the home after plaintiff and his wife separated. *Durham v. Quincy Mutual Fire Ins. Co.*, 361.

§ 150. Professional Liability Insurance

Public policy does not preclude liability insurance coverage for punitive and compensatory damages in a medical malpractice case based on wanton or gross negligence. *Mazza v. Medical Mut. Ins. Co.*, 621.

JUDGMENTS

§ 44. Judgments in Criminal Prosecutions as Bar to Civil Action

Defendant's criminal conviction under G.S. 14-322 for the willful neglect of and refusal to support his minor children collaterally estopped him from relitigating the issue of paternity in a subsequent civil action by the State for indemnification of its payments of support to defendant's children. *S. v. Lewis*, 727.

JURY

§ 5. Excusing of Jurors

The trial court did not abuse its discretion in refusing to excuse a juror who had a hearing impairment. *S. v. King*, 603.

§ 6. Voir Dire Generally

Defendant's right to counsel was violated when his counsel was not present during the State's questioning of prospective jurors. *S. v. Colbert*, 283.

§ 7. Challenges to Array

Defendant was not denied a fair trial by a jury constituting a representative cross-section of the community when the trial court permitted challenges for cause of jurors who would be unwilling to impose the death penalty. *S. v. Jenkins*, 194.

JURY — Continued

§ 7.11. Challenges to Array; Scruples Against Capital Punishment

The procedure for death-qualifying a jury prior to the guilt phase of a first degree murder trial is constitutional. *S. v. Withers*, 699.

§ 7.14. Manner of Exercising Peremptory Challenges

The trial judge did not err in overruling defendant's objection to the State's use of peremptory challenges to excuse certain black veniremen. *S. v. Jenkins*, 194.

KIDNAPPING

§ 1. Elements of Offense

A proper indictment for first degree kidnapping must not only allege the elements of kidnapping set forth in G.S. 14-39(a) but must also allege one of the elements set forth in G.S. 14-39(b), to wit, that the victim was not released in a safe place, was seriously injured, or was sexually assaulted. *S. v. Bell*, 131.

MASTER AND SERVANT

§ 11.2. Inventions and Discoveries by Employee

Plaintiffs did not acquire any interest in a secret process for the use of lactobacillus acidophilus in dairy products which they discovered while employed as professors and researchers by N. C. State University. *Speck v. N. C. Dairy Foundation*, 679.

§ 87. Claim Under Workers' Compensation Act as Precluding Common Law Action

Where plaintiff was subject to the provisions of the Workers' Compensation Act, she was required to pursue her remedies in the Industrial Commission and could not institute a common law action against the employer based on alleged gross negligence and intentional acts. *Freeman v. SCM Corporation*, 294.

MONOPOLIES

§ 2. Agreements and Combinations Unlawful Generally

The prohibition of an additional American Motors Jeep franchise in the North Wilkesboro market area by the Commissioner of Motor Vehicles pursuant to G.S. 20-305(5) did not create a monopoly in violation of Art. I, § 34 of the N. C. Constitution. *American Motors Sales Corp. v. Peters*, 311.

MORTGAGES AND DEEDS OF TRUST

§ 17.1. Payment and Satisfaction; Burden of Proof

In a foreclosure proceeding where the evidence did not establish the amount due the holder of the deed of trust, the case must be remanded for further proceedings on the question of the amount. *Hofler v. Hill and Hofler v. Hill*, 325.

§ 28. Persons Who May Bid or Purchase the Property

The signing of a repurchase agreement with a bank by the maker of the equipment for which a loan was being made did not make the company's status either that of a co-surety or that of a guarantor. Rather, the "repurchase agreement" made the company a secondary, conditional obligor, and did not bar the company from maintaining an action against the individual defendants, who were uncondi

MORTGAGES AND DEEDS OF TRUST — Continued

tional obligors, for any amount due the company as assignee to the bank's loan and from foreclosing the deeds of trust in order to collect the amount. *Hofler v. Hill and Hofler v. Hill*, 325.

MUNICIPAL CORPORATIONS

§ 23. Franchises for Public Utilities and Services

An exclusive garbage collection franchise granted by a county does not remain effective in areas subsequently annexed by a city and thereby entitle the franchisees to compensation for a taking when the city begins providing its own garbage collection service in the newly annexed areas. *Stillings v. Winston-Salem*, 689.

PARENT AND CHILD

§ 1. Creation and Termination of Relationship

The Court of Appeals erred in finding that due process requires a separate and distinct finding regarding the adequate fulfillment of a child's intangible and non-economic needs in termination of parental rights proceedings. *In re Montgomery*, 101.

