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VOLUME 312

SUPREME COURT OF NORTH CAROLINA

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THE SUPREME COURT
OF
NORTH CAROLINA

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* Appointed effective 15 October 1984 to replace Christie Speir Price who resigned 30 September 1984.

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1. Elected and took office 28 November 1984 to fill the unexpired term of Elbert S. Peel, Jr., who died 16 October 1984.
2. Appointed 1 January 1986 to replace William T. Grist who retired 31 December 1985.
3. Appointed 1 December 1985 to replace Donald L. Smith who was appointed Resident Superior Court Judge.

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1. Appointed 14 February 1986 to replace Walter P. Henderson who retired 7 January 1986.
2. Appointed 8 January 1986 to replace Donald Lee Paschal who retired 31 December 1985.
3. Appointed Chief Judge to replace Robert L. Warren who retired 31 December 1985.
4. Appointed 1 April 1986.
5. Appointed 11 April 1986 to replace Joseph John Gatto who resigned 28 February 1986.
6. Appointed Chief Judge 1 January 1986 to replace William Marion Styles who retired 30 December 1985.
7. Appointed 7 February 1986.

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CASES REPORTED

ORDERS OF THE COURT

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

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

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

GENERAL STATUTES CITED AND CONSTRUED

RULES OF EVIDENCE CITED AND CONSTRUED

RULES OF CIVIL PROCEDURE CITED AND CONSTRUED

CONSTITUTION OF UNITED STATES CITED AND CONSTRUED

CONSTITUTION OF NORTH CAROLINA CITED AND CONSTRUED

RULES OF APPELLATE PROCEDURE CITED AND CONSTRUED

LICENSED ATTORNEYS

I, FRED P. PARKER III, Executive Secretary of the Board of Law Examiners of the State of North Carolina do certify that the following named person duly passed the examinations of the Board of Law Examiners as of the 27th day of September, 1985, and said person has been issued a certificate of this Board:

GARY ARTHUR GOERS ..... Greenville

Given over my hand and Seal of the Board of Law Examiners this 10th day of October, 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 December 5, 1985, the following individuals were admitted:

JAMES STROUSE CAMPBELL ..... Pinehurst, applied from the State of Virginia
NANCY ZUPANEC ..... Charlotte, applied from the State of Kentucky
WILLIAM O. ROWLAND ..... West End, applied from the State of Ohio
ROBERT EDWARD HEMPSON ..... Charlotte, applied from the State of Kentucky

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

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

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

On January 10, 1986, the following individuals were admitted:

CONRAD C. BALDWIN, JR. ..... Winston-Salem, applied from the State of Wyoming
KATHRYN MCLEAN CHRISTIE ..... Durham, applied from the State of Illinois
EUGENE A. FERRERI, JR. ..... Raleigh, applied from the State of Ohio
ROBERT GEORGE KISTNER ..... Raleigh, applied from the State of Illinois
JOHN C. MILLBERG ..... Raleigh, applied from the State of Texas

Given over my hand and Seal of the Board of Law Examiners this 10th day of January, 1986.

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 January 17, 1986, the following individual was admitted:

GARY W. SWINDELL ..... Charlotte, applied from the State of Virginia

Given over my hand and Seal of the Board of Law Examiners this 20th day of January, 1986.

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:

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JOHN CRAIG DORSEY ..... Raleigh, applied from the State of Ohio
DOUGLAS WAYNE KENYON ..... Raleigh, applied from the State of Virginia
ROSEMARY GILL KENYON ..... Raleigh, applied from the State of Virginia
ERIC ROBERT MEIERHOEFER
McLean, Virginia, applied from the District of Columbia

Given over my hand and Seal of the Board of Law Examiners this 27th day of February, 1986.

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. JOHN THOMAS NOLAND, JR.

No. 1A83

(Filed 2 October 1984)

1. **Criminal Law § 135.3; Constitutional Law § 63; Jury § 7.11— exclusion of veniremen opposed to capital punishment—proper**

North Carolina's jury selection process is constitutional and the trial court did not err by death-qualifying the jury.

2. **Constitutional Law § 80; Criminal Law § 135.1— constitutionality of death penalty—discretion of district attorney to seek death penalty**

The defendant failed to prove that the exercise of prosecutorial discretion undermines the constitutionality of the death penalty statute, G.S. 15A-2000, since he did not show that the prosecutor employed an arbitrary standard in selecting which cases to try as capital cases.

3. **Criminal Law § 106; Burglary § 5.9— breaking and entering and assault—sufficiency of the evidence**

The State presented sufficient evidence of first-degree burglary, and defendant's motion to dismiss the charge was properly denied, where the evidence showed that an occupant of the house went to the back door in response to a knock on the window; there was no evidence that the victim invited defendant inside; witnesses heard a bang and saw the victim running into the house screaming; the glass pane in the door was broken; and that defendant followed the victim into the house, cornered her, and shot her.

4. **Criminal Law § 102.1— prosecutor reading the law to the jury—proper**

The State was within the bounds of proper argument in reading the law on amnesia to the jury since the issue was relevant and fairly presented by the evidence; furthermore, the prosecutor's "misquoting" of the law did not constitute an impropriety so extreme as to require the trial judge to act *ex mero motu*.

5. **Criminal Law §§ 114, 120.1— first-degree murder—instruction to the jury to determine guilt or innocence, not punishment—proper**

A jury instruction which may have been requested by defendant, which was quoted almost verbatim from the Pattern Jury Instruction on first-degree murder, and which simply explained to the jury that their duty was to determine only the guilt or innocence of the defendant and not the punishment, did not suggest to the jury that a finding of guilty of first-degree murder was appropriate, nor did it intimate to the jury that the trial judge believed defendant was guilty.

6. **Criminal Law §§ 102.12, 135.8— first-degree murder—sentencing—prosecutor's argument—aggravating factor**

The trial court did not err in failing to act *ex mero motu* to take curative action when a prosecutor emphasized to the jury the seriousness of an aggravating factor, particularly when defense counsel had earlier attempted to diminish the seriousness of the aggravating factor.

7. **Criminal Law §§ 135.8, 109.1— first-degree murder—sentencing—mitigating factor—peremptory instruction not required**

The district attorney did not act improperly in indicating to the jury that it could determine the existence of the mitigating factor consisting of lack of any prior criminal activity, and the trial judge did not err by failing to give a peremptory instruction that defendant had no significant history of prior criminal activity, when there was evidence that defendant had communicated threats and had been convicted of that charge, that he had communicated threats on several other occasions, and that he had at least once committed assault on a female.

8. **Criminal Law § 102.12— first-degree murder—prosecutor's argument—death penalty a deterrent**

The prosecutor's argument that the imposition of a sentence of death would be a deterrent to future dangerous activity by defendant was not improper.

9. **Criminal Law § 135.4— first-degree murder—sentencing issues**

In a first-degree murder sentencing proceeding, the issues as framed by the trial court were constitutionally valid and free of prejudicial error.

10. **Criminal Law § 135.9— first-degree murder—mitigating circumstance—burden of persuasion**

The burden of persuasion as to the existence of mitigating circumstances is on the defendant.

11. **Criminal Law § 135.9— first-degree murder—mitigating circumstance—peremptory instruction not required**

The trial court was not required to give a peremptory instruction on the mitigating circumstance that "the capital felony was committed while defendant was under the influence of mental or emotional disturbance" because the evidence was conflicting. A peremptory instruction is proper only when *all* the evidence, if believed, tends to show that a particular mitigating factor exists.

12. Criminal Law § 135.9— first-degree murder—mitigating circumstance—jury not required to list mitigating factors

The trial court did not err by not requiring the jury to list each mitigating factor it found on the issue sheet, although the better practice is to require the jury to specify mitigating factors found and not found to facilitate appellate review.

13. Criminal Law § 135.4— first-degree murder—sentencing—unanimity required in determination of mitigating factors

The trial court did not err by instructing the jury that it was required to reach a unanimous decision in its determination of mitigating factors.

14. Criminal Law § 135.4— first-degree murder—finding in aggravation supported by the record—no impermissible influence in sentencing

The jury's finding in aggravation was fully supported by the record, and the death sentence was not imposed under the influence of passion, prejudice, or any other arbitrary factor.

15. Criminal Law § 135.4— first-degree murder—death sentence not disproportionate

The death sentence imposed was neither excessive nor disproportionate to the penalty imposed in similar cases considering both the crime and the defendant.

Justice EXUM dissenting as to sentence.

Justices MARTIN and FRYE join part II of this dissent.

ON appeal by defendant as a matter of right from the judgments of *Gaines, Judge*, entered at the 25 October 1982 Criminal Session of Superior Court, MECKLENBURG County. In bills of indictment, proper in form, defendant was charged with first degree murder of Cynthia Jean Milton, with first degree murder of Troy C. Milton, with first degree burglary of the home of Cynthia Milton, with first degree burglary of the home of Troy C. and Mary N. Milton, and with assault with a deadly weapon upon Mary N. Milton with intent to kill, inflicting serious injury. The jury returned verdicts of guilty on all five charges and recommended the sentence of death in both murder cases. Judge Gaines ordered the imposition of the death penalty for each murder conviction, and imposed consecutive life sentences for each burglary conviction and a consecutive twenty year sentence for the assault conviction. On 22 November 1983 we granted the defendant's motion to bypass the Court of Appeals on the assault conviction.

In relevant part, the State's evidence tended to show the following: The defendant John Thomas Noland, Jr. was married to Susan Milton Noland, hereinafter referred to as Susan Milton, for nine years and nine months prior to their separation on 3 March 1981. For the last eight years of their marriage the couple resided at 4144 S. Tryon Street in Charlotte, North Carolina, next to Susan's parents, Mary and Troy Milton. The defendant and Susan had two daughters, Missy and Christy, who were ages nine and six respectively at the time of trial.

Susan Milton testified at trial that she and the defendant were married when she was eighteen years old. They separated for a short period within the first year of their marriage, and again when their oldest daughter was ten months old. Throughout their marriage John had difficulty retaining permanent employment for extended periods of time. The couple's final separation was induced in part by John's striking Susan in March of 1981. At that time Susan and the children moved into an apartment with Susan's sister, Cynthia Milton, hereinafter referred to as Cindy Milton. Three weeks later Susan and the children returned to the Tryon Street home after John eventually moved out. During the ensuing period of separation, John visited Susan and their daughters at least once a week and talked on the telephone with them frequently. Initially John constantly begged Susan to return to him. Then, he began to make threats regarding their property. Finally, in an effort to find peace, Susan moved with the children to California in June 1981. There they lived with Susan's older sister, Dorothy Milton Gardalcic. Susan informed John by letter where she and the children were living. For the next several months there was ongoing telephone contact between Susan and the children, and John. After approximately four months, Susan and her children moved from her sister's house into a separate home, but did not give John the address or telephone number. They maintained contact with him through her sister's telephone.

Every time Susan and John talked on the telephone, he asked her when she was coming back to Charlotte. She always replied that she did not know. In November 1981, John began making threats against Susan's family. He told both Susan and her sister Dorothy that he would kill their father, mother and sister Cindy if Susan didn't return to Charlotte with the children before Christmas. He said, "I'm going to kill Cindy first because

she means more to [Susan] than anything. I'm going to kill your daddy and make your momma watch." John further informed Susan that he would place a "gun between [her] daddy's eyes and blow his head off." Susan and the children did not return to Charlotte.

On Friday, 5 February 1982, John telephoned Susan and gave her another ultimatum. He told her she had two weeks to come back to Charlotte and that, if she did not, he would kill her family. The following day John called and told Susan that he was not giving her two weeks or any more time. He demanded her decision immediately. When she answered that she did not want to take the children out of school, he responded, "Well, you will come back; you'll have to come back, because I am going to kill your family."

About two weeks later on Saturday, 20 February 1982, John called Susan again. He inquired as to whether she was coming back, to which she replied, "Not now." He then told Susan, with regard to his plans for her family, "I know how I'm going to do it and when I'm going to do it, but, I'm not going to tell you when." Prior to this conversation, John had informed Susan that he had a .44 magnum in the trunk of his car, which was waiting for her when she returned. After the 20 February 1982 telephone conversation with John, Susan called her mother Mary Milton, as she always did after John made threats against her family, to warn her about John's latest threat. The following day at approximately 7:00 p.m. Charlotte time, Susan telephoned her sister Cindy and warned her to be very careful because of the defendant's latest threat.

At around 9:00 p.m. on Sunday, 21 February 1982, Cindy Milton and her two friends, Roger Campbell and Jody Renhold, were watching television in the living room of her home at 4144 S. Tryon Street in Charlotte, North Carolina. This house was the same one that previously had been occupied by Cindy's sister Susan Milton and the defendant. Upon hearing a knock on the living room window, Cindy went to the back door to investigate. The next sound Renhold and Campbell heard was a loud bang followed by Cindy's screams as she rushed into the house. With her hands covering her face, she cried, "Oh God, no," and ran into the laundry room adjacent to the kitchen. A man, later identified by

Renhold and Campbell as the defendant, John Thomas Noland, Jr., followed Cindy into the house yelling, "I told you not to get involved." He followed her into the laundry room, took aim, and shot Cindy in the back of the head as she huddled helplessly behind the laundry room door. The defendant turned and entered the living room. Renhold and Campbell stood facing the defendant for a few seconds before scrambling for cover in other parts of the house. The assailant departed, leaving the two witnesses unharmed.

Directly across a vacant lot from Cindy Milton's house, at 418 West Peterson Drive, lived Cindy's parents, Mary and Troy Milton. At approximately 9:00 p.m. on the day in question, Mary Milton was in her living room writing a letter, while her husband was in the back bedroom asleep. Mary Milton heard what sounded like a gunshot and walked into the front bedroom to peer out the window in the direction of her daughter Cindy's house. While Mrs. Milton was still in the bedroom, she turned to find a man whom she recognized and later identified as the defendant, standing in the hallway of her home. Upon seeing the defendant with a gun in his hand, Mary Milton screamed and slammed her door shut. She heard a gunshot coming from the room in which her husband was sleeping. Then, as the defendant pushed her door open, he told Mary Milton, "I told you I was going to kill all three of you. And, I've already killed Cindy and your old man. I'm going to get you." The defendant shot at Mrs. Milton. She picked up a nearby bar stool and lunged at the defendant. He fired again, this time wounding Mary Milton who fell to the floor, rolled toward the bed and remained very still. The defendant turned and walked out of the house. Mrs. Milton immediately telephoned Cindy's house, and discovered from Roger Campbell that Cindy had been shot. She called the Charlotte City Police Department.

Charlotte law enforcement officers J. L. Hughes and J. P. Albini arrived at the Milton home simultaneously. Mary Milton met them at the door. Her bathrobe was shredded and her right front midsection bore extensive gun powder burns. She informed the officers that her husband and daughter had been shot. Officer Hughes entered the Milton home and found Troy Milton lying in his bed dead. The forensic pathologist Dr. Hobart Wood later determined that the cause of Mr. Milton's death was a massive

gunshot wound of the head, with entry through the left eye and face.

While Officer Hughes investigated the Milton home, Officer Albini proceeded to Cindy Milton's house located on the corner. He found Jody Renhold and Roger Campbell standing outside the house, clutching each other and screaming hysterically. As the officer entered the back door, he noticed that the glass from the top portion of the door had been shattered and lay in pieces on the steps. Once inside he observed a large amount of blood and tissue on the floor which appeared to be seeping from the laundry room. Officer Albini looked behind the partially closed laundry room door and discovered Cindy Milton's body, in a kneeling position facing the wall. Dr. Wood testified that Cindy's death resulted from a massive gunshot wound to the head, with the point of entry in the back right occipital area of the head and measuring six inches in diameter.

Before being taken to the hospital, Mary Milton informed Officer Hughes that the assailant was her ex-son-in-law John Noland, Jr. She gave the officer a physical description of the defendant as well as a description of his automobile. Renhold and Campbell gave a similar physical description and further told Officer Albini that they believed the gunman was Cindy Milton's ex-brother-in-law.

Within an hour after the shootings, the Charlotte City Police received a call to investigate a suspicious vehicle parked in front of a residence on Beam Road. As Sergeant J. R. Haston approached the Beam Road residence, he observed a car parked crossways in the driveway. The car fit the description of defendant's car given by Mary Milton. The officer stopped his vehicle about 25 yards away from the parked car, drew his revolver and told the driver, who was still sitting in the car, to put his hands out the window. The driver complied and, in response to Sergeant Haston's request for his name, the driver stated, "John Noland. You got me man."

The sergeant handcuffed the defendant, placed him in the back of the police car and read him the *Miranda* rights. Soon thereafter, Mecklenburg County and Charlotte City law enforcement officers arrived. The defendant was transported to the Charlotte Law Enforcement Center.

Mrs. Patsy Norment, who resided at the Beam Road house in front of which defendant had parked his car, informed the officers that at one time she observed the defendant get out of his car. Thus, a search of the surrounding area was conducted. In the grass approximately 12 feet in front of defendant's car, the officers discovered a Sturm Ruger 6 shot single action revolver chambered for a .44 magnum cartridge. A shell casing was found on the front seat of the car. Two empty shell casings were discovered by Mrs. Norment the following day and were turned over to the police. A holster and a box of ammunition were eventually discovered in the trunk of the car.

An examination of the gun by Roger Thompson of the Charlotte-Mecklenburg Crime Laboratory revealed that the cylinder contained two live .44 caliber cartridges and one discharged .44 cartridge. In Mr. Thomas's expert opinion the gun found near the defendant's car was the weapon that fired the projectile removed from the body of Troy Milton. Mr. Thomas also testified that he examined the clothing worn by Mary Milton at the time she was wounded, and determined that Mrs. Milton's bathrobe exhibited two areas of gunshot damage. The left side of the robe exhibited characteristics of a firearm being held parallel to the garment with the muzzle in contact with it when it was discharged. The area of damage on the mid-right abdominal area of the garment exhibited powder and residue characteristics consistent with a firearm held at a distance greater than contact but less than 6 inches.

At the Charlotte Law Enforcement Center, the defendant was advised of his *Miranda* rights by Officer C. E. Boothe, a homicide investigator. Defendant acknowledged that he understood his rights and requested the presence of an attorney during any further questioning by the officers. Officer Boothe testified that later that night the defendant stated, without any prompting or questioning from the officers, "Man I just killed two people, man. Why are you being so nice to me?"

Through various witnesses the defendant offered evidence of his mental and emotional condition at the time prior to and during the shooting incidents. The defendant's parents testified that the defendant became very depressed and nervous subsequent to his separation from his wife. He frequently cried or sat inside the

house staring vacantly. Defendant began receiving treatment in April 1981 at the Mecklenburg County Mental Health Center, first as an outpatient. In May 1981 he was voluntarily hospitalized and treated as an inpatient for about a week. During that hospitalization, the initial diagnosis was depressive neurosis. One week after his discharge from the Mental Health Hospital, defendant's father committed him with an involuntary commitment petition. An attending psychiatrist, Dr. John Humphrey, found the defendant to be mentally ill and made a tentative diagnosis of borderline personality with recurring thoughts of suicide and homicide. In late May 1981 defendant's condition showed little improvement. Thus, he was involuntarily committed to the Mecklenburg Mental Health Hospital by Chief Judge Chase Saunders of Mecklenburg County District Court for a period not to exceed 90 days. On 10 June 1981 the defendant was unconditionally discharged from the hospital.

Dr. Billy W. Royal, a forensic psychiatrist at Dorothea Dix Hospital in Raleigh, North Carolina, examined the defendant subsequent to his arrest and diagnosed the defendant's condition as a dysthymic disorder, which is also known as depressive neurosis. Personality tests administered by Dr. Royal revealed evidence of depression, insecurity, anxiety, and low self-esteem. According to Dr. Royal, the defendant's personality structure and past history created an instability which made it impossible for the defendant to deal with the loss of his wife and children.

With regard to the incidents of 21 February 1982, Dr. Royal noted that the defendant John Noland was in a condition of continued distress, which had recently been heightened by the defendant's conclusion that his hope of reconciliation with his wife and children would not be fulfilled. He became increasingly disturbed and obsessive. Dr. Royal learned from the defendant that on the evening of 21 February 1982 the defendant was driving his car and passed by the house that he and his family had shared at 4144 South Tryon Street. At that time, the defendant's attention riveted on a swing set in the backyard. According to the defendant, he drove up and down the road in an obsessional trance. John Noland told Dr. Royal that he went to the door of the house, saw movement in the house and had no recollection of the events after that. Later, he found himself out in the car. He felt strange and different, and realized he had a hot gun in his

hand. He became anxious and threw the gun away. The next thing the defendant remembered was the police talking to him.

Dr. Royal testified, with respect to John Noland's lack of recollection of the killings, that amnesia based upon psychiatric or psychological causes can occur when a person experiences a conflict of emotions. Such conflict involves activities which the normal consciousness views as an unacceptable impulse or feeling. "And we may have a period of time either with or without activity that would be blocked out because we can't deal with [the fact that we have succumbed to that unacceptable behavior.]" The doctor further testified that he had no opinion on the sanity of John Thomas Noland, Jr. at the time of the offenses because, with the reported amnesia, he had no basis for knowing whether John Noland was psychotic. He testified, however, that there was "a suggestion that he may not have known the difference" between right and wrong.

At the end of all the evidence the jury found the defendant guilty of two counts of first degree murder, two counts of burglary in the first degree, and assault with a deadly weapon with the intent to kill inflicting serious injury. Judge Gaines imposed consecutive life sentences for each burglary conviction and a consecutive twenty year sentence for the assault conviction. The defendant and the State relied on the evidence presented during the guilt determination of the trial and did not present any additional evidence at the sentencing hearing.

In its instructions during the sentencing hearing in each first degree murder case, the court submitted one aggravating circumstance for the jury's consideration: the murder for which the defendant stands convicted was part of a course of conduct in which the defendant engaged and which included the commission by the defendant of other crimes of violence against another person or persons. N.C. Gen. Stat. § 15A-2000(e)(11). The court also submitted to the jury sixteen mitigating circumstances, including three statutory mitigating circumstances. The jury found at least one or more mitigating circumstances, without indicating which mitigating circumstance they found, and that one aggravating circumstance existed. In each case the jury unanimously found that the mitigating factors were outweighed by the aggravating factors beyond a reasonable doubt. Therefore, the jury recommended

the imposition of the death penalty for both murders, and it was so ordered.

Additional facts relevant to the defendant's specific assignments of error will be incorporated into the opinion.

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

Grant Smithson and Jean B. Lawson, for the defendant appellant.

COPELAND, Justice.

Defendant brings forward numerous assignments of error[1] relating to the guilt determination phase of his trial and to the sentencing phase of his trial. After a careful consideration of these assignments, as well as the record before us, we find no error in any of these proceedings and affirm the judgments.

GUILT PHASE

I.

[1] Defendant contends that prior to the guilt-innocence phase of the trial, the trial court erred in "death-qualifying" the jury because a "death-qualified" jury is allegedly prosecution prone, i.e., more likely to convict a defendant, and thus is constitutionally unacceptable. This Court has repeatedly held that North Carolina's jury selection process in first degree murder cases is constitutional. *State v. Maynard*, 311 N.C. 1, 316 S.E. 2d 197 (1984). This assignment of error is overruled.

1. Defendant's brief contains twenty-four assignments of error, four of which defendant acknowledged in his index as abandoned. Upon reading the brief we discovered, via inserted indications, that defendant had abandoned five additional assignments of error. We assume that defendant also abandoned two other assignments, specifically XV and XVI, since we cannot locate these numbered assignments anywhere in his brief.

The defendant further complicated our duty of addressing his assignments by addressing certain assignments out of numerical sequence and by giving in the index incorrect corresponding page numbers for some of the assignments. Such discrepancies and errors result in confusion and an inefficient use of Court time.

II.

[2] Defendant next assigns as error the trial court's denial of his pretrial motion to bar the imposition of the death penalty on the basis that the prosecutorial discretion to seek or not to seek the death penalty violates the defendant's right to due process.[2] The defendant contends that the death penalty was unconstitutionally applied in the case *sub judice* due to the prosecutor's exercise of discretion in determining that his case would be tried as a capital case. The defendant relies on two cases, which arguably could have factors in aggravation, in which the prosecutor in the same judicial district in which the defendant was tried permitted the defendants to plead guilty to second degree murder. *State v. Coy Devore* (81CRS12679, Mecklenburg County) and *State v. Larry Wilson* (82CRS17018, Mecklenburg County).

Under the legal system of this State, the prosecutor has the authority and duty to use his best judgment in deciding which cases to pursue and which penalties to seek. Unless defendants show that the prosecutor's selectivity is systematically based on race, religion or some other arbitrary classification, *Oyler v. Boles*, 368 U.S. 448, 7 L.Ed. 2d 446 (1962), the fact that one case possesses a strong fact situation which would justify seeking the death penalty, while another case does not, does not constitute a constitutional violation.

The United States Supreme Court, in *Gregg v. Georgia*, 428 U.S. 153, 49 L.Ed. 2d 859 (1976) and *Proffitt v. Florida*, 428 U.S. 242, 49 L.Ed. 2d 913 (1976), rejected the argument that prosecutorial discretion invalidated the death penalty statutes because it allowed impermissible discretion. The fact that discretionary stages in the legal process exist, does not, by itself, show that the death penalty is capriciously imposed. The arbitrary and capricious imposition of the death penalty with which we are concerned occurs only when the punishing authority operates without any guidance.

2. Although defendant brought this motion prior to the empaneling of the jury, the trial court declined to rule on this motion until the close of the guilt-innocence phase. At that time, the trial judge denied defendant's motion, but agreed to allow the defendant to present evidence in support of the motion at the end of the sentencing phase of the trial.

Thus, since the defendant has not shown that the prosecutor employed an arbitrary standard in selecting which cases are tried as capital cases, he has failed to prove that the exercise of prosecutorial discretion in any way undermines the constitutionality of our death penalty statute, N.C. Gen. Stat. § 15A-2000. This assignment is without merit.

III.

[3] The defendant contends that the trial court erred by failing to dismiss the charge of first degree burglary at the home of Cynthia Milton. At the close of the State's evidence, defendant moved to dismiss on the above charge. The trial court denied the motion. Defense counsel renewed the motion at the end of all the evidence, and the trial court again denied the motion. Although the defendant's counsel on appeal excepts only to the denial of the motion made at the close of the State's evidence, instead of on the denial of the motion made at the close of all the evidence as mandated by N.C. Gen. Stat. § 15-173, we shall nevertheless review the merits of this assignment of error. *State v. Leonard*, 300 N.C. 223, 266 S.E. 2d 631 (1980).

First degree burglary is the breaking and entering during the nighttime of an occupied dwelling with the intent to commit a felony therein. *State v. Simpson*, 299 N.C. 377, 261 S.E. 2d 661 (1980). The defendant contends that the evidence was not sufficient to support the element of a breaking, either actual or constructive. The defendant does not question the sufficiency of the evidence with regard to the remaining elements of first degree burglary. A breaking, as it pertains to the crime of burglary, "constitutes any act of force, however slight, 'employed to effect an entrance through any usual or unusual place of ingress, whether open, partly open, or closed.' " *State v. Jolly*, 297 N.C. 121, 127-128, 254 S.E. 2d 1, 5-6 (1979); *see State v. Myrick*, 306 N.C. 110, 291 S.E. 2d 577 (1982).

The evidence reveals that Cindy Milton walked to her back door in response to a knock on the window. There was no evidence that the victim invited the defendant inside. The witnesses testified that they heard a bang and saw Cindy running into the house, screaming. The glass pane in the back door was broken. The defendant followed Cindy into the house, cornered her in the laundry room, and shot her. There was substantial evidence from

which the jury could infer that defendant entered the house with force and without consent.

When given the benefit of the reasonable inferences drawn from this evidence, we believe the State presented sufficient evidence of a breaking, as well as the other elements of first degree burglary. Thus, the defendant's motion to dismiss the charge of first degree burglary was properly denied.

IV.

[4] In his next assignment of error, defendant argues that the district attorney during closing arguments improperly and prejudicially read to the jury the law concerning "amnesia" found in *State v. Caddell*, 287 N.C. 266, 215 S.E. 2d 348 (1975). Defendant claims that this reading denigrated and downplayed his defense of insanity, by convincing the jury to totally disregard the evidence in support of his defense of not guilty by reason of insanity. We find this assignment of error meritless.

During closing argument in the guilt-innocence stage, the prosecutor read the following to the jury:

> Amnesia is rare. More frequently the accused, remembering full well what he's done, alleges amnesia in false defense. He is a malingerer . . . Failure to remember later, when accused, is in itself no proof of the mental condition when the crime was performed.

The precise language on amnesia in *Caddell* appears as follows:

> "Amnesia, loss of memory, may lead to crimes entirely unknown to the culprit at a later date. That is rare. More frequently, the accused, remembering full well what he has done, alleges amnesia in false defense. He is a malingerer. To prove his innocence or guilt may be most difficult . . . Failure to remember later, when accused, is in itself no proof of the mental condition when crime was performed."

Id. at 286, 215 S.E. 2d at 361.

The defendant did not object to the remarks of which he now complains. Ordinarily, defense counsel must object to the prosecuting attorney's jury argument prior to the verdict in order to avoid waiving the alleged error for appellate review. *State v.*

Brock, 305 N.C. 532, 290 S.E. 2d 566 (1982). In *Brock*, however, we noted that:

> An exception to this rule is found in capital cases where, because of the severity of the death sentence, this court will review alleged improprieties in the prosecutor's jury argument despite defendant's failure to timely object. *State v. Johnson*, 298 N.C. 355, 259 S.E. 2d 752 (1979). However, even in death cases the impropriety must be extreme for this court to find that the trial judge abused his discretion in not recognizing and correcting *ex mero motu* an argument that defense counsel failed to find prejudicial when he heard it.

Id. at 537, 290 S.E. 2d at 570.

In the case *sub judice* the evidence revealed that the defendant claimed amnesia about the shootings. Yet, according to the testimony of certain law enforcement officers, shortly after the killings the defendant made comments which indicated that he was well aware of his criminal actions. The examining psychiatrist was unable to form an opinion as to Noland's ability to know the difference between right and wrong due to the claimed amnesia; nor was the doctor able to determine whether the amnesia was in all actuality real.

The crux of the defendant's complaint is that because his defense to the murder charges was insanity, the reading of the quoted material was irrelevant to the issues before the jury. We disagree. The defendant introduced evidence at trial concerning his alleged "amnesia." By so doing, the issue of amnesia became relevant, particularly in terms of its possible fabrication and its effect on the underlying insanity defense. Defendant concedes that the well established law in North Carolina allows counsel the right to argue to the jury the law and the facts in evidence and all reasonable inferences to be drawn therefrom. *State v. Pinch*, 306 N.C. 1, 292 S.E. 2d 203, *cert. denied*, 459 U.S. 1056 (1982), *reh. denied*, 459 U.S. 1189 (1983).

We believe the State was well within the bounds of proper argument in reading the law on amnesia to the jury since the issue was relevant and fairly presented by the evidence. Furthermore, the prosecutor's "misquoting" of *Caddell* did not constitute

an impropriety so extreme as to require the trial judge to act *ex mero motu*. The assignment of error is overruled.

V.

[5] The trial judge, in his instructions to the jury during the guilt-innocence phase, informed the jury that it might possibly serve as the triers of fact in the sentencing phase. The judge instructed as follows:

> Now, Members of the jury, *in the event* that the defendant in this case is convicted of murder in the first degree, I instruct you that the Court will conduct a sentencing proceeding to determine whether the defendant shall be sentenced to death or life imprisonment. This proceeding may be conducted before you or another jury. It will be conducted, *if necessary*, as soon as practical after any verdict of guilty of first degree murder is returned. (Emphasis added.)

Defendant asserts that this "instruction constituted an improper expression of opinion by the [c]ourt on the evidence," since the trial judge, in essence, told the jury that the evidence presented warranted verdicts of guilty. Although the defendant now maintains that this instruction violated N.C. Gen. Stat. § 1-180 (repealed in 1977 and replaced by N.C. Gen. Stat. § 15A-1232), and caused irreparable prejudice, he failed to object at trial. In fact, the record seems to indicate that the instruction was requested by the defendant since, according to N.C.P.I.—Crim. 206.10 (Replacement May 1980), the court shall give this instruction upon request by a party. The transcript discloses the following subsequent to the reading of the instruction in question:

> THE COURT: Mr. Mercer, is that the instruction now that you wanted?
>
> MR. MERCER: Yes, sir.
>
> THE COURT: All right.

Furthermore, following the above portion of the jury instructions, the trial judge also informed the jurors that:

> If that time comes, you will receive separate sentencing instructions. However, at this time, your only concern is to determine whether the guilty [sic] of the defendant—whether

the defendant is guilty of the crimes charged; or, any lesser included offenses, about which you were instructed.

The instruction, quoted almost verbatim from the Pattern Jury Instruction on first degree murder, N.C.P.I.—Crim. 206.10 (Replacement May 1980), simply explains to the jury that their duty at this stage is to determine only the guilt or innocence of the defendant, and not the punishment. We do not believe that the instruction suggested to the jury that a finding of guilty of first degree murder was appropriate nor do we find that it intimates to the jury that the trial judge believed the defendant was guilty. The trial judge was merely explaining the legal process to the jurors, as it pertained to their duty. Accordingly, we reject defendant's contention and hold that the instruction was properly given.

SENTENCING PHASE

VI.

[6] In his next assignment of error, defendant contends that the district attorney in his argument to the jury improperly elevated the statutory aggravating factor N.C. Gen. Stat. § 15A-2000(e)(11). This aggravating circumstance provides that:

> (11) The murder for which the defendant stands convicted was part of a course of conduct in which the defendant engaged and which included the commission by the defendant of other crimes of violence against another person or persons.

The district attorney argued in detail to the jury the legal importance of the mitigating factors and the single submitted statutory aggravating factor. The portion of his argument in question is as follows:

> The second question, "Does the aggravating factor warrant the death penalty"?
>
> As I've told you, under the statutory scheme, it's not necessary for the State to have more than one aggravating factor in order to be able to request the jury to return a verdict of the death penalty. The presence of any one or more of those aggravating factors, if in your mind, if you decide it is

> serious enough to warrant the imposition of the death penalty, is sufficient for you to find that.
>
> I would argue to you that this aggravating factor is perhaps the most serious of any of them. And, I would argue to you that the fact that this man killed two people and tried to kill another, seriously wounding her, is sufficiently serious to warrant the imposition of the death penalty. I don't know of any other case—I can't imagine any other case that can be more serious. And, I would argue to you that the answer to that question is, "Yes."

Defendant argues that the district attorney improperly injected his personal beliefs concerning the applicable law, by asserting his opinion that greater weight should be given to this factor in aggravation. Defendant lodged no objection during this portion of the prosecutor's argument. Because we do not believe that these remarks constituted error, the trial judge correctly refrained from taking curative action *ex mero motu.*

Prosecutors may not misstate the law or inject personal opinion concerning a legal principle. *State v. Maynard,* 311 N.C. 1, 316 S.E. 2d 197. N.C. Gen. Stat. § 15A-2000 does not apportion or assign any particular weight to be afforded the listed mitigating and aggravating factors for the sentencer's consideration. The law assigns no particular value or weight to any of the factors for the jury's consideration. *State v. McDougall,* 308 N.C. 1, 301 S.E. 2d 308, *cert. denied,* --- U.S. ---, 78 L.Ed. 2d 173 (1983).

Although the capital sentencing statute does not assign the relative value to be given to each circumstance, certainly attorneys should be allowed to discuss the merits of each of the factors presented and their seriousness or lack thereof. *State v. Kirkley,* 308 N.C. 196, 302 S.E. 2d 144 (1983) (jury argument regarding weight to be given mitigating factors); *see State v. Craig,* 308 N.C. 446, 302 S.E. 2d 740, *cert. denied,* --- U.S. ---, 78 L.Ed. 2d 247 (1983). Here, defense counsel in his jury argument emphasized to the jury that out of eleven statutory aggravating factors the evidence supported only one. He further attempted, as the law permits him, to diminish the seriousness of that one aggravating factor. The district attorney responded to what he called the defense counsel's indication that "the State intend[ed] to rely on . . . a technical [aggravating factor]," and attempted to

bolster the aggravating factor. We perceive the prosecutor's statement, "I would argue to you," not as an injection of personal opinion but as a contention to be considered by the jury. We hold that the district attorney's statement that "this aggravating factor is perhaps the most serious of any of them" was not improper, particularly when viewed in light of defense counsel's earlier argument.

VII.

[7] The defendant combines two assignments of error, first contending that the district attorney improperly indicated to the jury that it could determine the existence of the mitigating factor, the lack of any prior criminal activity, and second that the trial judge erred in his instructions concerning that mitigating factor. Defendant did not object at trial to the prosecutor's remark or to the trial judge's instructions.

Subsequent to reminding the jury that the evidence indicated the defendant pled guilty to communicating threats, the district attorney stated to the jury, "you make your decision about whether you think his lack of any prior criminal history is a mitigating factor." Contrary to defendant's assertions, we do not believe this statement constitutes error. "[T]he weight a mitigating circumstance is assigned is entirely for the jury to decide. It follows that counsel is entitled to argue what weight circumstances should ultimately be assigned." *State v. Craig*, 308 N.C. 446, 460, 302 S.E. 2d 740, 749. Here, the prosecutor's remark clearly goes to the weight the jury should attach to this mitigating factor.

Additionally, the defendant argues that the trial judge should have given a peremptory instruction to the jury that the defendant had no significant history of prior criminal activity. Instead, the trial court simply instructed that:

> Mitigating Circumstance No. 1, first you should consider whether or not the defendant, John Thomas Noland, had a significant history of prior criminal activity. The mitigating circumstance listed is that,
>
> "The defendant had no significant history of prior criminal activity."

You can consider this.

Significant means important or notable. Whether any history of prior criminal activities is sufficient is for you to determine from all the facts and circumstances that you find from the evidence. However, you should not determine whether it is significant only on the basis of the number of convictions, if any, in the defendant's record. Rather, you should consider the nature and quality of the defendant's history, if any, in determining whether it is significant.

You would find this mitigating circumstance if you find that any criminal activity presented to you during the course of this trial is not significant and that this is not a significant history of prior criminal activity that the defendant—of the defendant's prior criminal history.

Now Members of the jury, in this regard, Susan Milton offered evidence for the State, during the course of the trial and by way of cross-examination, testified that John Thomas Noland, Jr., had not been in any trouble with the law while they were married. He did plead guilty to communicating threats to her family in 1981 and paid the Court costs. Communicating threats is a violation of G.S. 14-277.1; and, it is a misedmeanor [sic].

In addition to that, John Thomas Noland's mother, Nanny Noland, testified that her son had never been in any trouble prior to these incidents.

Where all the evidence in a case, if believed, tends to show that a particular mitigating factor exists, a peremptory instruction is proper. *State v. Johnson*, 298 N.C. 47, 257 S.E. 2d 597 (1979). However, a peremptory instruction is inappropriate when the evidence surrounding that issue is conflicting. *State v. Smith*, 305 N.C. 691, 292 S.E. 2d 264, *cert. denied*, --- U.S. ---, 74 L.Ed. 2d 622 (1982).

The mitigating circumstance with which we are concerned, N.C. Gen. Stat. § 15A-2000(f)(1), does not speak in terms of "criminal convictions," but rather in terms of "criminal activity." Thus this subsection does not necessarily restrict the jury's consideration to only prior convictions. *See State v. Stokes*, 308 N.C.

634, 304 S.E. 2d 184 (1983). The evidence reveals, as the trial court noted, that the defendant communicated threats and was convicted of that charge. The defendant's former wife testified that on several other occasions defendant communicated threats and at least once committed an assault on a female. Clearly this constituted some evidence of criminal activity. Whether this evidence was sufficient to constitute significant history of criminal activity, thereby precluding a finding of this factor, was for the jury to decide. The assignment of error is overruled.

VIII.

[8] Defendant's next contention is that the prosecutor improperly and prejudicially argued that the imposition of a sentence of death would be a deterrent to future dangerous activity by the defendant. The prosecutor argued:

> You all are going to have to make a decision. We're trying to run a society. I think we all some times take our society for granted. We see the televisions and computers and the cars and all the wonderful things we have, and I think we tend to forget that society is a gunshot away, or the lack of society is a gunshot away and maybe three meals away.
>
> And I think we build a society every day in what we all do. And, if all the people in this room were starting out to build a society, tomorrow, and, we all depended on each other for the conduct of our society and our survival as a civilization, and, John Noland was among us, having killed his father-in-law and having killed his sister-in-law, two entirely innocent people. And we were trying to decide the rules or how we were going to conduct our society, and whether we were going to be safe in our beds, I think the decision would be the death penalty.

Defendant failed to object at trial to this alleged improper argument. We do not, in any way, find these particular remarks improper, and they certainly do not amount to such gross impropriety as to require the trial judge to act *ex mero motu*. *See State v. Boyd*, 311 N.C. 408, --- S.E. 2d --- (8/28/84). This assignment of error is without merit.

IX.

[9] Defendant's next contention is that the trial court's framing of the sentencing issues unconstitutionally precluded the jury from considering the mitigating circumstances at each appropriate issue stage of the sentencing determination process. Defendant did not object at trial to these issues. The issues in the case *sub judice* are substantially the same as those repeatedly approved by this Court. *See e.g. State v. Oliver and Moore*, 309 N.C. 326, 307 S.E. 2d 304 (1983). The issues are constitutionally valid and free of prejudicial error. The assignment of error is overruled.

X.

[10] Defendant next contends that the trial court erred in its instructions to the jury during the sentencing phase by placing on the defendant the burden of persuasion by a preponderance of the evidence as to the existence of mitigating circumstances. Defendant did not object at trial. Furthermore, this Court has repeatedly ruled that the burden of persuasion as to the existence of mitigating circumstances is on the defendant. *See State v. Maynard*, 311 N.C. 1, 316 S.E. 2d 197. We overrule this assignment of error.

XI.

[11] In his next assignment of error the defendant argues that the trial court committed prejudicial error in its jury instructions concerning the mitigating circumstance set out in N.C. Gen. Stat. § 15A-2000(f)(2) that "the capital felony was committed while the defendant was under the influence of mental or emotional disturbance," because the trial court did not peremptorily charge the jury that this circumstance existed. Defendant made no request at trial for such an instruction.