The court could still find a child to be neglected within the meaning of our neglect and termination of parental rights statutes even if the parent does provide love, affection and concern. *Ibid.*

In the adjudication stage of a proceeding to terminate parental rights, petitioner must prove by clear, cogent and convincing evidence one or more grounds for termination, and once the petitioner has met its burden of proof, the court then moves on to the disposition stage where the court's decision to terminate parental rights is discretionary. *Ibid.*

The evidence in a proceeding to terminate parental rights was sufficient to support the trial court's finding of neglect. *Ibid.*

The Court of Appeals misinterpreted G.S. 7A-289.32 in holding that a petitioner must establish the "reasonable needs of the child" and that a finding as to the cost of foster care failed to establish such reasonable needs. *Ibid.*

The statute providing for the termination of parental rights upon a finding that "the parent is incapable as the result of mental retardation or mental illness of providing for the proper care and supervision of the child . . . and that there is a reasonable probability that such incapability will continue throughout the minority of the child" did not deny respondents their due process or equal protection rights. *Ibid.*

The trial court could properly conclude that the father of the children in a proceeding to terminate parental rights had not paid a reasonable portion of the cost of caring for the children, and that he had the ability to pay where the evidence tended to show that the father paid only $90.00 for the support of his four children over a forty-five week period; his earnings ranged between $100 and $125 per week; and he had enough money to venture $60.00 per week into a hog operation. *Ibid.*

§ 1.6. Termination of Parental Rights; Sufficiency of Evidence

Evidence of neglect by a parent prior to losing custody of a child, including a prior adjudication of neglect, could be considered by the trial court in subsequent proceedings to terminate parental rights on the ground of neglect, but the trial court erred in treating a prior adjudication of neglect as determinative of the ultimate issue. *In re Ballard*, 708.

RAPE AND ALLIED OFFENSES — Continued

§ 4. Relevancy and Competency of Evidence

Although a knife found in the glove compartment of a car used in the crimes of kidnapping, attempted rape and sexual offense was neither used nor displayed during the course of the crimes and bore only slight relevance thereto, its admission into evidence was not prejudicial error. *S. v. Bell*, 131.

Testimony in a rape case by a social worker that she had filed a child abuse petition after investigating the facts of the case was harmless error. *S. v. Sills*, 370.

Sexually explicit magazines discovered in a search of defendant's property were competent to illustrate the testimony of investigating officers and to corroborate the testimony of child victims of rape and indecent liberties. *S. v. Wood*, 739.

§ 5. Sufficiency of Evidence

There was no fatal variance between an indictment charging the rape of a child "on or about March 15, 1983" and evidence that the rape occurred on March 14. *S. v. Sills*, 370.

The State's evidence was sufficient to convict defendant of first-degree rape although the nine-year-old victim was unable to testify with certainty as to the date of the offense. *S. v. Wood*, 739.

The State's evidence was sufficient to support defendant's convictions of (1) first degree sexual offense based on the theory that he aided and abetted his brother in the commission of the offense, and (2) attempted first degree rape based on the theory that defendant was aided and abetted in this attempt by his brother. *S. v. Bell*, 131.

The evidence was sufficient to support defendant's conviction of conspiracy to commit sexual assaults. *Ibid.*

§ 6. Instructions

A defendant convicted of a first-degree sexual offense was not denied his right to a unanimous verdict by the court's instruction in the disjunctive that the jury should return a verdict of guilty if it found beyond a reasonable doubt, *inter alia*, that defendant engaged in "oral sex or anal sex with the victim." *S. v. Foust*, 351.

§ 6.1. Instructions; Lesser Degrees of the Crime

The court's failure to submit the lesser included offense of attempt to commit first-degree rape did not constitute plain error. *S. v. Wood*, 739.

§ 7. Sentence

The trial court did not err in imposing a sentence of not less than and not more than life imprisonment for first-degree rape. *S. v. Sills*, 370.

RECEIVING STOLEN GOODS

§ 6. Instructions

In a prosecution for possession of a stolen firearm, the trial court's instructions contained all the elements of the crime, a felony, and the Court of Appeals erred in stating that the trial judge instructed the jury on misdemeanor possession of stolen goods. *S. v. Taylor*, 380.

§ 7. Verdict and Judgment

The General Assembly intended to make the possession of any stolen firearm, by anyone knowing or having reasonable grounds to believe the firearm to be stolen, a felony, regardless of the value of the firearm. *S. v. Taylor*, 380.

ROBBERY

§ 4.3. Armed Robbery; Evidence Sufficient

The State's evidence was sufficient for the jury to find defendant guilty of armed robbery of a service station attendant under the doctrine of possession of recently stolen property. *S. v. Gonzalez*, 80.

RULES OF CIVIL PROCEDURE

§ 4. Process

Defendant was sufficiently served with process to bring him within the jurisdiction of the court when defendant was inadvertently delivered a copy of a summons directed to a codefendant in the action where the caption of the summons listed defendant's name first among the various individual defendants being sued. *Harris v. Maready*, 536.

§ 8.1. Complaint

The trial court did not err in refusing to dismiss an attorney malpractice action because the complaint contained allegations that plaintiff had been damaged in an amount exceeding five million dollars and that plaintiff was entitled to an award of the same amount for punitive damages. *Harris v. Maready*, 536.