As discussed earlier in this opinion, a peremptory instruction is proper only when *all* the evidence, if believed, tends to show that a particular mitigating factor exists. We disagree with the defendant's contention that *all* the evidence in this case tended to show that he was under the influence of a mental or emotional disturbance. The evidence was conflicting.

Evidence of defendant's emotional state subsequent to his separation from his wife was adequately presented through the

testimony of witnesses for the defendant. The anguish and despair a marital separation may cause is not disputed. Furthermore the impact of such an event may vary according to the person. It appears from the medical testimony that the effect of marital separation would be more profound on a person diagnosed as suffering from a borderline personality disorder with narcissistic features. Defendant's evidence also revealed that he was involuntarily committed in May 1981, treated for his problems, and thereafter released.

The State offered evidence which tended to contradict the defendant's contention that he was under a mental disturbance during the occurrence of the criminal acts. The defendant bought the pistol, determined to be the murder weapon, from an acquaintance two days prior to the shootings. He assured the person from whom he purchased the gun that he did not plan to shoot anyone. The acquaintance's testimony disclosed no evidence of defendant's being in an emotional state at that time.

Additional evidence presented by the State tended to show that the defendant killed and wounded his victims in the exact order and manner in which he threatened. Nothing in the testimony of the witnesses to the killing suggested that the defendant appeared to be acting under a mental disturbance. The emotion that he displayed was anger. The defendant was confronted by law enforcement officers within an hour of the shootings. The officers noticed nothing peculiar about his eyes, his speech, or his walk. He commented that he knew he had killed two people. Nothing in his actions led the officers to believe that he was not in control of his faculties.

The State argues that its evidence "showed the defendant going through a detailed series of steps. . . . The events before, during, and after the killing suggested deliberation, not the frenzied behavior of an emotionally disturbed person." In light of all the evidence presented, a peremptory instruction would have been improper in this instance. Defendant's mental state was appropriately considered and determined by the jury.

XII.

[12] Defendant next argues that the trial court erred by not requiring the jury to list each mitigating factor it found on the issue

sheet. We addressed this same issue in *State v. Pinch*, 306 N.C. 1, 292 S.E. 2d 203 and *State v. Rook*, 304 N.C. 201, 283 S.E. 2d 732 (1981), and found no merit in this contention. We reiterate that although we find no such requirement in our statutes, the better practice is to require the jury to specify mitigating factors found and not found to facilitate appellate review. This assignment of error is overruled.

XIII.

[13] In his final assignment of error, defendant contends that the trial court erred in instructing the jury that it was required to reach a unanimous decision in its determination of mitigating factors. Defendant maintains that required unanimity unconstitutionally restricts the jury from a full opportunity to consider mitigating circumstances. Defendant failed to object at trial. We have ruled on this precise question adversely to the defendant's position. In *State v. Kirkley*, 308 N.C. 196, 302 S.E. 2d 144, we found this jury unanimity instruction to be constitutional and in accord with the requirements of *Lockett v. Ohio*, 438 U.S. 586, 57 L.Ed. 2d 973 (1978) and *Eddings v. Oklahoma*, 455 U.S. 104, 71 L.Ed. 2d 1 (1982). We reaffirm our holding in *Kirkley* and, thus, overrule defendant's assignment of error on this issue.

PROPORTIONALITY

[14] 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 finding 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.

[15] 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 recently upheld the death penalty in *State v. Boyd*, 311 N.C. 408, --- S.E. 2d --- (8/28/84), a case not dissimilar from the case *sub judice* in that the murder evolved from the separation of the defendant from a woman he purportedly loved; the defendant

was apparently unable to cope with the separation; prior to the murder, the defendant threatened to kill the victim; and the murder was carefully planned and executed and committed overtly. *See State v. Martin*, 303 N.C. 246, 278 S.E. 2d 214, *cert. denied*, 454 U.S. 933, *reh. denied*, 454 U.S. 1117 (1981).

In addition, we have affirmed the death penalty in numerous cases involving death or serious injury to one or more people other than the murder victim. *See State v. McDougall*, 308 N.C. 1, 301 S.E. 2d 308; *State v. Pinch*, 306 N.C. 1, 292 S.E. 2d 203; *State v. Hutchins*, 303 N.C. 321, 279 S.E. 2d 788 (1981); *State v. Barfield*, 298 N.C. 306, 259 S.E. 2d 510 (1979), *cert. denied*, 488 U.S. 907, *reh. denied*, 448 U.S. 918 (1980). *State v. McDowell*, 301 N.C. 279, 271 S.E. 2d 286 (1980), *cert. denied*, 450 U.S. 1025, *reh. denied*, 451 U.S. 1012 (1981); *see also, State v. Gardner*, 311 N.C. 489, --- S.E. 2d --- (8/28/84). Considering the circumstances surrounding the crimes in this case, together with those in similar cases, we hold that the penalty of death is neither excessive nor disproportionate.

No error.

Justice EXUM dissenting as to sentence.

I believe the evidence here required the trial court to instruct the jury peremptorily that if they believed what all the evidence tended to show they should find as mitigating circumstances (1) the capital felony was committed while defendant was under the influence of a mental or emotional disturbance, N.C. Gen. Stat. § 15A-2000(f)(2), and (2) defendant has no significant history of prior criminal activity, *id.* § (f)(1). I dissent from so much of the majority opinion as finds no error in the judge's failure to so instruct. I also believe the death sentence under the circumstances of this case is excessive and disproportionate when compared to sentences in other similar cases. I dissent, therefore, from so much of the majority's opinion which holds to the contrary. My vote in the case is to remand the matter for the imposition of life imprisonment and, failing that, to remand for a new sentencing hearing.

I.

With regard to peremptory instructions on mitigating factors in a capital case, our rule is that where "all of the evidence in the case, if believed, tends to show that a particular mitigating circumstance does exist, the defendant is entitled to a peremptory instruction on that circumstance." *State v. Johnson*, 298 N.C. 47, 76, 257 S.E. 2d 597, 618 (1979). A peremptory instruction does not require the jury as a matter of law to find the existence of the circumstance. The jury is still left free to believe or disbelieve the evidence tending to show the existence of the circumstance. We said in *State v. Johnson*, *id.* at 75, 257 S.E. 2d at 617, with regard to the impaired capacity mitigating circumstance:

> 'When all the evidence offered suffices, if true, to establish the controverted fact, the court may give a peremptory instruction—that is, if the jury find the facts to be as all the evidence tends to show, it will answer the inquiry in an indicated manner . . . . A peremptory instruction does not deprive the jury of its right to reject the evidence because of a lack of faith in its credibility.' *Chisolm v. Hall*, 255 N.C. 374, 376, 121 S.E. 2d 726, 728 (1961).

A.

All evidence in the case, both from the state and defendant, demonstrates without contradiction that these tragic killings were the result of defendant's mental illness exacerbated by the loss, through separation, of his wife and children.

Defendant met Susan Milton in 1970 while she was in high school and he, aged twenty-two, had been discharged under honorable conditions from the Navy. They were married in 1971 when Susan Milton was eighteen; and two daughters, aged nine and six at the time of the trial in 1982, were born of the marriage. They separated four or five times before the final separation on 3 March 1981.

According to the state's evidence defendant had back surgery in December 1980 which caused him to be unemployed until the parties' final separation. During this time Susan Milton was working full time and defendant tended to the house and children. After the March 1981 separation, "it was extremely difficult for [defendant] to cope with the girls' being gone." Defend-

ant called his estranged wife by telephone "on a number of occasions about the kids and about [her]." On 19 June 1981, the day after defendant's birthday, Susan Milton and the children left to live with her sister in California without telling defendant. During the marriage defendant "didn't really like to be around people that much, too often." He preferred to remain home with his wife and children. Defendant also developed a particularly close relationship with his father-in-law, one of the victims, and "thought as much, if not more, of [his father-in-law] than he did his own."

The state's evidence further tended to show that after the March 1981 separation and before Susan Milton left with the children to go to California, defendant "had almost lost control of himself . . . ." When he was able to see the children "he would cry a lot in front of . . . them. I don't know if it was from seeing them or that I would say that I was not going to go back with him to be a family again." Defendant "was constantly begging [his wife] to come back home and bring the kids" and never gave up hope that his family would be together again. Defendant "was more or less a loner. He liked just for us [the family] to be there by ourselves; and, that was it."

Defendant's evidence tended to show as follows: After the March 1981 separation he stayed briefly at the YMCA and then moved in with his parents. At his parents' home he "cried constantly [and] kept getting worse and worse. He really loved his kids." His parents became concerned enough over defendant's emotional condition and suicidal tendencies that they arranged for him to consult with the Mecklenburg Mental Health Center where, after being hospitalized for several weeks, he lost "about 40 pounds." Defendant and his estranged wife continued, after she moved to California, to communicate frequently by telephone. The telephone conversations resulted in defendant's further emotional upset.

Dr. Avelina Reback, a staff psychiatrist at the Mecklenburg Mental Health Center, testified concerning defendant's course of treatment there. She saw defendant in April 1981 and recommended "partial hospitalization" at the Center. By 13 May 1981 she decided defendant needed full, in-patient hospitalization. Defendant was suffering from depression and anti-depressant medication was prescribed. As of 19 May 1981 defendant was

"very depressed, despondent, withdrawn and hopeless. . . ." He was, in the opinion of Dr. Reback, "mentally ill and dangerous." Dr. Reback described defendant's behavior as follows:

> At the time, he was oriented as to time, place, person and situation; but, he was very depressed. And, his whole affect, the way the patient looks when we look at them, was very flat or bland, you know, he has no expression on his face. And, very slow movement; his head was bowed down and continuously wringing his hands, which showed agitation and excited. He hardly spoke. He would not—he would not talk spontaneously unless we asked him; and, he would only answer in one syllables.
>
> His thinking however was logical; but, he was so depressed that it took time for him to respond when asked questions. He was not confused; there was no looseness of thinking; and, he was well aware of what he was saying. And, his responses to the questions, they were not out of what we were asking him.
>
> . . . .
>
> He talked about his depression, his hopelessness and his despondency.
>
> There were no evidences of bizarre thinking; his thinking was very clear. However, he has no insight at all into his problems; at that time, his judgment was poor.

Dr. Reback's final diagnosis was that defendant suffered from "borderline personality with narcissistic characteristics [and] crisis neurosis." She said this diagnosis "is a mental illness because it makes him dysfunctional. He is unable to function; he is unable to form lasting personal relationships; he is unable to be flexible within his social and work atmosphere or situations." She said, "The only . . . friend he had was probably his family and his wife."

On 21 May 1981 the Mecklenburg County District Court after a hearing ordered defendant committed to Broughton Hospital for the mentally ill in Morganton after finding defendant "consents to commitment [and] by clear and convincing evidence, is mentally ill and dangerous to himself."

Defendant was admitted to Dorothea Dix Hospital in Raleigh on 20 May 1982 where he was treated by Dr. Billy Royal, a psychiatrist at the hospital. After examination and testing, Dr. Royal found evidence in defendant "of depression, insecurity, anxiety and low self-esteem." After obtaining a history from defendant's family, Dr. Royal "learned that Mr. Noland had a history of mental illness" with in-patient and out-patient treatment at the Mecklenburg County Mental Health Center and in-patient treatment on one occasion at the Veterans' Hospital in Salisbury. Dr. Royal learned "that there had been a history of some instability and different aspects of mental illness that extended back for quite a number of years." Dr. Royal testified, in essence, that defendant had "very primitive [childlike] emotional needs" which were largely met by his wife, children, and his wife's father. The separation cut off these relationships and defendant's personality structure . . . was not such that he could deal with the loss. . . ." Dr. Royal said, "After the separation [defendant's] ability to cope deteriorated." Until a time shortly before the killings defendant "felt that he was getting some positive feedback from his separated wife, about the possibility of their getting back together on a permanent basis; and/or working out some continued involvement with his children . . . so that he would have that kind of relationship and gratification." Dr. Royal diagnosed defendant as suffering from "dysthymic disorder, which is a new word for depressive neurosis, which is the word we used to use" and "borderline personality problems, personality disorders." Dr. Royal said, "All of these diagnoses are mental illnesses." Dr. Royal did not think defendant "was psychotic" at the time of the killings and, although he was not able to say definitely about it, "I think . . . there is a suggestion that he may not have known the difference [between right and wrong] in terms of how he functioned."

Shortly before the killings, Dr. Royal noted that defendant "had been in some continued distress. . . . Had had some recent contact with his wife with some suggestion or certainly interpretation on his part, that the resolution of their separation was not going to occur; and, that he was probably not going to have contact with his children . . . on any basis that was established."

There is no evidence which contradicts the testimony that defendant was suffering from a mental illness at the time of these

killings. The majority alludes to the fact that defendant purchased the murder weapon two days before the shootings, assuring the seller that he did not plan to shoot anyone; killed his victims in the manner in which he predicted he would; and did not appear "peculiar" to law enforcement officers within an hour of the shootings. None of this is evidence tending to show that defendant was not suffering from a mental illness. Mental illnesses such as defendant's are often not readily observable nor do they negate the ability to plan ahead and think logically. Dr. Royal testified that persons suffering from mental illnesses like defendant's can function "so that someone in general would not see that they had any mental illness." Dr. Reback pointed to defendant's ability to think logically, saying "he was oriented as to time, place, person, and situation. . . . His thinking was logical. . . . He was not confused."

Defendant's mental illness does not, of course, excuse the crime. It was, however, substantiated by overwhelming, uncontradicted, evidence. Defendant was, therefore, entitled to have the jury peremptorily instructed that if they believed what all the evidence on the point tended to show, they would find the existence of the mitigating circumstance that the capital felonies were committed while defendant was under the influence of a mental or emotional disturbance.

B.

All the evidence in the case tended to show that defendant had no significant history of prior criminal activity and the jury should have been peremptorily instructed on this mitigating circumstance. The evidence was that defendant had "two or three times" communicated threats to his wife's family by telephone. On one occasion a "peace warrant" was taken out against defendant, and as a result of court proceedings pursuant to the warrant defendant was fined $30 and ordered to pay the costs of court. The only other evidence of criminal activity was defendant's wife's testimony that in March 1981, "the night before I left him he hit me." The jury should not have been permitted to speculate on whether these instances constituted a significant history of prior criminal activity. I am satisfied that, as a matter of law, they do not. The jury, consequently, should have been peremptorily instructed that if they believed as all the evidence tended to

show on this point, they would find defendant had no significant history of prior criminal activity.

C.

An error is reversible if there is "a reasonable possibility that had the error . . . not been committed, a different result would have been reached" at trial. N.C. Gen. Stat. § 15A-1443(a).

Since the jury did not specify whether it found these mitigating circumstances to exist, we must assume on this aspect of the case that it did not find them. Had the jury found the existence of these circumstances, there is a reasonable possibility that their sentence recommendation would have been different. Had the jury been given a peremptory instruction on these circumstances, there is a reasonable possibility that it would have found them to exist. Therefore, failure to give the peremptory instructions amounts to reversible error which entitles defendant to a new sentencing hearing.

II.

Finally, this sentence of death, considering both the crime and defendant, is excessive and disproportionate. The record clearly shows defendant at the time of these crimes was suffering from a mental or emotional disturbance. Indeed, in conducting our proportionality review we must assume the jury so found. The jury indicated that it found one or more of the mitigating circumstances submitted to exist without specifying which one or ones. Consequently, we must assume on proportionality review that the jury found all mitigating circumstances submitted to exist. *State v. Lawson*, 310 N.C. 632, 314 S.E. 2d 493 (1984). Thus, we must assume that the jury found: defendant has no significant history of prior criminal activity; the murders were committed while defendant was under the influence of mental or emotional disturbance; defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired; defendant was a loving and kind father to his children; defendant voluntarily sought help for his mental illness; defendant did not resist arrest or try to escape when confronted by law enforcement officers; and defendant has expressed remorse for his crimes. Balanced against all of these mitigating circumstances, there is only one aggravating circumstance, *i.e.*, the

murders were a part of a course of conduct which included crimes of violence against other persons. The victims were persons with whom defendant had had a close personal relationship. One of the victims had been loved by defendant as a substitute father. The impetus for the killings was defendant's estrangement from his wife and children.

Our job on proportionality review

> is to compare the cases at bar with other cases in the pool which are roughly similar with regard to the crime and the defendant, such as, for example, the manner in which the crime was committed and defendant's character, background, and physical and mental condition. If, after making such a comparison, we find that juries have consistently been returning death sentences in the similar cases, then we will have a strong basis for concluding that a death sentence in the case under review is not excessive or disproportionate. On the other hand if we find that juries have consistently been returning life sentences in the similar cases, we will have a strong basis for concluding that a death sentence in the case under review is excessive or disproportionate.

State v. Lawson, *supra*, 310 N.C. at 648, 314 S.E. 2d at 503.

It is true, as the majority notes, that in *State v. Boyd*, 311 N.C. 408, --- S.E. 2d --- (1984), and *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), this Court sustained death sentences where the murder victim was an estranged lover in *Boyd*, and an estranged wife in *Martin*. Both *Boyd* and *Martin* are easily distinguishable from the instant case. In *Boyd* the victim died as a result of 37 stab wounds inflicted by defendant. The jury found as aggravating factors that the murder was especially heinous, atrocious or cruel and that defendant had previously been convicted of a violent felony. The Court in *Boyd* said at the close of its proportionality review that "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." In *Martin*, likewise, the murder of defendant's estranged wife was particularly brutal. Defendant shot her twice causing her to be disabled. He then dragged her across the room,

held her up with one hand while he struck her four or five times with the pistol, slung her against the wall and hit her again several times with the pistol while she begged him not to hit her any more. Then in the presence of her small child and with the victim pleading for her life and asking for forgiveness, defendant fired three more shots, two of which, entering her head, were fatal. The jury found the murder to be especially heinous, atrocious or cruel and found no mitigating circumstances. The jury expressly found that defendant was not under the influence of a mental or emotional disturbance and that his capacity to appreciate the criminality of his conduct was not impaired.

In every case so far, affirmed on appeal, where murders have arisen out of prior close relationships and estrangement of loved ones, absent the kind of brutality present in *Boyd* and *Martin*, our juries have returned sentences of life imprisonment. *State v. Hinson*, 310 N.C. 245, 311 S.E. 2d 256 (1984) (defendant killed husband); *State v. Woods*, 307 N.C. 213, 297 S.E. 2d 574 (1982) (wife killed husband); *State v. Parton*, 303 N.C. 55, 277 S.E. 2d 410 (1981) (defendant killed girlfriend with whom he had gone fishing); *State v. Colvin*, 297 N.C. 691, 256 S.E. 2d 689 (1979) (defendant killed wife after marital difficulties and after threatening to kill her "before he would allow her to take his children away from him"); *State v. Myers*, 299 N.C. 671, 263 S.E. 2d 768 (1980) (defendant killed estranged wife). This result holds true for every case in which there was substantial evidence of impaired capacity or mental or emotional disturbance. *State v. Anderson*, 303 N.C. 185, 278 S.E. 2d 238 (1981) (defendant killed woman with whom he had previously lived but from whom he was separated at the time of the murder; there was evidence that defendant suffered from a mental disorder); *State v. Clark*, 300 N.C. 116, 265 S.E. 2d 204 (1980) (defendant killed father; evidence on insanity plea that defendant was paranoid schizophrenic); *State v. Franks*, 300 N.C. 1, 265 S.E. 2d 177 (1980) (defendant killed girlfriend with whom he lived; evidence that defendant suffered from chronic undifferentiated schizophrenia).

In *State v. Boyd, supra*, in which this Court sustained a death penalty where the victim was an estranged lover, the Court justified its conclusion that the penalty was not disproportionate in light of other similar cases in which life imprisonment had been imposed on the ground that in these other cases "there was evi-

dence that the defendants were suffering from legitimate mental or emotional disorder." Here there is substantial evidence that defendant was suffering from a mental or emotional disturbance. Indeed, as I have earlier pointed out, I think all the evidence tends to show this.

The sentence of death here, therefore, when compared with sentences rendered in other similar cases is excessive and disproportionate.

Justices MARTIN and FRYE join part II of this dissent.

STATE OF NORTH CAROLINA v. CALVIN CHAVIS BAKER

No. 74A84

(Filed 2 October 1984)

1. **Criminal Law §§ 75.2, 75.15— confession—defendant not affected by threat—not intoxicated at time of statement**

There was evidence to support findings and conclusions that defendant was not threatened or intoxicated and that his pretrial confession was voluntary where a detective was unable to recall at the voir dire hearing a threatening statement made to defendant, but remembered it at trial; the threatening statement was made around 11:00 p.m. after an interview with defendant had been terminated by his request for an attorney; the detective testified that defendant did not react to the threatening statement or appear to be afraid; defendant did not waive his rights and subsequently make statements until 2:20 p.m. the next day; and the detectives and defendant testified that defendant was not intoxicated on the day he made his statements, although he may have been drinking and smoking marijuana on the day of the crime and of his arrest.

2. **Criminal Law §§ 75.4, 75.15; Constitutional Law § 49— waiver of right to counsel—insufficient evidence of intoxication—questioning after request for an attorney**

The defendant knowingly, voluntarily and intelligently waived his constitutional right to counsel where the evidence indicated that defendant was not intoxicated when he waived his rights, although he had consumed a beer and marijuana the day before, and where the defendant informed detectives on his own and without prompting that he wished to talk about the crime after he had previously refused to talk and requested an attorney. Police may question an accused who has invoked his right to silence and to counsel if the accused himself initiates further communication with the police concerning the crime.

3. Criminal Law § 181.2— post-conviction hearing—motion for appropriate relief—sufficiency of the evidence to support findings

The trial court properly denied a motion for appropriate relief based on a detective's failure to recall at voir dire a threatening statement made to defendant and his recollection of that statement at trial, because the evidence supported the court's finding that defendant had not been threatened during the interview and had not expressed fear or mentioned any statement made by the detective the previous evening. Findings of fact made by a court in its order granting or denying a motion for appropriate relief are binding on appeal if supported by evidence in the record, even if the evidence is conflicting.

4. Criminal Law § 15.1; Jury § 2.1— motion to change venue or for a new venire—insufficient prejudice from newspaper articles

There was no error in denying a defendant's motions for a change of venue or a change in the venire where the newspaper articles cited by defendant were factual, non-inflammatory reports of events; prospective jurors who said that the newspaper accounts would influence their judgment were excused; there had been no difficulty in selecting the jury; the defense had not exhausted its peremptory challenges; there was no evidence that papers read by jurors in the jury room contained articles relating to the crime or the trial; and the two jurors who said they had read newspaper articles in the jury room specifically denied having read any articles about the case. The trial judge was not required to ask the jurors whether they had discussed any outside accounts or information about the case when the defendant did not request such an inquiry.

5. Criminal Law § 5— mental capacity of defendant to proceed—fear of reprisal insufficient to show incompetency

The court did not err in denying defendant's motions to stop the trial, strike his testimony due to mental incapacity, and for a mistrial, where defendant's testimony on direct examination implicated him in the crimes charged against him; a certified forensic screening examiner testified that defendant was competent; defendant's father testified that defendant had changed and become nervous while in jail before trial and was irrational and did not know what he was doing; a bailiff testified that defendant had not been hostile, irrational, or violent; defendant's attorney stated that defendant had completely changed the story he had consistently told before trial; and there was evidence that defendant was afraid that a man still at large and also charged in the crime would retaliate against his family.

6. Criminal Law § 86.4— impeachment of defendant—juvenile petitions

There was no prejudicial error in a prosecutor asking questions from juvenile petitions on cross-examination where defendant had been found delinquent in the proceedings arising from the petitions; the prosecutor was acting in good faith; and the witness was either evasive or confused.

APPEAL by defendant from the judgment entered by *Long, Judge*, at the 26 September 1983 Criminal Session of FORSYTH

County Superior Court, and from a ruling by *Wood, Judge*, on 5 August 1983, denying defendant's motion to suppress.

Defendant, Calvin Chavis Baker, was charged with first degree rape, felonious larceny of an automobile, felonious breaking or entering and felonious larceny.

The State's evidence tended to show that in the late afternoon of 27 June 1983, two young black males came to the residence of Mr. and Mrs. P. in Winston-Salem. When Mr. P. came to the door, he was knocked to the floor by one of the black males and struck in the throat with a metal rod by the other. He was then bound hand and foot and placed on a bed in the front bedroom of the residence. One of the assailants found Mrs. P. asleep in another room, bound her, and forced her into a back bedroom. There, he threatened her with a metal rod and raped her. The other assailant then entered the bedroom, threatened Mrs. P. with a pistol, and raped her. Mr. and Mrs. P. were then forced into a bathroom and bound. The assailants ransacked the residence, removed a number of articles of personal property, and placed them in the victims' automobile. The assailants then drove away in the automobile.

Mr. P. freed himself from his bonds, freed his wife, and called the police. A police broadcast describing the automobile was heard by C. S. Poteat, a private investigator. Shortly afterward, Mr. Poteat saw the described vehicle occupied by two black males, one of whom he subsequently identified as the defendant. Mr. Poteat followed the automobile and notified the police over a telephone in his vehicle. After a high-speed chase, the occupants of the victims' automobile abandoned it near a public school and fled on foot. The defendant was apprehended and arrested a few minutes later near the scene by a police officer.

On the day after his arrest, defendant executed a waiver of his constitutional rights and agreed to answer questions. He then made written and oral statements in which he admitted helping Tommy Covington with the robbery. He also stated that he had seen Covington rape Mrs. P. but did not admit that he had raped her. Subsequently defendant moved to suppress these statements on the grounds that they were involuntary and were taken in violation of his constitutional rights.

Defendant testified at trial and at one point began to admit all of the crimes charged against him, as well as crimes with which he was not charged. Defendant objected to this testimony on the grounds that he was not competent and did not understand what he was doing. After a hearing the court concluded that defendant was competent and allowed the trial to proceed. Subsequent to his conviction and sentencing the defendant moved to have his conviction set aside based on new evidence of threats made to him prior to trial and because some jurors had access to newspapers during the trial. The motions were denied.

Rufus L. Edmisten, Attorney General, by Henry T. Rosser, Assistant Attorney General, for the State.

Zachary T. Bynum, III, for defendant-appellant.

COPELAND, Justice.

Defendant has excepted to the denial of his motion to suppress his pretrial statement, motion for a change of venue or venire, motion for mistrial and motion to strike his testimony, and motions for appropriate relief. However, defendant did not object at trial to the rulings on his motions or to the findings of fact and conclusions of law on which the rulings were based. Defendant also failed to file objections to the findings of fact and conclusions of law which were the basis of the trial court's denial of his motions for appropriate relief. Exceptions must be properly preserved for review "by action of counsel taken during the course of the proceedings in the trial tribunal by objection noted" unless by rule or law such exception is deemed to be preserved or taken without objection. N.C. R. App. P. 10(b)(1). If no exceptions are taken to findings of fact, "such findings are presumed to be supported by competent evidence and are binding on appeal." *Schloss v. Jamison*, 258 N.C. 271, 128 S.E. 2d 590 (1962). Defendant has not properly preserved his exceptions pursuant to Rule 10(b)(1) and so they cannot properly be the basis for his assignments of error. N.C. R. App. P. 10(a). However, in the interest of justice we will review defendant's assignments of error based on these exceptions as well as those based on properly preserved exceptions.

I.

[1] Defendant assigns as error the failure of Judge Wood and Judge Long to suppress the written and oral statements made by

him to the police prior to trial. Defendant contends that at the time he made the statements he was physically threatened and intoxicated so that the statements and his waiver of the right to counsel were involuntary.

Defendant contends that he was coerced into confessing by a statement of Detective Reavis to the effect that defendant "needed the hell kicked out of him." Detective Jones recalled this statement at trial but had been unable to remember it at the *voir dire* hearing. Detective Reavis testified at the *voir dire* hearing that he did not recall making the statement. Detective Reavis interviewed the defendant between 10:30 and 11:00 p.m. on 27 June 1983. The interview was held so that the defendant could fill out a personal history sheet and be advised of his constitutional rights. The statement of which the defendant complains was made after the interview had been terminated by the defendant's request for an attorney. Defendant did not execute a waiver of his constitutional rights until the next day at 2:20 p.m. and his oral and written statements were made some time later.

The defendant makes much of the fact that Judge Long did not have before him a transcript of the *voir dire* hearing conducted by Judge Wood when he ruled on the admissibility of defendant's statements at trial. Defendant argues that Judge Long relied on the decision made by Judge Wood in the *voir dire* hearing even though the detectives testified in that hearing that Detective Reavis made no statement about the defendant needing to have "the hell kicked out of him." The trial transcript and record indicate the opposite. Judge Long was made aware that the statement attributed to Detective Reavis had not been admitted by the officers at the *voir dire* hearing when he ruled defendant's statements to be admissible. While Judge Long did not make detailed findings at the *voir dire* hearing held during the trial, he did consider the testimony of Detective Jones that the defendant did not react to Detective Reavis' statement or appear to be afraid. Judge Long then denied defendant's motion to suppress his statements.

The defendant also argues that his statements were involuntary because he was acting under the influence of intoxicants when he made them. We find no support in the record for this argument. While the defendant may have been drinking beer and

smoking marijuana on the day of the crime and of his arrest (27 June 1983), the detectives testified that he was not intoxicated on the night of his arrest nor on the following day when he made his statements. Defendant himself testified that he was not intoxicated on June 28, the day the statements were made. Judge Wood, in denying defendant's pretrial motion to suppress his statement, and Judge Long, in denying defendant's motion for appropriate relief, both weighed the conflicting testimony and concluded that the defendant was not intoxicated when he made his statement on 28 June 1983.

Based on their findings that defendant had not been intoxicated or threatened, both judges concluded that defendant's statements were voluntarily made. While Judge Wood did not hear Detective Jones' testimony concerning the statement made by Detective Reavis there was sufficient evidence before him to support his finding. Findings by the court that no threats or promises were made to the defendant to induce him to make a statement are proper findings of fact. *State v. Jackson*, 308 N.C. 549, 578, 304 S.E. 2d 134, 150 (1983). Findings of fact made by the trial judge following a *voir dire* hearing on the voluntariness of a defendant's confession are conclusive on appeal if supported by competent evidence in the record. *Id.* at 569, 304 S.E. 2d at 145; *State v. Oxendine*, 305 N.C. 126, 135, 286 S.E. 2d 546, 551 (1982); *State v. Rook*, 304 N.C. 201, 212, 283 S.E. 2d 732, 740 (1981). The findings of Judges Wood and Long that the defendant was not threatened or intoxicated are supported by competent and material evidence and are binding on this Court. Their conclusions that defendant's confession was voluntary are supported by the findings.

[2] Defendant also contends that his waiver of the right to counsel was not knowingly and intelligently made. We disagree. The defendant argues that he was intoxicated when he waived his rights and made his statement because of the beer and marijuana he had consumed on the day of the crime. But, as previously mentioned, the evidence indicates that defendant was not intoxicated when he waived his rights. Whether a waiver of constitutional rights has been knowingly and intelligently made is to be determined from the totality of the circumstances. *State v. Steptoe*, 296 N.C. 711, 716, 252 S.E. 2d at 711 (1979). Judge Wood concluded that defendant was not intoxicated when he waived his

rights on 28 June 1983 and that his waiver was knowingly and voluntarily made. His findings are supported by competent and material evidence.

The fact that on the night of his arrest defendant had refused to talk and requested an attorney does not prevent his statement from being voluntary. Defendant on his own and without prompting from the detectives informed them that he wished to talk about the crime. Police may question an accused who has invoked his right to silence and to counsel if the accused himself initiates further communication with the police concerning the crime. *Edwards v. Arizona*, 451 U.S. 477, 484-85 (1981). That is exactly what defendant did here. We hold that in the totality of the circumstances defendant's waiver of his constitutional rights was knowingly, voluntarily, and intelligently made.

II.

[3] In his brief defendant argues that the trial court erred in denying his motion for appropriate relief based on the changed testimony of Detective Jones. We find no error and affirm the ruling of the trial court.

In denying defendant's motion for appropriate relief Judge Long found as a fact that "[d]uring the interview Officer Reavis did not threaten the defendant in any way and the defendant did not express any fear and did not mention any statement made by the detective on the previous evening." Findings that no threats or promises were made to the defendant is a proper finding of fact. *Jackson*, at 578, 304 S.E. 2d at 150. Findings of fact made by a court in its order granting or denying a motion for appropriate relief are binding on appeal if supported by evidence in the record. *State v. Bush*, 307 N.C. 152, 168, 297 S.E. 2d 563, 573 (1982); *State v. Stevens*, 305 N.C. 712, 719-20, 291 S.E. 2d 585, 591 (1982). This test is applicable even if the evidence is conflicting. *Stevens*, at 720, 291 S.E. 2d at 591. There is abundant evidence in the record to support Judge Long's findings, and they in turn support his conclusion that defendant's confession was voluntary.

III.

[4] We next turn to defendant's contention that the trial court erred in denying his motions for change of venue or change of venire. Defendant argues that pretrial publicity was so extensive

and of such an inflammatory nature that he could not obtain a fair trial. In support defendant refers to numerous newspaper articles written about the crime and contends that this publicity was more inflammatory and widespread in the county of prosecution. Defendant contends that denial of his motion was clearly prejudicial in light of the fact that jurors had access to newspapers before the trial and in the jury room during deliberations. We hold that the trial court properly exercised its discretion and that defendant was not prejudiced.

A trial court must grant a change of venue or order a special venire "[i]f, upon motion of the defendant, the court determines that there exists in the county in which prosecution is pending so great a prejudice against the defendant that he cannot obtain a fair and impartial trial, . . ." N.C. Gen. Stat. § 15A-957 (1983). A motion for a change of venue, or a change of venire, is addressed to the sound discretion of the trial court and its ruling will not be disturbed in the absence of an abuse of discretion. *State v. Jerrett*, 309 N.C. 239, 250, 307 S.E. 2d 339, 345 (1983). *State v. Oliver*, 302 N.C. 28, 37, 274 S.E. 2d 183, 189 (1981). The burden is on defendant to show that the prejudice against him is so great that he cannot obtain a fair and impartial trial. *State v. Boykin*, 291 N.C. 264, 269, 229 S.E. 2d 914, 917-18 (1976). If the defendant shows that there is a reasonable likelihood that a fair trial cannot be had, it is an abuse of discretion if the trial court fails to grant a change of venue or a special venire panel. *Id.* at 270, 229 S.E. 2d at 918.

After examining the newspaper articles submitted by the defendant we find that they are factual, non-inflammatory, reports of events. Such general factual coverage of a crime is not innately prejudicial. *State v. Matthews*, 295 N.C. 265, 279, 245 S.E. 2d 727, 736 (1978), *cert. denied*, 439 U.S. 1128 (1979). The record indicates that prospective jurors who said that the newspaper accounts would influence their judgment were excused. In denying defendant's motion the trial judge noted that there had been no difficulty in selecting the jury and that the defense had not exhausted its peremptory challenges. We see nothing in this that demonstrates that defendant was prejudiced.

However, defendant argues that events during the trial show that he was prejudiced by the court's failure to grant a change of

venue. Specifically, he argues he was prejudiced because the jury had access to newspapers while in the jury room. While this is true there is no evidence that any of the papers read by the jurors contained articles relating to the crime or the trial. After this was brought to his attention the trial judge questioned the jury, and none of the jurors indicated that they had read any articles pertaining to the trial. The two jurors who said they had read newspapers in the jury room specifically denied having read any articles about the case. This evidence is insufficient to show that the defendant was prejudiced.

In arguing that the trial court erred in denying his motion for appropriate relief the defendant contends that the two jurors who read newspapers in the jury room must have read the headlines or the opening paragraphs of articles about the case before they could know that the articles concerned the case and that they were forbidden to read them. Defendant then contends that the trial judge erred by not asking the jurors if they had discussed the newspaper accounts of the case because word of mouth recounting of the information contained in headlines or articles would prejudice the defendant. We find these arguments to be without merit.

It is pure speculation to suggest that the newspapers read by the jurors contained articles about the case or that the jurors discussed such articles among themselves. The trial transcript does not reveal what papers were read by the jurors so this Court has no way of knowing that such papers contained any articles about defendant's case. What evidence there is suggests that the papers did not contain any such articles because all of the jurors indicated that they had read no newspaper articles concerning the case. While the trial judge might have done better to nail down this issue by asking the jurors whether they had discussed any outside accounts or information about the case, his failure to do so was not prejudicial to the defendant. Defendant did not request that the court question the jury about any such discussions, and we hold that it was not error for the trial judge to fail to ask such questions on his own motion.

Based on our review of the transcript we conclude that defendant has failed to show that he was prejudiced by publicity about the case or denied a fair and impartial trial. Therefore, we

hold that the trial court did not err in denying defendant's motions for a change of venue or a change in the venire. For the same reasons we hold that the court correctly denied defendant's motion for appropriate relief.

IV.

[5] Defendant contends that the trial court erred in its denial of his motions to stop the trial, strike his testimony due to his mental incapacity, and for mistrial. We disagree.

N.C. Gen. Stat. § 15A-1001(a) (1983) provides that

> (n)o person may be tried, convicted, sentenced, or punished for a crime when by reason of mental illness or defect he is unable to understand the nature and object of the proceedings against him, to comprehend his own situation in reference to the proceedings, or to assist in his defense in a rational or reasonable manner.

The defendant bears the burden of persuasion on a motion under this section. *State v. Jacobs*, 51 N.C. App. 324, 276 S.E. 2d 482 (1981). The court's findings of fact as to defendant's mental capacity are conclusive on appeal if supported by the evidence. *State v. McCoy*, 303 N.C. 1, 18, 277 S.E. 2d 515, 528 (1981); *State v. Taylor*, 290 N.C. 220, 226 S.E. 2d 23 (1976).

Defendant took the stand in his own defense and on direct examination the following exchange took place:

> Q. Mr. Baker, we've heard a lot of evidence here today. On this night, June 27th, all of this is alleged to have occurred, would you tell us what happened in your own words that day.
>
> A. Okay. Well, Mr. Covington came over my house that morning and talking about he wanted to shoot some ball, and shot some ball. Got through, went to got some beer. After that he say he know where to make some money at. So he told me, you know, what the deal was, and so I said okay. Then when we got there—
>
> Q. What do you mean what the deal was?
>
> A. You know, he thought nobody wasn't going to be home anything like that. And so after that, he open a door and so he went over there and knocked on the door and this old man

came to the door. And then I pushed Mr. Covington aside and then I hit the old man. Then I started cutting him.

Cut him on the wrist. And then after that, I started hitting on Mr. Covington with a iron bolt and knocked him out. Tied this old man up and to the bedroom.

Seen a lady and tied her up. Start screaming. After that, I started searching the house.

Q. What you mean started cutting them up?

Cut their wrist. I just started cutting.

THE COURT: Are you saying you cut a wrist?

THE WITNESS: Yeah.

Doing it for y'all. That's what they wanted anyway.

And so I tied Mr. Covington up and told them tied up. Then I wanted to tie both of them up. I did everything. And then started raping her about nine or ten times the whole day.

MR. BYNUM: Your Honor, I'm going to object to this—

MR. COLE: Let him talk. I object. Let him talk.

A. After that, I got all the property dumped out in the floor and left—

THE COURT: Just one moment. What is the objection?

MR. BYNUM: Perhaps this better be heard on voir dire. I'm not sure, Your Honor.

MR. COLE: Your Honor, I hate to interrupt the defendant's testimony. The jury has a right to hear the testimony. He wants to tell his story. Let him tell his story.

MR. BYNUM: Your Honor, he has unbeknownst to counsel changed everything he told me at this time.

On motion of defendant's counsel the court ordered defendant to be examined by Bryan Brown, a certified forensic screening examiner. The court then held a *voir dire* hearing on defendant's competency to stand trial. Mr. Brown was tendered by defendant as an expert witness and testified that he had examined defend-

ant sometime before the trial and that at the time of his first examination it was his opinion that defendant was competent and able to proceed to trial. He also testified that he had examined defendant again on the day of the *voir dire* hearing. Mr. Brown testified that defendant was aware of the charges against him, but in his opinion defendant consciously decided not to talk about the events occurring on the day of the crime. The court also heard testimony from defendant's father that defendant had changed and become nervous during his confinement in jail prior to trial, and that it was his opinion that defendant was irrational and did not know what was going on when he testified. The bailiff testified that defendant had not exhibited hostile, irrational or violent behavior but that he looked away, turned his back, or commented when he disagreed with testimony or rulings by the court. Mr. Bynum, defendant's counsel, informed the court that defendant had completely changed the story he had consistently told him in preparation for trial. He noted that at the pretrial *voir dire* hearing defendant had adhered to his original story. Mr. Bynum also told the court that defendant was not assisting him in conducting the defense. There was also evidence that defendant took full responsibility for the crime out of fear that Tommy Covington, who was still at large and also charged in the crime, would retaliate against defendant's family if defendant implicated him in the crime.

After hearing the evidence the court concluded that defendant was capable of understanding the nature and object of the proceedings, that he was able to comprehend his situation, and assist in his own defense in a reasonable and rational manner. Based on these findings the court held that defendant's testimony was not motivated by any of the traditional reasons which would make him incompetent to proceed. While defendant's conduct was unusual, to say the least, there was much evidence that he was competent, and we hold that he has not met his burden of persuasion. Defendant may have testified as he did due to a fear of Tommy Covington, but that does not demonstrate that he was incompetent. The court's findings are supported by the evidence and so are binding on appeal.

V.

[6] Defendant's final assignment of error that was briefed and argued concerns the prosecutor's use of defendant's juvenile

record to impeach his credibility. Because this case was tried before 1 July 1984, the rules of the new Evidence Code will not be addressed.

In any criminal or delinquency proceeding a juvenile who testifies, either as the defendant or a witness, may be ordered to testify as to whether he has been adjudicated delinquent. N.C. Gen. Stat. § 7A-677(b) (1981). This is in line with the general rule that a defendant who takes the stand may be cross examined for impeachment purposes about prior convictions. *State v. Lynch*, 300 N.C. 534, 543, 268 S.E. 2d 161, 166 (1980). Defendant contends that the prosecutor in this case went beyond these well established rules by reading directly from the juvenile petitions while questioning defendant and by characterizing the petitions as felonious. Defendant argues that by this method of questioning the prosecutor improperly characterized the adjudications of delinquency and in effect improperly offered evidence of such adjudications.