§ 15.1. Discretion of Court to Grant Amendment to Pleadings

The trial judge did not err in allowing a formal amendment of defendant's answer to allege the affirmative defense of lack of proper licensing of plaintiff general contractor after the trial judge had denied defendant's motion for summary judgment. *Sample v. Morgan*, 717.

SCHOOLS

§ 13.2. Dismissal of Teachers

Defendant board of education properly dismissed a teacher for the excessive use of alcohol where the teacher's use of alcohol on school property during school hours was obvious to teachers, parents and students. *Faulkner v. New Bern-Craven Bd. of Educ.*, 42.

SEARCHES AND SEIZURES

§ 11. Search and Seizure of Vehicles

The trial court properly found that the stop and detention of defendant did not violate any of defendant's constitutional rights, and that the search incident to the arrest was valid. *S. v. White*, 238.

§ 21. Application for Warrant; Hearsay

The totality of circumstances test is adopted for resolving questions arising under Art. I, § 20 of the N. C. Constitution with regard to the sufficiency of probable cause to support the issuance of a search warrant. *S. v. Arrington*, 633.

§ 24. Application for Warrant; Information from Informers Sufficient

An officer's affidavit based on information from two informants provided a sufficient basis under the "totality of circumstances" test for the issuance of a warrant to search defendant's home for controlled substances. *S. v. Arrington*, 633.

SEARCHES AND SEIZURES — Continued

§ 43. Motions to Suppress Evidence

Defendant waived his right to seek suppression of evidence seized pursuant to a search warrant on the ground that the deputy clerk who issued the warrant was not neutral where defendant failed to file an affidavit with the motion to suppress and failed to specify his source of information or the basis for his belief as required by G.S. 15A-977(a). *S. v. Holloway*, 523.

TRIAL

§ 33.1. Immaterial Issues

The trial court properly failed to submit an issue to the jury of whether plaintiff failed to submit to an examination under oath by defendant. *Durham v. Quincy Mutual Fire Ins. Co.*, 361.

In an action on a fire insurance policy, the trial court did not abuse its discretion in failing to submit as an issue to the jury whether plaintiff increased the hazard of loss in breach of the policy. *Ibid.*

TRUSTS

§ 4.2. Particular Modifications

A charitable trust established by a will to erect a building for the Carolina Playmakers became impracticable of fulfillment when a dramatic arts building was constructed on the UNC-CH campus solely with funds appropriated by the General Assembly, and terms of the trust could be modified pursuant to G.S. 36A-53 to fulfill testatrix's manifested general charitable intention. *Board of Trustees of UNC-CH v. Heirs of Prince*, 644.

UNIFORM COMMERCIAL CODE

§ 1. Generally

Provisions of the Uniform Commercial Code rather than the title transfer provisions of the Motor Vehicle Act governed the issue of whether the manufacturer of a recreational vehicle or the lender which financed the purchase of the vehicle from a dealer had the superior title or security interest in the vehicle after the dealer failed to pay the manufacturer for the vehicle. *American Clipper Corp. v. Howerton*, 151.

§ 16. Title or Interest in Goods

Even if the manufacturer of a consigned recreational vehicle retained title by retaining the manufacturer's statements of origin, it ultimately lost title under the law of entrustment set forth in G.S. 25-2-403(2) where it entrusted the vehicle to a merchant dealing in goods of that kind who sold it to a buyer in the ordinary course of business. *American Clipper Corp. v. Howerton*, 151.

§ 39. Particular Transactions and Security Devices

The manufacturer did not preserve its title in a consigned recreational vehicle by keeping the manufacturer's statements of origin but at most reserved a security interest, and the manufacturer was required to comply with the provisions of Art. 9 of the Uniform Commercial Code in order to protect its security interest. *American Clipper Corp. v. Howerton*, 151.

UNIFORM COMMERCIAL CODE — Continued

§ 43. Transfer of Security Interests or Collateral

Where the manufacturer of a consigned recreational vehicle took no action to protect its security interest, a lender which gave new value in purchasing the installment sale contract from the consignee and took possession of it in the ordinary course of its business had a superior security interest in the installment sale contract. *American Clipper Corp. v. Howerton*, 151.

WITNESSES

§ 1.2. Children as Witnesses

The trial court did not abuse its discretion in declaring an eight-year-old rape victim competent to testify. *S. v. Sills*, 370.

§ 5.2. Evidence of Character and Reputation

Character evidence offered by defendant physician was inadmissible for the reason that it was not limited to the doctor's reputation where a witness testified to his opinion of defendant based on his personal knowledge rather than what he knew, if anything, about defendant's reputation. *S. v. Cutchin*, 277.

§ 7. Refreshing Memory

Hypnotically refreshed testimony is too unreliable to be used as evidence in judicial proceedings, but such rule will apply only to cases which have not been finally determined on direct appeal as of the certification date of this decision. *S. v. Peoples*, 515.

A person who has been hypnotized may testify as to facts which he related before the hypnotic session. *Ibid.*

WORD AND PHRASE INDEX

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