Defendant correctly points out that a prosecutor may not in cross examining a defendant on collateral crimes use questions which assume as facts unproved insinuations of the defendant's guilt of collateral offenses. *State v. Phillips*, 240 N.C. 516, 524, 82 S.E. 2d 762, 767 (1954). However, defendant's argument that the prosecutor violated this rule is clearly erroneous. The prosecutor based his questions concerning defendant's prior convictions on juvenile petitions from proceedings in which defendant had been found to be delinquent. Clearly, the prosecutor was not making insinuations of unproven facts as was the case in *Phillips*.

"When a cross-examiner seeks to discredit a witness by showing prior inconsistent statements or other conduct, the answers of the witness to questions concerning collateral matter are generally conclusive and may not be contradicted by extrinsic testimony." *State v. Cutshall*, 278 N.C. 334, 349, 180 S.E. 2d 745, 754 (1971). Defendant contends that the prosecutor's tactic of reading from defendant's juvenile petitions while cross examining defendant in effect put those petitions into evidence to contradict defendant's denials. Such conduct by the prosecutor is not to be commended, but we hold that it does not constitute prejudicial error. When a prosecutor is acting on a good faith belief in the reliability of his information, as was clearly the case here, he may

press or "sift" the witness by further cross examination when the witness denies that he committed the crimes or bad acts that are the subject of the cross examination. *State v. Fountain*, 282 N.C. 58, 68-69, 191 S.E. 2d 674, 682 (1972). This is particularly true where the witness is either evasive or confused, as appears to be the case here. In the past we have found that it was not reversible error for the prosecutor to question a defendant about his signature on a purported transcript of his guilty plea to a collateral crime, *id.*, and we now hold that the prosecutor's questions from defendant's juvenile petitions do not constitute prejudicial error.

We do not discuss defendant's remaining assignments of error since they were neither briefed nor argued and are deemed abandoned. *See* N.C. R. App. P. 28(a). After a careful review of the record we find no error.

No error.

WENDY BETTS, ANGIE BETTS, BY AND THROUGH THEIR GUARDIAN AD LITEM, SANDRA BETTS PARKER AND KENNETH WAYNE O'NEIL v. MARGARET PARRISH, ADMINISTRATRIX CTA OF THE ESTATE OF RUSSELL SANDERFORD, RUBY WILSON ELLIS AND MILDRED S. POLLARD

No. 303A83

(Filed 2 October 1984)

1. Wills §§ 30.1, 52— partial intestacy—lack of ambiguity in will—condition precedent in residuary clause

Where the testator's will devised his real property to his mother for life, then in fee simple to his wife, with the wife to take the property in fee simple if the mother predeceased the testator, and further provided that plaintiffs should take the property if both the mother and wife should predecease the testator, there is no ambiguity when the wife predeceases the testator and the last clause should not be applied as a residuary clause to prevent partial intestacy. That clause contains a condition precedent which was not met. G.S. 31-42, G.S. 29-15(3).

2. Wills § 28— doctrine of implied gift

The doctrine of implied gift set out in *Wing v. Trust Co.*, 301 N.C. 456, does not apply because *Wing* did not involve a lapsed devise, the plaintiffs in

this case were not recipients of a lifetime estate, and *Wing* will not be invoked merely to avoid intestacy.

Justice EXUM dissenting.

APPEAL by plaintiffs, pursuant to G.S. 7A-30(2), from a decision of a divided panel of the Court of Appeals, 62 N.C. App. 77, 302 S.E. 2d 288 (1983), reversing an Order granting summary judgment for the plaintiffs, entered by *Godwin, J.*, at the 24 March 1982 Civil Session of Superior Court, WAKE County.

Moore, Ragsdale, Liggett, Ray & Foley, P.A., by John N. Hutson, Jr., for plaintiffs-appellants.

Kimzey, Smith, McMillan & Roten, by Duncan A. McMillan, for defendant-appellee.

FRYE, Justice.

This is a declaratory judgment action seeking a construction of the will of Russell W. Sanderford [hereinafter also referred to as the testator]. The testator's wife, Mamie Prince Sanderford, predeceased him. At the time of the testator's death, he was survived by one lineal ascendant, his mother, Ruby Wilson Ellis, a defendant in this action. He was also survived by the plaintiffs, Kenneth Wayne O'Neil, a nephew; Wendy Betts and Angie Betts, step-great-grandchildren (referred to as "nieces" in the Will).

The plaintiffs filed a complaint in the superior court seeking a declaratory judgment adjudging them to be the owners of the testator's real property located at 134 Maywood Avenue, Raleigh, North Carolina, subject to the life estate of Ruby Wilson Ellis. The defendants answered seeking a declaratory judgment that Ruby Wilson Ellis is the fee simple owner of the aforementioned real estate. Both parties moved for summary judgment pursuant to Rule 56 of the North Carolina Rules of Civil Procedure. The superior court granted the plaintiffs' motion for summary judgment. The court ruled that the devise to the testator's wife (ITEM THREE of the Will) of the remainder interest in the real estate lapsed upon her death prior to the testator's death. The court further ruled that ITEM FOUR of the Will devised the lapsed remainder to the plaintiffs as tenants in common. Therefore, the testator's mother, Ruby Wilson Ellis, held only a life estate in the

real property with the remainder interest vested in fee to the plaintiffs.

The Court of Appeals (Judges Webb and Braswell, with Judge Whichard dissenting) held that the remainder interest in the testator's real estate passed to his mother, Ruby Wilson Ellis, pursuant to G.S. 31-42(c)(1)b and G.S. 29-15(3), since the testator and his wife died without issue. *Betts v. Parrish*, 62 N.C. App. 77, 302 S.E. 2d 288 (1983).

We affirm the decision of the Court of Appeals.

I.

Russell W. Sanderford died 10 April 1980 at age 66. Mr. Sanderford's Last Will and Testament was admitted to probate in the Superior Court, Wake County, on 16 May 1980. The Will provided as follows:

> I, RUSSELL W. SANDERFORD, being of sound and disposing mind but knowing the certainty of death and the uncertainty of my earthly existence, do hereby make, declare and publish this my last will and testament, hereby revoking all former wills by me made.
>
> ITEM ONE
>
> I direct my Executrix hereinafter named to give my body a decent burial and to pay from the first monies she receives all of my just debts, including the inheritance tax payable by the beneficiaries of this devise.
>
> ITEM TWO
>
> I will and bequeath all of my personal property in equal shares to my wife, Mamie Prince Sanderford, and my mother, Ruby Wilson Ellis; provided that if either should predecease me then the survivor shall receive all of said personal property.
>
> ITEM THREE
>
> I will and devise my house at 134 Maywood Avenue, Raleigh, N. C., and all other real estate that I own to my mother for her lifetime and after her death to my wife,

Mamie Prince Sanderford, in fee simple. Should my mother predecease me, then I will and devise said real estate to my wife, Mamie Prince Sanderford, in fee simple.

ITEM FOUR

If my mother and my wife should both predecease me, then I will, devise and bequeath all of my property, real, personal and mixed in equal shares to my nieces and nephew as follows:

One-third interest to Wendy Betts

One-third interest to Angie Betts

One-third interest to Kenneth Wayne O'Neil

ITEM FIVE

I hereby name and appoint my wife, Mamie Prince Sanderford, as Executrix of my estate to serve without bond.

IN TESTIMONY WHEREOF, I, the said RUSSELL W. SANDERFORD, have hereunto set my hand and seal, this (illegible) day of May 1974.

[1] In this declaratory judgment action, the plaintiffs contend that there is an ambiguity in the Will created by the difference in language between ITEM TWO and ITEM THREE of the Will. When the testator disposed of his personal property in ITEM TWO, he stated that if his wife were to predecease him, then his mother should take his wife's share of his personal property. However, no similar disposition of the real property was made in ITEM THREE of the Will. Therefore, plaintiffs argue, this omission indicates that Sanderford intended that his mother take only a life estate in the real property, with the remainder in fee passing to the plaintiffs pursuant to ITEM FOUR of the Will, thus preventing partial intestacy. The trial court agreed with the plaintiffs.

On appeal the Court of Appeals reversed, stating that ITEM FOUR of the Will was not ambiguous. The contingency in ITEM FOUR of the Will, requiring that both the wife and mother predecease the testator before any interest should pass to the plaintiffs, had not occurred. Consequently, the remainder interest in the property lapsed and passed to the mother, Ruby Wilson Ellis, in accordance with G.S. 31-42(c)(1)b and G.S. 29-15(3).

Judge Whichard dissented, believing that the Will permits "two interpretations, and that the interpretation which results in complete testacy should prevail." *Betts v. Parrish*, 62 N.C. App. 77, 80, 302 S.E. 2d 288, 290 (1983) (Whichard, J., dissenting). Judge Whichard concluded that, although the draftsman failed to take account of the possibility that testator's wife would predecease his mother, the testator nevertheless intended that his "nieces" and nephew should have the property after the death of both his wife and mother. He thus voted to affirm the trial court. Therefore, the plaintiffs appeal to this Court as a matter of right. *See* G.S. 7A-30(2) (Cum. Supp. 1983).

II.

We agree with the Court of Appeals that there is no ambiguity in Mr. Sanderford's Will. *Betts v. Parrish*, 62 N.C. App. 77, 302 S.E. 2d 288 (1983). ITEM THREE of the Will reads as follows:

> I will and devise my house at 134 Maywood Avenue, Raleigh, N. C., and all other real estate that I own to my mother for her lifetime and after her death to my wife, Mamie Prince Sanderford, in fee simple. Should my mother predecease me, then I will and devise said real estate to my wife, Mamie Prince Sanderford, in fee simple.

This provision creates a life estate for testator's mother, with a remainder over in fee simple to the testator's wife. Sanderford's wife, the remainderman under ITEM THREE, predeceased the testator and left no issue surviving that would have been an heir to the testator had he died intestate. Therefore, G.S. 31-42(a)[1] would not prevent a lapse from occurring. G.S. 31-42(b)[2] is not ap-

1. § 31-42. Failure of devises and legacies by lapse or otherwise; renunciation. —(a) Devolution of Devise or Legacy to Person Predeceasing Testator.—Unless a contrary intent is indicated by the Will, where a devise or legacy of any interest in property is given to a devisee or legatee who would have taken individually had he survived the testator, and he dies survived by issue before the testator, whether he dies before or after the making of the will, such devise or legacy shall pass by substitution to such issue of the devisee or legatee as survived the testator in all cases where such issue of the deceased devisee or legatee would have been an heir of the testator under the provisions of the Intestate Succession Act had there been no will.

2. Devolution of Devise or Legacy to Member of Class Predeceasing Testator. —(b) Unless a contrary intent is indicated by the will, where a devise or legacy of

plicable since that subsection applies to members of a class who predeceased the testator.

Because G.S. 31-42 does not prevent a lapse under subsections (a) or (b), the remainder interest would pass according to the statutory provisions of subsection (c) which provides:

> (c) Devolution of Void, Revoked, Renounced or Lapsed Devises or Legacies.—If subsections (a) and (b) above are not applicable and if a contrary intent is not indicated in the will:
>
> (1) Where a devise or legacy of an interest in property is void, is revoked, or lapses or which for any other reason fails to take effect, such a devise or legacy shall pass:
>
> a. Under the residuary clause of the will applicable to real property in case of such devise, or applicable to personal property in case of such legacy, or
>
> b. As if the testator had died intestate with respect thereto when there is no such applicable residuary clause[.]

Subsection (c)(1)a of the statute requires the devise to pass under the terms of an applicable residuary clause in the event of a lapse. In the absence of an applicable residuary clause, subsection (c)(1)b requires that the property pass as intestate property.

Plaintiffs contend that ITEM FOUR of the Will, though not specifically designated as such, is in reality an applicable residuary clause. If so, the property would pass to the plaintiffs pursuant to subsection (c)(1)a, rather than to the testator's mother, his sole heir under the laws of intestacy, pursuant to subsection (c)(1)b.

It is well settled that no particular mode of expression is needed to constitute a residuary clause. All that is required is an

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an interest in property is given to a devisee or legatee who would have taken as a member of a class had he survived the testator, and he dies survived by issue before the testator, whether he dies before or after the making of the will, such devise or legacy shall pass by substitution to such issue of the devisee or legatee as survive the testator in all cases where such issue of the deceased legatee would have been an heir of the testator under the provisions of the Intestate Succession Act had there been no will: Provided, however, if such devisee or legatee is not survived by such issue, then the entire property interest therein shall devolve upon the remaining members of the class who survive the testator.

adequate indication that a particular clause was intended to dispose of property which was not otherwise disposed of by the Will. *Faison v. Middleton*, 171 N.C. 170, 88 S.E. 141 (1916). ITEM FOUR of the Will provides:

> If my mother and my wife should both predecease me, then I will, devise and bequeath all of my property, real, personal and mixed in equal shares to my nieces and nephew as follows:
>
> One-third interest to Wendy Betts
>
> One-third interest to Angie Betts
>
> One-third interest to Kenneth Wayne O'Neil

Assuming *arguendo* that this provision constitutes a residuary clause, it is apparent from the express language used by the testator at the beginning of the provision that the plaintiffs should take all of his property only if the testator's mother and wife *both* predeceased the testator. This, in fact, did not happen. Only the wife predeceased the testator. "So where it is clear from the residuary clause itself or other parts of the will, that the testator had in fact a contrary intention, namely, that the residue should not be general, and that things given away . . . should not fall into the residue," *Holton v. Jones*, 133 N.C. 399, 406, 45 S.E. 765, 768 (1903) (quoting *Sorrey v. Bright*, 21 N.C. (1 Dev. & Bat Eq.) 114, 116 (1835)); *see generally*, Annot., 10 A.L.R. 1522 (1921), subsection (c)(1)a of G.S. 31-42 does not apply. Therefore, the plaintiffs do not take any interest under ITEM FOUR of the Will since the condition precedent, i.e., the prior death of the testator's mother and wife, was not satisfied.

Since the remainder interest in the real property does not pass under ITEM FOUR or any other provision of the Will, this devise lapses and passes as intestate property to the testator's sole heir at law, his mother. *See* G.S. 31-42(c)(1)b and 29-15(3). Plaintiff contends, however, that the Court should depart from the express language in ITEM FOUR so that no part of the testator's estate will pass by intestacy. "It is a general rule always to construe a residuary clause so as to prevent an intestacy as regards any part of the testator's estate, *unless there is an apparent intention to the contrary.*" *Faison*, 171 N.C. at 172, 88 S.E. at 142 (emphasis added). The condition precedent in ITEM

FOUR demonstrates a contrary intention and requires that part of the testator's estate pass by intestacy.

In *Williard v. Weavil*, 222 N.C. 492, 23 S.E. 2d 890 (1943), this Court said:

> We are not inadvertent to the presumption against intestacy, called to our attention by the plaintiffs; but this rule, however strong, is but a rule of construction, which must yield to the true intent of the testator when it can be ascertained. . . . It does not authorize the Court to make a will or to add to a testamentary disposition something which, by reasonable inference, is not there, or to make intestacy impossible.

Id. at 496, 23 S.E. 2d at 893.

Furthermore, when the language of the will is definite and clear, the presumption that the will must be construed to prevent partial intestacy is generally not employed. If the language is unambiguous, then there is no need to resort to a construction of the will, and the expression of the testator must be given effect. *McCallum v. McCallum*, 167 N.C. 310, 83 S.E. 250 (1914).

The language in ITEM FOUR of Sanderford's Will is clear and definite. The testator limited the effectiveness of ITEM FOUR of the Will by inserting language at the beginning, which creates a condition precedent. The Will stated that the beneficiaries under ITEM FOUR would take an interest in the testator's property if his mother and wife should *both* predecease him. If either the testator's wife or mother were living at the testator's death then this condition was not met, since it is obvious that both of them had not predeceased the testator. This is consistent with ITEM TWO of the Will wherein Sanderford expressly provided that in the event that either his wife or mother should predecease him then the survivor should be entitled to all of his personal property. This language achieves a perfectly legitimate and desirable testamentary plan under the circumstances because it provides primarily for the wife and mother in case of the testator's death.

[2] Plaintiffs strongly argue that the doctrine of implied gifts, as espoused in *Wing v. Wachovia Bank & Trust Co.*, 301 N.C. 456, 272 S.E. 2d 90 (1980), should be applied to the facts in the present

case to imply a gift to the plaintiffs of the remainder interest in Sanderford's real property. This doctrine simply states that:

> If a reading of the whole will produces a conviction that the testator must necessarily have intended an interest to be given which is not bequeathed by express and formal words, the Court may supply the defect by implication and so mould the language of the testator as to carry into effect, so far as possible, the intention which it is of opinion that he has on the whole will sufficiently declared.

Id. at 464-465, 272 S.E. 2d at 96 (quoting *Burcham v. Burcham*, 219 N.C. 357, 359, 13 S.E. 2d 615, 616 (1941)).

A brief review of the facts in *Wing* is necessary to accurately distinguish it from the present case. In *Wing* the testator's will established a testamentary trust, which provided that a small portion of the income was to be paid to the testator's brothers and sisters for life, a small portion to testator's nieces and nephews for life, with the bulk of the income passing to the great-nieces and great-nephews. The trust was to terminate upon the death of the last survivor of all of the life income beneficiaries; however, there was no express provision in the will for ultimate distribution of the trust corpus. The Court did indeed recognize the doctrine of implied gifts by concluding that the corpus of the trust should pass to certain income beneficiaries, namely, the great-nieces and great-nephews. The Court declined to accept the judgment of the Court of Appeals which had concluded that the corpus should pass by intestacy.

The first important distinction between the present case and *Wing* is the fact that in *Wing* the Court was not concerned with the issue of a lapsed devise. A lapsed devise occurs when the devisee dies prior to the death of the testator. *See generally* N. Wiggins, *Wills and Administration of Estates in North Carolina*, § 149 (2d ed. 1983) and Leath, *Lapse, Abatement, and Ademption*, 39 N.C.L. Rev. 313 (1961) for a discussion of North Carolina law relating to lapsed devises. The *Wing* case involves the question of the ultimate distribution of the corpus of a testamentary trust after the death of the income beneficiaries, unfettered by any question of a lapsed devise. However, in the instant case, the dispositive issue is the ultimate disposition of a lapsed devise under ITEM THREE of the Will, created by the death of the testa-

tor's wife prior to the death of the testator. If indeed a named income beneficiary in *Wing* had predeceased the testator, then the facts of that case would have been more similar to those before the Court today. *See generally* Annot., 118 A.L.R. 559 (1939) (discussing application of various states' anti-lapse statutes in the event of the death of a devisee or legatee before testator as applicable to the interest of a beneficiary of a trust who dies before the testator).

Second, the law of trusts recognizes that equity will infer an intent to give the remainder interest in the principal to the income beneficiary when there is no express disposition of the principal provided for by the testator. *Poindexter v. Wachovia Bank and Trust Co.*, 258 N.C. 371, 128 S.E. 2d 867 (1963). *See, e.g.*, G. G. Bogert and G. T. Bogert, *The Law of Trusts and Trustees*, § 182, at 357 (rev. 2d ed. 1979) (hereinafter Bogert and Bogert). Absent an express disposition of the principal by the testator, an implied gift can result if there is an implied intent on the part of the testator that an additional interest be given to an income beneficiary. Bogert and Bogert, *supra*, § 82, at 354. In *Wing*, the Court considered the scheme employed by the testator in disposing of his estate as evidence of an unequivocal intent on the part of the testator that the great-nieces and great-nephews should ultimately receive the remainder of the trust corpus. The testator had given eighty percent of the trust income to the great-nieces and great-nephews and provided that ultimately they would receive one hundred percent of the trust income.

Unlike the *Wing* case, the plaintiffs in the present case were not recipients of any lifetime interest in the testator's estate. Instead, Sanderford demonstrated his intent to benefit primarily his mother by devising a life estate in his real property to his mother and also bequeathing one-half of his personal property to her. Sanderford clearly indicated an intent to favor his mother over the plaintiffs, who were beneficiaries under ITEM FOUR of the Will, only if his mother and wife predeceased him.

Finally, the Court in *Wing* explicitly acknowledged that "a gift by implication is not favored in the law and cannot rest upon mere conjecture." *Wing*, 301 N.C. at 464, 272 S.E. 2d at 96. The inference of such an implied gift must rest upon cogent reasoning and " 'cannot be indulged merely to avoid intestacy.' " *Id.* (quoting

Burney v. Holloway, 225 N.C. 633, 637, 36 S.E. 2d 5, 8 (1945)). For the Court to infer that Sanderford favored his nephew and step-great-grandchildren over his mother would be indulging in mere conjecture. Indeed, cogent reasoning dictates that the testator expressly limited the plaintiffs to an interest in his property only upon the happening of an expressly stated condition, that is, the death of both his mother and his wife prior to his own death.

The fact that part of the testator's estate will pass by intestacy to the primary and natural object of his bounty, his mother, is certainly not a compelling reason to find an implied gift to the plaintiffs. Justice Seawell succinctly stated the same conclusion in *Van Winkle v. Berger*, 228 N.C. 473, 46 S.E. 2d 305 (1948):

> A man is not required to visualize all changes and contingencies near or remote, trivial or important, which might come about . . . and meticulously provide against intestacy in order to make a valid will; nor may the Court, by the exercise of hindsight better than his foresight, improve upon the testamentary disposition.

Id. at 479, 46 S.E. 2d at 309.

Accordingly, we hold that ITEM FOUR of the Will, even if in the nature of a residuary clause, is subject to a condition precedent, namely, that testator's mother and spouse should both predecease him before any property should pass to the plaintiffs. To construe ITEM FOUR of testator's Will so as to give this property to plaintiffs, contrary to the expressed provision of that item, would amount to rewriting the Will. This we decline to do. Because the property does not pass to plaintiffs under ITEM FOUR of the Will, it must pass by the laws of intestacy. The laws of intestacy clearly favor a parent over a collateral relative or a non-blood relative.

In conclusion, we hold that the life estate in the testator's real estate passed to the testator's mother under ITEM THREE of the Will, and the remainder interest in the real estate passes to the testator's mother under the laws of intestacy via the anti-lapse statute, G.S. 31-42(c)(1)b. We find this result consistent with the intention of the testator as expressed in and ascertained from his Will as a whole, giving greater regard to the dominant purpose of the testator.

The decision of the Court of Appeals, reversing the trial court and remanding for judgment that the remainder interest in the testator's real property passes to his mother, is hereby affirmed.

Affirmed.

Justice EXUM dissenting.

I dissent essentially for the reasons stated by Judge Whichard in his dissenting opinion in the Court of Appeals.

I think the majority errs in construing this will by focusing on whether Item Four, standing alone, is ambiguous. This is not the question. The question is whether the will, read as a whole, creates an ambiguity with regard to the testator's intent in disposing of the remainder interest in the real property in the event his wife, but not his mother, should predecease him. I think there is an ambiguity. Item Three of the will makes it clear that the testator intended for his mother only to have a life estate in the property. Item Four expresses the testator's intent in the event both his wife and mother should predecease him. In that event he desired plaintiffs to have the remainder interest together with all other property which he owned. The testator did not express himself with regard to his intent in the event his wife, but not his mother, predeceased him.

As Judge Whichard pointed out in his dissent, the will is subject to two interpretations. One is that the testator's mother should have only a life interest in the property and the remainder interest should lapse and pass under the residuary clause. The second is that the remainder should lapse and pass as an intestacy.

Where a will is subject to two interpretations, the one favoring complete testacy should prevail. *Ferguson v. Ferguson*, 225 N.C. 375, 35 S.E. 2d 231 (1945); *Coddington v. Stone*, 217 N.C. 714, 9 S.E. 2d 420 (1940).

My vote, therefore, is to reverse the Court of Appeals and to sustain the judgment of the trial court.

STATE OF NORTH CAROLINA, EX REL. UTILITIES COMMISSION; DUKE POWER COMPANY (APPLICANT); NORTH CAROLINA PUBLIC INTEREST RESEARCH GROUP; NORTH CAROLINA TEXTILE MANUFACTURERS ASSOCIATION; PEOPLES ALLIANCE; AND PUBLIC STAFF, NORTH CAROLINA UTILITIES COMMISSION v. CONSERVATION COUNCIL OF NORTH CAROLINA; GREAT LAKES CARBON CORPORATION; AND KUDZU ALLIANCE

No. 126A84

(Filed 2 October 1984)

1. Utilities Commission § 57— review of Utilities Commission decision—adequate findings

In an order in a general rate case, the Utilities Commission's recitation of the factors in G.S. 62-133(b)(1), its summarization and rejection of appellant's statutory interpretation arguments, and its conclusions that all of Duke's CWIP expenditures were reasonable, prudent, and needed to insure future service to customers were adequate to meet the requirements of G.S. 62-79(a).

2. Utilities Commission § 34— findings not required for CWIP

The Utilities Commission is not required by G.S. 62-133(b)(1) to make findings on the need for construction before considering the reasonableness of CWIP costs incurred where the Commission has already issued a certification that "public convenience and necessity requires, or will require such construction"; or findings that the construction will be completed within a reasonable time when there is evidence in the record that the plant would be completed within a reasonable time and when there was no challenge to the reasonableness of the prices paid by Duke.

3. Utilities Commission § 57— finding that construction work was in progress

The Utilities Commission's finding and conclusion that construction work was in progress at Cherokee Nuclear Station and that the costs should be included in Duke's rate base is supported by competent, material, and substantial evidence in that delay in the construction of Cherokee was due to economic conditions, in that Duke intended to complete Cherokee once its financial circumstances permitted, and in that the Commission was aware of the possibility that uncertain economic conditions might force Duke to cancel Cherokee.

4. Utilities Commission § 34— AFUDC—exclusion from CWIP—capitalization

In a general rate case in which the allowance for funds used during construction, AFUDC, was entered on Duke Power Company's books after 1 July 1979, the effective date for construction work in progress, G.S. 62-133(b)(1), but had accrued on construction work prior to that date, the Utilities Commission erred by including the AFUDC in the rate base as a CWIP expense. However, the AFUDC amount may be capitalized.

5. Utilities Commission §§ 21, 51— power of the Supreme Court to order refunds

The power given a court reviewing an order of the Utilities Commission under G.S. 92-94(b) includes the power to order refunds, even though such

authority is not specifically set out in the statute, because ratepayers would otherwise lack adequate relief while utilities could retain the proceeds of illegally charged rates; moreover, refunds ordered by the Supreme Court do not constitute retroactive ratemaking because rates ordered by the Utilities Commission in an order in which the Commission made an error of law are not lawfully established until the appellate courts have made a final ruling.

6. Utilities Commission § 38— improper use of prior expedited fuel cost proceeding to determine base rates

In a general rate case, the Court of Appeals properly remanded the case to the Utilities Commission where the Commission relied on a prior expedited fuel cost proceeding under G.S. 62-134(e) in determining Duke's base fuel cost because an expedited fuel proceeding considers fluctuations in fuel costs and not the reasonableness of the utility's base fuel cost.

APPEAL by Great Lakes Carbon Corporation and the Kudzu Alliance pursuant to G.S. 7A-30(3) (repealed 1983) from the decision of the Court of Appeals at 64 N.C. App. 266, 307 S.E. 2d 375 (1983), *modified on rehearing*, 66 N.C. App. 456, 311 S.E. 2d 617 (1984), affirming in part and remanding in part the order of the North Carolina Utilities Commission entered 11 February 1982 in Docket No. E-7, Sub. 314. Heard in the Supreme Court 11 June 1984.

On 18 March 1981, Duke Power Company, the applicant-appellee (hereinafter Duke), filed with the North Carolina Utilities Commission (hereinafter Commission) an application to increase its revenues by approximately 19.7% or $211,000,000. The Commission ordered that the application be treated as a general rate case and suspended the proposed rate increase. The matter was set for hearing and public hearings were conducted at several locations across the State. Various parties, including the appellants and the Public Staff of the Commission were permitted to intervene. The Commission issued its final order on 11 February 1982 allowing $166,403,000 of the proposed increase applied for by Duke. After considering data from a test year ending 31 December 1980 the Commission decided that an increase of 11.92% would provide a fair rate of return for Duke. Intervenors Kudzu Alliance (hereinafter Kudzu), Conservation Council of North Carolina, and Great Lakes Carbon Corporation (hereinafter Great Lakes) appealed. The Court of Appeals affirmed the decision of the Commission in all respects except with regard to whether there was sufficient evidence in the record as to the

reasonableness of Duke's fuel costs. The court remanded the case on that issue for further findings of fact.

Intervenors Kudzu and Great Lakes appealed the decision of the Court of Appeals.

Duke Power Company by Steve C. Griffith, Jr. and George W. Ferguson, Jr.; Kennedy, Covington, Lobdell & Hickman by Clarence W. Walker, Stephen K. Rhyne, and Myles E. Standish, attorneys for applicant-appellee Duke Power Company.

Byrd, Byrd, Ervin, Blanton, Whisnant & McMahon, P.A., by Robert B. Byrd and Sam J. Ervin IV, attorneys for intervenor-appellant Great Lakes Carbon Corporation.

Edelstein, Payne and Jordan, by M. Travis Payne, attorney for intervenor-appellant Kudzu Alliance.

COPELAND, Justice.

I.

Appellants argue that the Commission erred in including the sum of $144,841,000 in Duke's retail rate base for construction work in progress (hereinafter CWIP) because its findings on this matter were inadequate as a matter of law. Appellants base their argument on both G.S. § 62-79(a) and G.S. § 62-133(b)(1) (1977) (amended 1981). Each statute will be considered separately.

[1] G.S. § 62-79(a) provides that:

> All final orders and decisions of the Commission shall be sufficient in detail to enable the court on appeal to determine the controverted questions presented in the proceedings and shall include:
>
> (1) Findings and conclusions and the reasons or bases therefor upon all the material issues of fact, law, or discretion presented in the record, and
>
> (2) The appropriate rule, order, sanction, relief or statement of denial thereof.

The appellants contend that the final order of the Commission falls short of this standard because its finding of Fact

Number 7 is simply a recitation of the factors in G.S. § 62-133 (b)(1).[1] We disagree.

The purpose of the findings required by G.S. § 62-79(a) is to provide the reviewing court with sufficient information to allow it to determine the controverted questions presented in the proceedings. In the section of its order entitled "Evidence and Conclusions for Finding of Fact No. 7" the Commission summarized and rejected the statutory interpretation arguments made by the appellants. The Commission then concluded that all of Duke's CWIP expenditures, in particular those for the Cherokee plant and allowance for funds used during construction accrued after 1 July 1979, were reasonable and prudent expenditures under G.S. § 62-133(b)(1). The Commission further concluded that the expenditures were needed to insure adequate service to Duke's customers in the future. The Court of Appeals properly noted that such scant findings and conclusions barely pass muster. *State ex rel. Utilities Commission v. Conservation Council*, 64 N.C. App. at 273, 307 S.E. 2d at 379. We do not approve the practice of using such sparse evidence and conclusions to support the Commission's findings of fact, but we hold that they were adequate to meet the requirements of G.S. § 62-79(a). The Commission's summary of the appellant's argument and its rejection of the same is sufficient to enable the reviewing court to ascertain the controverted questions presented in the proceeding. That is all that G.S. § 62-79(a) requires.

[2] A somewhat more difficult issue is posed by appellants' contention that G.S. § 62-133(b)(1) first requires the Commission to make findings on the reasonableness and prudence of including CWIP expenses in the rate base before it considers the reasonableness of the CWIP costs incurred. G.S. § 62-133(b)(1) as it read at the relevant time provides that the Commission shall:

> Ascertain the reasonable original cost of the public utility's property used and useful, or to be used and useful within a

1. 7. The reasonable original cost of Duke's property used and useful, or to be used and useful within a reasonable time after the test period, in providing the service rendered to the public within this State, less that portion of the cost which has been consumed by previous use recovered by depreciation expense, plus the reasonable original cost of investment in plant under construction (construction work in progress of CWIP) less cost-free capital is $2,138,009,000.

> reasonable time after the test period, in providing the service rendered to the public within this State . . . . In ascertaining the cost of the public utility's property, construction work in progress as of the effective date of this subsection shall be excluded until such plant comes into service but reasonable and prudent expenditures for construction work in progress after the effective date of this subsection shall be included subject to the provisions of subparagraph (b)(5)[2] of this section.

Appellants argue that before the Commission may include CWIP expenses in the rate base it must first find that the plant under construction is necessary and will be completed in a reasonable time.

We hold that G.S. § 62-133(b)(1) does not require the Commission to make new findings on the need for the construction. Before any public utility begins the construction of a facility for generating electricity for use by the public it must first obtain from the Commission a certificate stating that "public convenience and necessity requires, or will require such construction." G.S. § 62-110.1(a). Before such a certificate can be granted the applicant must file an estimate of construction costs and the Commission must hold public hearings. G.S. § 62-110.1(e). This procedure satisfies appellant's argument that the construction must be necessary.

The wording used by the legislature makes it clear that the Commission must include all reasonable CWIP expenditures in the rate base. The only matter left to the discretion of the Commission is whether such expenditures are reasonable and prudent. Evidence of whether the plant under construction will be completed within a reasonable time is pertinent to deciding if expenditures for such construction are reasonable and prudent. While it is the better practice for the Commission to specifically find that the construction will be completed within a reasonable time, the statute does not require it so long as there is evidence in the record that the plant would be completed within a reasonable

2. The reference to subsection (b)(5) in the Michie Company version of the General Statutes appears to be a typographical error even though it is confirmed by 1977 N.C. Sess. Laws c. 691, s. 2. The reference should be to G.S. § 62-133(b)(4a).

time. There was sufficient evidence in the record to allow the Commission to conclude that the Cherokee units would be completed within a reasonable time. We are not persuaded by the appellants' argument that the Commission must make findings as to the cost of each project and when it will be needed. Nowhere in G.S. § 62-133(b)(1) is there such a requirement. To require such extensive evidence would put an undue burden on Duke and cause the ratemaking process to be more time consuming and difficult of administration.

Costs are presumed to be reasonable unless challenged. *Utilities Commission v. Intervenor Residents*, 305 N.C. 62, 76-77, 286 S.E. 2d 770, 779 (1982), and there was no challenge to the reasonableness of the prices paid by Duke. Further, the Commission found that Duke's construction expenditures were reasonably incurred and were needed to provide adequate electric service to its customers. The Commission's findings on this point are supported by competent, material, and substantial evidence and are conclusive on appeal. *Utilities Commission v. Intervenor Residents*, 305 N.C. at 77, 286 S.E. 2d at 779.

II.

[3] We next turn to the portion of CWIP expenditures ($103,880,000) related to the Cherokee Nuclear Station. G.S. § 62-133(b)(1) requires that expenses added to the rate base to represent the costs of construction must come from construction work that is in progress. Appellants argue that work had ceased on Cherokee by the time the hearings were held because Duke had indefinitely delayed construction and had no target date for completion. Work on unit two had been terminated and work on unit one was reduced to a bare minimum. Also, Duke's witness acknowledged that the company had not yet decided whether the Cherokee plant would be completed. However, Duke did offer evidence tending to show that the delay was due to the uncertain economic conditions in 1981, including Duke's financial circumstances, and that the Cherokee units were needed to provide Duke's customer's with an adequate reserve margin. Approximately 166 people were still working on Cherokee unit one, no contracts had been cancelled, and Duke's vice president assured the Commission that Duke intended to complete Cherokee. The Commission considered this evidence and included the costs of Cherokee as a CWIP expenditure.

We note that before this appeal reached the Court of Appeals Duke had abandoned the Cherokee Nuclear Station. G.S. § 62-93 provides that a reviewing court may, in its discretion, remand a case for further consideration by the Commission if evidence has been discovered since the hearing before the Commission "that could not have been obtained for use at that hearing by the exercise of reasonable diligence, and will materially affect the merits of the case, . . ." The question before the Commission to which this evidence applies is whether the construction done at Cherokee Nuclear Station was in progress during the test year ending 31 December 1980. After considering the evidence we hold that the subsequent cancellation of Cherokee does not materially affect the Commission's determination that the Cherokee Nuclear Station was construction work in progress *during the test year.* Therefore, we decline to remand the case for further consideration of this issue.

The validity of the Commission's findings and conclusions must be determined in light of the evidence that was presented to it. There was evidence before the Commission from which it could reasonably conclude that the delay in the construction of Cherokee was due to economic conditions and that Duke intended to complete Cherokee once its financial circumstances enabled it to do so. The Commission was also made aware of the possibility that the uncertain economic conditions prevailing at the time might force Duke to cancel Cherokee. Further, the Court of Appeals correctly pointed out that Duke's failure to specify a definite completion date is irrelevant because the statute does not require it. Based on a review of the entire record, we hold that the Commission's finding and conclusion that construction work was in progress at Cherokee and that the costs should be included in Duke's rate base is supported by competent, material, and substantial evidence and so is binding on this Court. *Utilities Commission v. Intervenor Residents,* 305 N.C. at 76-77, 286 S.E. 2d at 779.

III.

[4] Appellants next argue that the Commission erred in including in Duke's rate base $29,685,371 of allowance for funds used during construction (hereinafter AFUDC) which was entered on Duke's books after 1 July 1979 but accrued on construction

work that occurred prior to that date. CWIP expenses that occur before 1 July 1979 are to be excluded from the rate base until such plant comes into service. G.S. § 62-133(b)(1). Appellants argue that the $29,685,371 AFUDC occurred before 1 July 1979 and so is not includable as a CWIP expense.

For a better understanding of this issue a brief explanation of AFUDC is in order. Before the 1977 amendment of G.S. § 62-133(b)(1), utilities were not allowed to include CWIP in their rate base. Instead, a utility would add together all of the costs incurred by a project each year and multiply that by the AFUDC rate. The AFUDC rate is a rate of interest which represents as nearly as possible the actual cost of money used for construction. The figure that results from multiplying the costs times the AFUDC rate is capitalized annually until the plant comes into service and is then recovered along with the original costs of the plant.

Appellants contend that the AFUDC expenses in question are not includable for several reasons. First, AFUDC expenses in North Carolina have not been recoverable in the past until the plant they are related to has actually gone into service. Second, CWIP under G.S. § 62-133(b)(1) only includes expenditures for construction work that is in progress after the effective date of the statute. Third, G.S. § 62-133(b)(4a) forbids capitalization of AFUDC once a general rate is set after 1 July 1979. We agree that the $29,685,371 AFUDC is not properly includable in the rate base as a CWIP expense.

Prior to the effective date of the statute AFUDC was treated as a part of the cost of the plant. As Justice Lake stated in *Utilities Commission v. Morgan*, 278 N.C. 235, 240, 179 S.E. 2d 419, 422 (1971): "The interest on the investment in this addition to plant, during the construction, is a part of its costs, just as truly as is the purchase price of the bricks, steel, copper wire, labor, etc., which go into the construction." While we have already held that the $29,685,371 AFUDC is not properly includable as a CWIP expense, G.S. § 62-133(b)(4a) does not bar Duke from capitalizing the AFUDC despite the fact that it was not actually entered on Duke's books until after the effective date of the statute. The purpose of G.S. § 62-133(b)(4a) is to prevent utility companies from obtaining a double recovery by capitalizing AFUDC after they have

had CWIP expenses for the same construction included in the rate base. In the case at bar no CWIP expenses can be added to the rate base for the construction on which the $29,685,371 AFUDC had accrued. If Duke were not allowed to capitalize the $29,685,371 AFUDC it would be unable to ever recover that part of its costs. We hold that G.S. § 62-133 (b)(4a) does not require such a result. On remand the Court of Appeals will direct the Commission to reduce Duke's CWIP expenses by $29,685,371 and order Duke to make appropriate refunds. Duke may enter the $29,685,371 on its books as AFUDC on construction that occurred before 1 July 1979.

IV.

[5] The final issue in this case briefed and argued by the parties concerns this Court's power to direct the Commission to order refunds from rates established by final order of the Commission. Duke argues that such refunds cannot be granted because to do so would constitute retroactive rate making prohibited under the North Carolina Statutes. We hold that the law is otherwise and affirm this Court's power to direct the Commission to order refunds.

"[R]etroactive rate making occurs when, . . . the utility is required to refund revenues collected, pursuant to the then lawfully established rates, for such past use." *Utilities Comm. v. Edmisten*, 291 N.C. 451, 468, 232 S.E. 2d 184, 194 (1977). The key phrase here is "lawfully established rates." A rate has not been lawfully established simply because the Commission has ordered it. If the Commission makes an error of law in its order from which there is a timely appeal the rates put into effect by that order have not been "lawfully established" until the appellate courts have made a final ruling on the matter.

Duke contends that the statutes limit any relief that this Court might give to prospective relief. In support Duke relies on the dichotomy between rates fixed by the Commission and those which are simply allowed to go into effect. Rates established by the Commission are deemed to be just and reasonable. G.S. § 62-132. Rates which the Commission simply allows to go into effect may be challenged by interested parties or the Commission, and after a hearing the Commission may order a refund if it finds the rates to be different from those established by the Commis-

sion and unjust or unreasonable. *Utilities Comm. v. Edmisten*, 291 N.C. 327, 352, 230 S.E. 2d 651, 666 (1976).

Duke concedes that G.S. §§ 62-130(e), 132 and 136 grant specific authority to the Commission to order refunds. However, Duke argues that G.S. § 62-94 which sets out the extent of appellate review prevents this Court from ordering refunds because it does not specifically grant such authority. G.S. § 62-94(b) gives the reviewing court the power to affirm, reverse, remand, or modify the order of the Commission if the substantial rights of the appellants have been prejudiced. This Court has often ordered refunds in the past, *State ex rel. Utilities Commission v. Public Staff*, 309 N.C. 195, 306 S.E. 2d 435 (1983); *Utilities Comm. v. Edmisten*, 299 N.C. 432, 263 S.E. 2d 583 (1980); *State ex rel. Utilities Comm. v. Edmisten*, 291 N.C. 451, 232 S.E. 2d 184 (1977), and we hold that G.S. § 62-94(b) gives this Court ample basis for ordering refunds to ratepayers who have been charged unlawfully high rates. To hold otherwise would deny ratepayers who appeal from erroneous orders of the Commission adequate relief while allowing utilities to retain the proceeds of rates that were illegally charged. It defies common sense to believe that the Legislature intended such a result. We, therefore, hold that this Court is authorized to order refunds when the Commission has made an error of law in its rate making procedures.

V.

[6] We next turn to the Commission's determination of Duke's reasonable operating expenses as required by G.S. § 62-133. Neither party has argued this issue, but we will address it because of Chief Judge Vaughn's dissent. In determining Duke's base fuel cost the Commission relied on a fuel cost previously set in an expedited fuel cost proceeding pursuant to G.S. § 62-134(e) (Supp. 1979) (repealed 1982). In the expedited fuel cost proceeding the Commission had set Duke's fuel costs at 1.4660 cents per kWh. In its order the Commission reduced the base fuel cost to 1.3093 cents per kWh by subtracting .1567 cents kWh for fuel savings related to the operation of the McGuire unit from the 1.4660 cents per kWh cost. The Public Staff's recommended fuel cost was also based on a G.S. § 62-134(e) proceeding. There was some testimony concerning the reasonableness of Duke's fuel costs in-

curred over the twelve month test period, but there is no indication in the Commission's order that it ever ruled on the reasonableness of the fuel costs. The Court of Appeals remanded the case for further findings on the reasonableness of Duke's fuel costs because the absence of proper findings frustrates appellate review. G.S. § 62-94(b)(4). We agree.

The purpose of the expedited fuel proceeding was to allow a utility to change its rates based solely on fluctuations in fuel costs. The reasonableness of the utility's base fuel costs are not to be considered. *Utilities Commission v. Public Staff*, 309 N.C. at 212, 306 S.E. 2d at 445. On the other hand, in a general rate case brought under G.S. § 62-133(b)(3) the Commission must determine the reasonableness of fuel costs. The Commission's findings are inadequate to do so in this case. The Commission simply accepted the fuel cost established in the G.S. § 62-134(e) proceeding before adjusting it to reflect savings resulting from the operation of McGuire. Based on our decision in *State ex rel. Utilities Commission v. N.C. Textile Mfrs. Ass'n*, 309 N.C. 238, 306 S.E. 2d 113 (1983) (per curiam) we affirm the Court of Appeals' decision to remand the case for a determination of whether there is sufficient evidence of reasonableness on which to base new findings on the proper level of fuel expenses to be included in Duke's rates. If there is not sufficient evidence in the record on which to base new findings, the Commission may reopen the hearing and take additional evidence on the reasonableness of Duke's fuel costs over the twelve month test period.

VI.

Lastly, we note that the portion of the Court of Appeals' opinion dealing with the inclusion of McGuire Unit One in the rate base and the separate hearing concerning McGuire has not been challenged by any of the parties. We find no error on these points.

The decision of the Court of Appeals is

Affirmed in part and reversed in part.

STATE OF NORTH CAROLINA v. JOHN STERLING GARDNER

No. 207A84

(Filed 2 October 1984)

1. **Criminal Law § 138— Fair Sentencing Act—sentencing hearing—finding of statutory mitigating factor not requested by defendant**

The court erred in a sentencing hearing when it failed to find a mitigating factor specifically listed in N.C. G.S. 15A-1340.4(a)(2), even though defendant did not request that finding, when all of the substantial, uncontradicted and manifestly credible evidence supported a finding that the defendant voluntarily acknowledged wrongdoing in connection with the offense to a law enforcement officer.

2. **Criminal Law § 138— Fair Sentencing Act—non-statutory mitigating factors not submitted by defendant**

The trial judge is not required to consider whether the evidence supports the existence of non-statutory mitigating factors in the absence of specific request by defense counsel.

APPEAL by defendant from *Judge Helms* at the 28 November 1983 Criminal Session of ROWAN Superior Court.

Defendant was charged in a bill of indictment with the first degree murder of Ray Eugene Shaver. He entered a plea of guilty to second degree murder.

At trial the State introduced evidence tending to show that in February 1983 Captain of Detectives Glenn A. Sides of the Rowan County Sheriff's Department received information that Defendant Gardner, who was confined in Forsyth County jail on an unrelated charge, wished to talk about the murder of Ray Eugene Shaver. Shaver had been killed in Rowan County on 17 December 1982 and at the time Gardner expressed his desire to speak with Rowan County police officers about the crime, they had no suspects.

Defendant made two inculpatory statements to Captain Sides in February 1983 and still another statement in September 1983. Each of these statements varied factually but each placed defendant at the scene of the murder as an aider and abettor in the felony of armed robbery.

The State also offered evidence of defendant's past criminal record which consisted of a misdemeanor breaking and entering

in 1976, three counts of breaking or entering into a motor vehicle in 1978, felonious breaking or entering into a building in 1978, two counts of felonious escape in 1978, a conviction of armed robbery in 1983 and two counts of murder in the first degree in 1983.

Defendant's evidence consisted of a statement made by his attorney. The attorney said defendant had told him that the original statement he made to Rowan County police officers was true. Defendant also told his attorney he would thereafter testify in court against the parties named in that statement as participants in the crime which resulted in Mr. Shaver's death.

The trial judge found as a single aggravating factor that the defendant had a prior conviction or convictions for criminal offenses punishable by more than 60 days' confinement. He found no mitigating factors. After finding that the aggravating factor was proven by a preponderance of the evidence and that it outweighed the factors in mitigation, the trial court entered judgment imposing a sentence of life imprisonment.

Rufus L. Edmisten, Attorney General, by John R. B. Matthis, Special Deputy Attorney General, and Alan S. Hirsch, Assistant Attorney General, for the State.

M. Bays Shoaf, for defendant-appellant.

BRANCH, Chief Justice.

[1] Defendant assigns as error the failure of the trial judge, *ex mero motu*, to 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. N.C. Gen. Stat. § 15A-1340.4(a)(2)(1) (1983).

We considered a question similar to the one here presented in *State v. Jones*, 309 N.C. 214, 306 S.E. 2d 451 (1983). There, in finding that the trial court erred in failing to find one of the statutory mitigating factors listed in N.C. Gen. Stat. § 15A-1340.4(a)(2) this Court stated:

> When evidence in support of a particular mitigating or aggravating factor is uncontradicted, substantial, and there is no reason to doubt its credibility, to permit the sentencing judge simply to ignore it would eviscerate the Fair Sentenc-

ing Act. The Act clearly states that unless the sentence is imposed pursuant to a plea arrangement "he *must* consider each of the [statutory] aggravating and mitigating factors." G.S. 15A-1340.4(a) (Cum. Supp. 1981) (emphasis added). The Act further states that one of "[t]he primary purposes of sentencing a person convicted of a crime [is] to impose a punishment commensurate with the injury the offense has caused, taking into account factors that may diminish or increase the offender's culpability. . . ." G.S. 15A-1340.3 (Cum. Supp. 1981). To allow the trial court to ignore uncontradicted, credible evidence of either an aggravating or a mitigating factor would render the requirement that he consider the statutory factors meaningless, and would be counter to the objective that the punishment imposed take "into account factors that may diminish or increase the offender's culpability." The sentencing judge, even when required to find factors proved by uncontradicted, credible evidence, may still attribute whatever weight he deems appropriate to the individual factors found when balancing them and arriving at a prison term. *State v. Ahearn*, 307 N.C. 584, 596-97, 300 S.E. 2d 689, 697 (1983) (quoting *State v. Davis*, 58 N.C. App. 330, 333-34, 293 S.E. 2d 658, 661, *disc. rev. denied*, 306 N.C. 745, 295 S.E. 2d 482 (1982)); G.S. 15A-1340.4(b) (Cum. Supp. 1981) (trial court must find aggravating factors outweigh mitigating if he imposes term greater than presumptive or that mitigating factors outweigh aggravating if he imposes term less than presumptive).

. . .

[T]he defendant bears the burden of persuasion on mitigating factors if he seeks a term less than the presumptive. Thus, when a defendant argues, as in the case at bar, that the trial court erred in failing to find a mitigating factor proved by uncontradicted evidence, his position is analogous to that of a party with the burden of persuasion seeking a directed verdict. He is asking the court to conclude that "the evidence so clearly establishes the fact in issue that no reasonable inferences to the contrary can be drawn," and that the credibility of the evidence "is manifest as a matter of law." (Citations omitted.)

State v. Jones, 309 N.C. at 220, 306 S.E. 2d at 455.

In the instant case all of the substantial, uncontradicted and manifestly credible evidence supports a finding that prior to his arrest for the murder of Ray Eugene Shaver, "the defendant voluntarily acknowledged wrongdoing in connection with the offense to a law enforcement officer." N.C. Gen. Stat. § 15A-1340.4 (a)(2)(1). We therefore hold that the trial judge erred when he failed to find this statutory mitigating factor, even though defendant did not request this finding. For this reason, this cause must be remanded for a new sentencing hearing. *See State v. Ahearn*, 307 N.C. 584, 602, 300 S.E. 2d 689, 700-01 (1983).

[2] We wish to make it abundantly clear that the duty of the trial judge to find a mitigating factor that has not been submitted by defendant arises only when the evidence offered at the sentencing hearing supports the existence of a mitigating factor *specifically listed in N.C. Gen. Stat. § 15A-1340.4(a)(2)* and when the defendant meets the burden of proof established in *State v. Jones*, 309 N.C. 214, 306 S.E. 2d 451 (1983). The trial judge is not required to consider whether the evidence supports the existence of non-statutory mitigating factors in the absence of specific request by defense counsel.

The judgment entered in the trial court is vacated and this cause is remanded for a new sentencing hearing.

Remanded for a new sentencing hearing.

Sherrod v. Any Child or Children

WATSON N. SHERROD, JR., INDIVIDUALLY, MAY HOLTON SHERROD, WIFE OF WATSON N. SHERROD, JR.; WATSON N. SHERROD, JR., IN HIS CAPACITY AS EXECUTOR OF THE ESTATE OF WATSON N. SHERROD, SR.; WATSON N. SHERROD, JR., IN HIS CAPACITY AS TRUSTEE UNDER ITEM FOUR OF THE LAST WILL AND TESTAMENT OF WATSON N. SHERROD, SR.; MAY McLAUGHLIN SHERROD, AN UNMARRIED ADULT; ELIZABETH LLEWELLYN SHERROD, AN UNMARRIED ADULT; AND WILLIAM LLEWELLYN SHERROD, AN UNMARRIED MINOR, ACTING BY AND THROUGH JOHN P. MORRIS, HIS DULY APPOINTED GUARDIAN AD LITEM
v.
ANY CHILD OR CHILDREN HEREAFTER BORN TO WATSON N. SHERROD, JR. AND ANY CHILD OR CHILDREN, BORN OR UNBORN, OR KNOWN OR UNKNOWN WHO MAY HEREAFTER BE ADOPTED BY WATSON N. SHERROD, JR.; ROY A. COOPER, JR., GUARDIAN AD LITEM OF ANY CHILD OR CHILDREN HEREAFTER BORN TO WATSON N. SHERROD, JR.; AND STEPHEN M. VALENTINE (NOW FRANKLIN L. ADAMS, JR.), GUARDIAN OR ANY CHILD OR CHILDREN, BORN OR UNBORN, OR KNOWN OR UNKNOWN WHO MAY HEREAFTER BE ADOPTED BY WATSON N. SHERROD, JR.

No. 637A83

(Filed 2 October 1984)

Trusts § 6.3— power of trustee—sale of land

The Court of Appeals erred in part by holding that a trustee has the power to sell all or any part of a farm which is income producing and valuable for agricultural purposes without approval of the court as provided by law.

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

APPEAL by defendants, pursuant to G.S. 7A-30(2), from a decision of a divided panel of the Court of Appeals, 65 N.C. App. 252, 308 S.E. 2d 904 (1984), reversing and vacating in part and remanding a declaratory judgment interpreting the will of Watson N. Sherrod, Sr., entered by *Rouse, J.*, at the 13 July 1982 Civil Term of Superior Court, NASH County.

John E. Davenport for plaintiffs-appellees.

Valentine, Adams, Lamar & Etheridge, by Franklin L. Adams, Jr., Guardian Ad Litem for any child or children hereafter adopted by Watson N. Sherrod, Jr., defendant-appellants.

Fields, Cooper & Henderson, by Leon Henderson, Jr., Guardian Ad Litem for any child or children hereafter born to Watson N. Sherrod, Jr., defendant-appellants.

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 Item Four of testator's will created an active trust and conferred upon the trustee the power to sell the property held in trust. Further, the court held that the class closed at the death of the testator, thus excluding as beneficiaries any children born after the death of the testator. The cause was remanded pursuant to G.S. 1-255(3) to resolve genuine issues regarding the parties' rights and liabilities under the will.

After carefully reviewing the record and briefs filed in this case and hearing oral arguments of counsel for all parties, we find the opinion of the Court of Appeals correct except for that portion of the opinion which holds that the trustee has the power to sell the property without prior court approval. The Court of Appeals relies upon *Ripley v. Armstrong*, 159 N.C. 158, 74 S.E. 961 (1912) to support this conclusion. We do not find *Ripley* controlling, however, because the trust property in this case, unlike the trust property in *Ripley*, is income producing and valuable for agricultural purposes. Accordingly, that portion of the Court of Appeals' opinion which holds that court approval of a sale of the farm is not required is reversed; and the trial court's judgment that the trustee does not have the power to sell any part or all of the Hunter Farm, except upon approval of the court as provided by law, is reinstated. As thus modified, we affirm the decision of the Court of Appeals.

Modified and affirmed.

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

STATE OF NORTH CAROLINA v. ERNEST McLEOD

No. 135PA84

(Filed 2 October 1984)

ON discretionary review pursuant to G.S. § 7A-31 of a decision of the Court of Appeals, 67 N.C. App. 186, 312 S.E. 2d 674 (1984), finding no error in the trial and sentencing of defendant before *Barnette, J.*, for assault with a deadly weapon inflicting serious injury at the 7 February 1983 Criminal Session of Superior Court, ORANGE County.

At his trial, defendant denied any involvement in the assault upon the prosecuting witness, Willie Johnson, and raised a defense of alibi. Defendant sought to have his witness, Jerry Rogers, declared hostile so that he could cross-examine and impeach Rogers with his prior extrajudicial statements tending to inculpate Rogers for the assault with which defendant was charged. On voir dire, three witnesses (including defendant's brother) testified that Jerry Rogers had told them, or they had overheard him say, that he had cut a "white dude" on the night of the assault in question. During voir dire, defendant examined Jerry Rogers who denied making these statements and stated that, prior to trial, he had never seen the victim. Defendant's request that Rogers be declared a hostile witness was denied. The trial court ruled that defendant could call Rogers as a witness, but that he could not impeach Rogers with evidence of Rogers' prior statements. On direct examination before the jury, Rogers denied that he had cut the victim or made any statements that he had cut a "white dude."

The defendant appealed his conviction, contending that it was error and a denial of due process as guaranteed by the United States Constitution and the North Carolina Constitution to prohibit defendant from (1) cross-examining Rogers as a hostile witness and (2) then attempting to impeach him through evidence of prior inconsistent statements by way of testimony offered from the three voir dire witnesses. The Court of Appeals, in an opinion by Whichard, J., with Arnold, J., and Becton, J., concurring, found no error or constitutional violation in the ruling of the trial court and affirmed defendant's conviction.

On 30 April 1984, we allowed defendant's petition for discretionary review to determine whether the Court of Appeals erred in affirming the trial court's ruling in refusing to allow defendant to impeach his witness with prior statements tending to inculpate the witness.

Rufus L. Edmisten, Attorney General, by Francis W. Crawley, Assistant Attorney General, for the State.

David M. Rooks, III, for defendant-appellant.

PER CURIAM.

The defendant has maintained throughout the trial and appellate process that the technical application of the North Carolina evidentiary rule that in criminal cases a defendant may not impeach his witness by evidence that the witness had made prior statements inconsistent with or contradictory to his testimony unless the party calling the witness has been misled to his prejudice, combined with evidentiary hearsay rules regarding declarations or admissions against penal interest, resulted in a denial of due process and a fair trial under the United States Supreme Court decision in *Chambers v. Mississippi*, 401 U.S. 284, 93 S.Ct. 1038, 35 L.Ed. 2d 297 (1973).

The Court of Appeals carefully considered and rejected defendant's evidentiary and constitutional arguments under the applicable rules of evidence, and decisions of this Court and the United States Supreme Court.[1] After reviewing the record and briefs, and hearing oral argument on the question presented, we conclude that the decision of the Court of Appeals should be and it is hereby

Affirmed.

1. G.S. 8C-1, Rule 607 became effective 1 July 1984, and has no application to this case. *State v. Cope*, 309 N.C. 47, 305 S.E. 2d 676 (1983).

STATE OF NORTH CAROLINA v. STEVE THOMAS SIMMONS

No. 133A84

(Filed 2 October 1984)

APPEAL of right under G.S. 7A-30(2) from a decision of a divided panel of the Court of Appeals, 66 N.C. App. 402, 311 S.E. 2d 357 (1984), finding no error in the judgment entered by *Judge Edward K. Washington* on 13 January 1983 in Superior Court, STOKES County. Heard in the Supreme Court 10 September 1984.

Rufus L. Edmisten, Attorney General, by Francis W. Crawley, Assistant Attorney General, for the State.

White and Crumpler, by Fred G. Crumpler, Jr. and Randolph M. James, for the defendant appellant.

PER CURIAM.

The decision of the Court of Appeals is

Affirmed.

STATE OF NORTH CAROLINA v. CARLTON KENT BOWEN

No. 217A84

(Filed 2 October 1984)

APPEAL by the State of North Carolina pursuant to N.C.G.S. 7A-30(2) from the decision of a divided panel of the Court of Appeals, reported in 67 N.C. App. 512, 313 S.E. 2d 196 (1984), which overruled the judgment entered by *Rousseau, J.*, at the 11 October 1982 session of Superior Court, FORSYTH County, and granted a new trial to defendant. Heard in the Supreme Court 13 September 1984.

Rufus L. Edmisten, Attorney General, by T. Byron Smith, Associate Attorney, for the State.

Alexander, Wright, Parris, Hinshaw & Tash, by Robert D. Hinshaw, for defendant.

PER CURIAM.

There being no issue before this Court for review as required by Rule 16(b) of the North Carolina Rules of Appellate Procedure, the appeal is

Dismissed.

STATE OF NORTH CAROLINA v. PRINCESS OHEEDA DULA

No. 252A84

(Filed 2 October 1984)

DEFENDANT appeals as a matter of right pursuant to G.S. 7A-30(2) from a decision of a divided panel of the Court of Appeals, 67 N.C. App. 748, 813 S.E. 2d 899 (1984), affirming the judgment, entered by *Griffin, J.*, at the 3 November 1982 Criminal Session of Superior Court, CALDWELL County, finding defendant guilty of felonious breaking or entering.

Rufus L. Edmisten, Attorney General, by Walter M. Smith, Assistant Attorney General, for the State-appellee.

Whisnant, Simmons & Groome, by G. C. Simmons, III, for defendant-appellant.

PER CURIAM.

The Court of Appeals correctly held that the trial court did not commit error when it required the defendant to make restitution for the loss and damage caused by the defendant "arising out of" the offense committed by her as provided by G.S. 15A-1343(d).

The decision of the Court of Appeals is

Affirmed.

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

ALAMANCE COUNTY HOSPITAL v. NEIGHBORS

No. 328PA84.

Case below: 68 N.C. App. 771.

Petition by plaintiff for discretionary review under G.S. 7A-31 allowed 2 October 1984.

AREA MENTAL HEALTH AUTHORITY v. SPEED

No. 467P84.

Case below: 69 N.C. App. 247.

Petition by defendant for discretionary review under G.S. 7A-31 denied 2 October 1984.

BENNETT v. BD. OF EDUCATION

No. 494P84.

Case below: 69 N.C. App. 615.

Petition by defendant for writ of certiorari to North Carolina Court of Appeals denied 2 October 1984.

BLACK v. BLACK

No. 459P84.

Case below: 69 N.C. App. 559.

Petition by defendant for discretionary review under G.S. 7A-31 denied 2 October 1984.

BUIE v. JOHNSTON

No. 463PA84.

Case below: 69 N.C. App. 463.

Petition by plaintiffs for discretionary review under G.S. 7A-31 allowed 2 October 1984.

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

COSTIN DISTRIBUTING v. KNIGHT

No. 423P84.

Case below: 69 N.C. App. 177.

Petition by defendant for discretionary review under G.S. 7A-31 denied 2 October 1984.

DAY v. COFFEY

No. 491P84.

Case below: 68 N.C. App. 509.

Petition by plaintiff for writ of certiorari to North Carolina Court of Appeals denied 2 October 1984.

DUKE POWER CO. v. CITY OF HIGH POINT

No. 449P84.

Case below: 69 N.C. App. 378.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 2 October 1984.

FESPERMAN v. FESPERMAN

No. 548P84.

Case below: 70 N.C. App. 344.

Petition by defendant for discretionary review under G.S. 7A-31 denied 4 October 1984.

GLENN v. WAGNER

No. 219PA84.

Case below: 67 N.C. App. 563.

Petition by plaintiffs for discretionary review under G.S. 7A-31 allowed 2 October 1984.

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

IN RE FORECLOSURE OF MILLS

No. 361P84.

Case below: 68 N.C. App. 694.

Petition by Horace Smith for discretionary review under G.S. 7A-31 denied 2 October 1984.

INDUSTRIAL & TEXTILE PIPING v. INDUSTRIAL RIGGING

No. 461P84.

Case below: 69 N.C. App. 511.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 2 October 1984.

KENNEY v. MEDLIN CONSTRUCTION & REALTY

No. 318P84.

Case below: 68 N.C. App. 339.

Petition by defendant for discretionary review under G.S. 7A-31 denied 2 October 1984.

LARGENT v. ACUFF

No. 462P84.

Case below: 69 N.C. App. 439.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 2 October 1984.

LOWDER v. ROGERS

No. 337P84.

Case below: 68 N.C. App. 507.

Petition by plaintiffs for discretionary review under G.S. 7A-31 denied 2 October 1984.

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

McCRIMMON v. N. C. MUTUAL LIFE INS. CO.

No. 431P84.

Case below: 69 N.C. App. 683.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 2 October 1984.

McDANIEL v. N. C. MUTUAL LIFE INS. CO.

No. 526P84.

Case below: 70 N.C. App. 480.

Petition by defendant for discretionary review under G.S. 7A-31 and for writ of supersedeas and temporary stay denied 2 October 1984.

McNAIR CONSTRUCTION CO. v. FOGLE BROS. CO.

No. 257P84.

Case below: 64 N.C. App. 282.

Petition by third party defendant (Lifetime Doors, Inc.) for discretionary review under G.S. 7A-31 denied 2 October 1984.

MILLER v. KITE

No. 479PA84.

Case below: 69 N.C. App. 679.

Appeal by defendant based on substantial constitutional question allowed and petition for discretionary review under G.S. 7A-31 denied 2 October 1984.

PEOPLES v. CONE MILLS CORP.

No. 460PA84.

Case below: 69 N.C. App. 263.

Petition by defendant for discretionary review under G.S. 7A-31 allowed 2 October 1984.

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

SIMMONS v. C. W. MYERS TRADING POST

No. 414P84.

Case below: 68 N.C. App. 511.

Petition by plaintiff for writ of certiorari to North Carolina Court of Appeals denied 2 October 1984.

SNIPES v. JACKSON

No. 392P84.

Case below: 69 N.C. App. 64.

Petitions by defendant Jackson and by several other defendants for discretionary review under G.S. 7A-31 denied 2 October 1984. Motion by plaintiff to dismiss appeal by defendant Jackson for lack of substantial constitutional question allowed 2 October 1984. Notice of appeal by several other defendants under G.S. 7A-30 dismissed 2 October 1984.

SON-SHINE GRADING v. ADC CONSTRUCTION CO.

No. 332P84.

Case below: 68 N.C. App. 417.

Petition by defendant for discretionary review under G.S. 7A-31 denied 2 October 1984.

STARLING v. SPROLES

No. 437P84.

Case below: 69 N.C. App. 598.

Petition by several defendants for discretionary review under G.S. 7A-31 denied 2 October 1984.

STATE v. BAKER

No. 508P84.

Case below: 65 N.C. App. 430.

Petition by defendant for writ of certiorari to North Carolina Court of Appeals denied 2 October 1984.

STATE v. BEAM

No. 527P84.

Case below: 70 N.C. App. 181.

Petition by defendant for writ of supersedeas and temporary stay denied 27 September 1984.

STATE v. BROWN

No. 242P84.

Case below: 68 N.C. App. 162.

Petition by defendant for discretionary review under G.S. 7A-31 denied 2 October 1984. Attorney General's motion to dismiss appeal for lack of substantial constitutional question allowed 2 October 1984.

STATE v. CALDWELL

No. 279P84.

Case below: 68 N.C. App. 488.

Petition by Attorney General for discretionary review under G.S. 7A-31 denied 2 October 1984.

STATE v. DOUGLAS

No. 502P84.

Case below: 69 N.C. App. 770.

Petition by defendant for discretionary review under G.S. 7A-31 denied 2 October 1984.

STATE v. DOWNING

No. 161PA84.

Case below: 66 N.C. App. 686.

Petition by defendant for discretionary review under G.S. 7A-31 allowed 2 October 1984.

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

STATE v. GARDNER

No. 390A84.

Case below: 68 N.C. App. 515.

Petition by defendant for writ of certiorari to the North Carolina Court of Appeals under Rule 16(b) allowed as to additional issues 2 October 1984.

STATE v. HICKS

No. 553P84.

Case below: 70 N.C. App. 611.

Petition by defendant for discretionary review under G.S. 7A-31 denied 17 October 1984.

STATE v. JACKSON

No. 482P84.

Case below: 69 N.C. App. 769.

Petition by defendant for discretionary review under G.S. 7A-31 denied 2 October 1984.

STATE v. LEWIS

No. 389P84.

Case below: 68 N.C. App. 575.

Petition by defendant for discretionary review under G.S. 7A-31 denied 2 October 1984. Motion by Attorney General to dismiss appeal for lack of substantial constitutional question allowed 2 October 1984.

STATE v. MATTHEWS

No. 465P84.

Case below: 69 N.C. App. 526.

Petition by defendant for discretionary review under G.S. 7A-31 denied 2 October 1984. Attorney General's motion to dismiss appeal for lack of substantial constitutional question allowed 2 October 1984.

STATE v. MEDLIN

No. 438P84.

Case below: 69 N.C. App. 340.

Petition by defendant for discretionary review under G.S. 7A-31 denied 2 October 1984.

STATE v. NELSON

No. 466P84.

Case below: 69 N.C. App. 455.

Petition by defendant for discretionary review under G.S. 7A-31 denied 2 October 1984.

STATE v. PALMER

No. 542P84.

Case below: 70 N.C. App. 496.

Petition by defendant for discretionary review under G.S. 7A-31 and for writ of supersedeas and temporary stay denied 1 October 1984.

STATE v. PHILLIPS

No. 263P84.

Case below: 67 N.C. App. 757.

Petition by defendant for discretionary review under G.S. 7A-31 denied 2 October 1984. Attorney General's motion to dismiss appeal for lack of substantial constitutional question allowed 2 October 1984.

STATE v. ROZIER

No. 518P84.

Case below: 68 N.C. App. 38.

Petition by defendant Carter for writ of certiorari to North Carolina Court of Appeals denied 2 October 1984.

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

STATE v. SNYDER

No. 76P84.

Case below: 66 N.C. App. 358.

Petition by Attorney General for discretionary review under G.S. 7A-31 and for writ of supersedeas and temporary stay denied 2 October 1984.

STATE v. SWINSON

No. 589P84.

Case below: 70 N.C. App. 496.

Petition by defendant for discretionary review under G.S. 7A-31 denied 23 October 1984.

STEPHENSON v. ROWE

No. 515A84.

Case below: 69 N.C. App. 717.

Petition by defendant for discretionary review under G.S. 7A-31 denied as to additional issues 2 October 1984.

STEVENS v. STEVENS

No. 380P84.

Case below: 68 N.C. App. 234.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 2 October 1984.

THIEL v. DETERING

No. 350P84.

Case below: 68 N.C. App. 754.

Petition by defendant for discretionary review under G.S. 7A-31 denied 2 October 1984.

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

TRUSTEES OF ROWAN COLLEGE v.
HAMMOND ASSOCIATES

No. 376PA84.

Case below: 68 N.C. App. 565.

Petition by plaintiff for discretionary review under G.S. 7A-31 allowed 2 October 1984.

WACHOVIA BANK v. GUTHRIE

No. 230P84.

Case below: 67 N.C. App. 622.

Petition by plaintiff for writ of certiorari to North Carolina Court of Appeals denied 2 October 1984.

WILDCATT v. SMITH

No. 407PA84.

Case below: 69 N.C. App. 1.

Petition by plaintiff for discretionary review under G.S. 7A-31 allowed 2 October 1984. Motion by defendant to dismiss appeal for lack of substantial constitutional question denied 2 October 1984.

WILSON v. LUMBERMENS

No. 410P84.

Case below: 69 N.C. App. 178.

Petition by defendant for discretionary review under G.S. 7A-31 denied 2 October 1984. Notice of appeal by defendant dismissed 2 October 1984.

WILSON v. LUMBERMENS

No. 411P84.

Case below: 69 N.C. App. 178.

Petition by defendant for discretionary review under G.S. 7A-31 denied 2 October 1984.

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

WINFIELD v. PIERCE

No. 317P84.

Case below: 68 N.C. App. 357.

Petition by plaintiffs for discretionary review under G.S. 7A-31 denied 2 October 1984.

STATE OF NORTH CAROLINA v. DAVID EARL HUFFSTETLER

No. 329A83

(Filed 6 November 1984)

1. **Jury § 6— individual voir dire—sequestration of the venire—prohibition of jury dispersal—refused—no abuse of discretion**

There was no abuse of discretion in the trial court's denial of defendant's motions for individual *voir dire* of the venire, for sequestration of the venire, and to prohibit jury dispersal.

2. **Criminal Law § 135.3; Jury § 7.11; Constitutional Law § 63— death qualifying the jury proper—death penalty constitutional**

There was no error in "death qualifying" the jury, and North Carolina's death penalty statutes are constitutional.

3. **Criminal Law § 99.2— court's opening comments to the jury—necessity for sentencing hearing—no prejudice**

There was no prejudice in the trial court's opening remark to the jury that the court would be required to conduct a sentencing hearing if defendant should be found guilty, despite the provision in G.S. 15A-2000(a)(1) that the court is not required to hold a separate sentencing hearing if it is clear that no evidence of aggravating circumstances has been or will be introduced. The court's statement merely informed potential jurors that their function might involve determination of the appropriate sentence, a sentencing hearing was required, and defense counsel made almost identical statements to certain prospective jurors during the selection of the jury.

4. **Criminal Law § 135.3— exclusion of venire—members opposed to death penalty—proper**

Although a prosecutor's questions during *voir dire* included the incorrect assumption that a verdict of guilty of murder in the first degree standing alone might result in the imposition of the death penalty, jurors were properly excused for cause when they clearly indicated that they would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed.

5. **Jury § 6.2— voir dire—instructions on the law by counsel**

There was no error in sustaining objections to defense counsel's statements during *voir dire* concerning the significance of bills of indictment where the statements were efforts to instruct the jury on the law rather than questions designed to reveal bias.

6. **Jury § 6.3— voir dire—repetitious questions—remotely relevant questions**

The court did not err in refusing to permit defendant to question prospective jurors concerning the positions leaders of their churches held on the death penalty when each juror defendant sought to question had previously indicated that he or she had no moral or religious scruples concerning the death penalty, and when positions held by leaders of the jurors' churches would be remotely

relevant at best. Furthermore, a question to a prospective juror as to whether she had previously had any occasion to discuss her views on the death penalty was properly sustained as repetitious.

7. Homicide § 20.1— photographs—gruesome—admissible

Photographs of the area where the victim's body was found were properly admitted because the photographs, although gruesome, illustrated the testimony of an officer as to conditions at the crime scene shortly after the body was discovered.

8. Criminal Law § 42.3— clothing—identification as defendant's—admissible

There was no error in admitting items of clothing which allegedly belonged to defendant where the clothing was found in a plastic bag not far from the scene of the murder, where the clothing was covered with blood of a type consistent with that of the victim, and where defendant's wife identified two of the items unequivocally and described the third as being "like" defendant's. No objection was made to the testimony as to the third item at trial and the admission of that testimony did not amount to "plain error."

9. Criminal Law §§ 50.1, 55.1— expert opinion based in part on tests performed by someone other than witness—admissible

There was no error in admitting the opinion testimony of an expert in the field of forensic serology which was partly based on lab tests performed by someone else because the tests are sufficiently reliable to support the admission of an expert opinion based on those tests. There was no violation of the Sixth Amendment because the defendant had the opportunity to fully cross-examine the expert testifying against him, and the jury had plenary opportunity to understand the basis for the expert's opinion and to determine whether that opinion should be found credible. G.S. 8C-1, Rule 703.

10. Homicide § 21.5— first degree murder—motion to dismiss—evidence sufficient

There was sufficient evidence of premeditation and deliberation to submit first degree murder to the jury where the evidence showed an extremely brutal slaying of a sixty-five-year-old woman in her home; where the victim died as a result of numerous wounds to her face, head, neck, and shoulders inflicted over a period of some time; where there was substantial evidence from which to infer that many of the blows were inflicted after the deceased had been felled and rendered helpless; where there was no evidence of provocation on the part of the deceased; and where there was further evidence tending to support an inference of premeditation in that the telephone had been removed from its socket. G.S. 14-17.

11. Criminal Law § 102.8— prosecutor's argument to the jury—failure to produce exculpatory evidence

In a first degree murder prosecution in which defendant did not testify, there was no error in allowing the prosecutor to argue to the jury that "there is no evidence that you heard in this case that is consistent with [the defendant's] innocence" where the prosecutor's comments did not go beyond direct rebuttal of the argument made previously by a defense attorney, and where the defense attorneys as well as the trial court reminded the jury that defend-

ant's silence created no presumption against him. Moreover, the State may properly bring to the jury's attention a failure to produce exculpatory evidence since exculpatory evidence need not come solely from a defendant's testimony.

12. Criminal Law § 102.6— prosecutor's argument—within the bounds of discretion

The trial court was within the bounds of its discretion in allowing a prosecutor's remarks, which, although touching upon matters not testified to, were reasonable inferences based on the evidence and were within the wide latitude properly afforded counsel in argument.

13. Criminal Law § 120.1— first degree murder—failure to instruct that sentencing hearing not required if no aggravating circumstance

The court did not err by failing to instruct the jury that a sentencing hearing would be held only if there was evidence of an aggravating circumstance because a sentencing hearing was, in fact, required, and because defendant did not show prejudice on appeal.

14. Criminal Law § 101.4— jury review of photographs in jury room—no prejudice

There was no prejudice when the court allowed the jury to take photographs which had been admitted into evidence into the jury room because defendant did not show a reasonable probability that a different result would have been reached had this error not been committed. G.S. 15A-1233(b), 15A-1443(a).

15. Criminal Law § 135.8— aggravating circumstance—murder—especially heinous, atrocious or cruel—evidence sufficient

The evidence presented by the State was sufficient to permit the jury to consider as an aggravating circumstance whether the murder was "especially heinous, atrocious or cruel" where the evidence showed that the victim died as a result of being battered to death by what can only have been a prolonged series of blows with a cast-iron skillet so severe as to fracture her skull, neck, jaws, and collarbone and to cause her skull to be pushed into her brain. G.S. 15A-2000(e)(9).

16. Criminal Law § 135.6— sentencing hearing—exclusion of evidence harmless

Any error in the trial court's refusal to permit the defendant's sister to testify to his nonviolent nature was harmless because his mother and wife testified that he was nonviolent and because the jury found his nonviolent past to be a mitigating circumstance.

17. Criminal Law § 135.9— first degree murder—mitigating circumstance—admission of wrongdoing—evidence not sufficient

The evidence was not sufficient to require the submission to the jury as a mitigating circumstance that defendant testified under oath and revealed his role in the victim's death where defendant's testimony, though a confession of guilt, came only after a jury had convicted him of first degree murder and was deciding between a life sentence and the death penalty; where his testimony sought to limit his personal responsibility by showing that drugs and alcohol

played a part in his killing of his mother-in-law; and where defendant indicated during his testimony that he had wanted to keep quiet during the sentencing hearing but that his wife and family wanted him to tell the truth.

18. Criminal Law § 135.10— proportionality review of death sentence

The record supports the submission of the aggravating circumstance which was considered and found by the jury and there was no indication that the death penalty was imposed under the influence of passion, prejudice, or arbitrary factors. Furthermore, the sentence of death was not disproportionate to those in the pool of similar cases where the record showed a senseless, unprovoked, exceptionally brutal, prolonged, and murderous assault by an adult male upon a sixty-five-year-old female in her home. G.S. 15A-2000(d)(2).

Justice MARTIN concurring.

Justices EXUM and FRYE dissenting as to sentence.

APPEAL from judgment and sentence of death entered by *Judge Forrest A. Ferrell* at the May 9, 1983 Session of Superior Court, GASTON County. The defendant was charged in a bill of indictment, proper in form, with the murder of Edna Cordell Powell. The jury found the defendant guilty of murder in the first degree and recommended a sentence of death. Judgment was entered sentencing the defendant to death, and the defendant appealed to the Supreme Court as a matter of right. Heard in the Supreme Court May 8, 1984.

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

Robert W. Clark, Assistant Public Defender, for the defendant appellant.

MITCHELL, Justice.

The defendant was convicted of the first degree murder of Edna Cordell Powell and sentenced to death. He brings forward assignments of error relative to the guilt-innocence phase of his trial and the sentencing phase. Having considered with care the entire record and each of the assignments, we find no prejudicial error in either phase of the defendant's trial. We do not disturb the defendant's conviction or the sentence of death.

The evidence as presented by the State tended to show that in December 1982 the defendant, David Earl Huffstetler, and his wife, Ruby Huffstetler, lived in a trailer on Highway 161 in Kings

Mountain. The deceased, Edna Powell, was Ruby Huffstetler's mother. She was sixty-five years old and lived in a trailer next door to the Huffstetlers. Mrs. Huffstetler visited her mother during the afternoon of December 31, 1982. Later that day Mrs. Huffstetler went with her daughter Kim to spend the night in a motel in Kings Mountain. Around 10:00 p.m. on that date, several long distance calls that she did not make were made from the telephone in the Huffstetler's trailer. Mrs. Huffstetler did not know where the defendant spent the night on December 31.

Another daughter of the deceased, Barbara Shannon, visited her mother at about 8:00 p.m. on December 31. During the time Mrs. Shannon and her family were visiting, Mrs. Powell received a telephone call. After the call, Mrs. Powell phoned her granddaughter, Ruby Huffstetler's daughter Debbie Sutton, who lived with the Huffstetlers. Mrs. Powell asked her granddaughter where Mrs. Huffstetler was. After ending the conversation with her granddaughter, Mrs. Powell called the police. Mrs. Powell then went with the Shannons to their home in Gastonia to spend the night.

On January 1, 1983, at approximately 6:00 a.m., Mr. Shannon took Mrs. Powell back to her home in Kings Mountain. He left after checking throughout the trailer and finding nothing suspicious.

A friend of Mrs. Powell's from work, Miller Eugene Hughes, drove her to First Union Bank in Kings Mountain to do "some banking" on December 31, 1982. He also made plans with Mrs. Powell to take her to the Veterans Hospital in Asheville early on the morning of January 1 so that she could visit her husband. Mrs. Powell asked him to call her before he came by to pick her up on the morning of January 1. He called Mrs. Powell's trailer three times at about 7:50 a.m. on January 1, 1983. He received no answer. He called two more times after that, thirty to forty minutes apart, but never got a response.

Paul Glenn Sisk was working for the Yellow Cab Company on the morning of January 1. At about 8:00 a.m. a call came in to the dispatcher for the company, and Sisk answered the phone. Sisk recognized the defendant's voice. The caller identified himself as David Huffstetler. The caller asked that a cab be sent to a point on Highway 161 about two miles out of Kings Mountain at two

churches. William Wilde, another employee of Yellow Cab, drove a cab towards Kings Mountain to pick up David Huffstetler. Although he drove out toward Highway 161 he never found Huffstetler.

Alice Cantrell testified that the defendant was a friend of hers and that he came to visit her on January 1, 1983 at about 10:00 a.m. He came into the room where she was sleeping and asked if she wanted to shoot pool. Ms. Cantrell and the defendant stayed together all day long at the home of Ms. Cantrell's sister. The two worked on a car most of the day. The defendant, Ms. Cantrell and her two sons spent the night of January 1 in a motel in Kings Mountain. Ms. Cantrell and the defendant stayed together for two days after January 1 spending the second night in Ms. Cantrell's mother's home.

Debbie Sutton, the granddaughter of the deceased, testified that on January 1, 1983 she was living in the trailer where her mother Ruby Huffstetler lived with the defendant. She saw the defendant leave with her mother and her sister on December 31. Her mother came back home without the defendant. She later saw her mother on the evening of December 31 at a New Year's Eve party, but the defendant was not with her mother. Ms. Sutton returned to her mother's trailer around 4:00 a.m. on the morning of January 1, 1983. She stated that she went to bed and got up late the next day. She did not leave the trailer again that day.

The deceased's daughter, Mrs. Shannon, began to try to call her mother at her mother's trailer between 4:00 and 4:30 p.m. on January 1. She received no answer and continued to call every thirty minutes until 6:00 p.m. After a final unsuccessful attempt to reach her mother, she called Deborah Sutton and asked her to go to Mrs. Powell's trailer and tell Mrs. Powell to come to the phone. Ms. Sutton went next door to her grandmother's trailer. She opened the unlocked door, entered and found the body of Mrs. Powell lying on the floor of the kitchen. She testified that she could tell her grandmother was dead because her head was "bashed in."

The police were called at 7:15 p.m. on January 1 and arrived at the Powell residence shortly thereafter. Officer Richard Redding of the Gaston County Police Department testified that after being called to the Powell residence, he went inside the de-

ceased's trailer and observed Mrs. Powell lying in a large amount of blood on the kitchen floor. The blood was spattered along the dryer and on the refrigerator in the kitchen. He also observed a pair of false teeth located under the front edge of the clothes dryer. A black metal fragment was found on the east wall of the kitchen area. A wall style telephone was not hanging in its place in the entryway of the trailer, but instead had been placed in a chair at the entry point. Officers found hair samples and metal fragments on the carpet.

Law enforcement officers searched the area surrounding the victim's home and found a black plastic garbage bag containing bloodstained clothes approximately two-tenths of a mile from the victim's trailer. The bag contained a pair of jeans and a shirt identified by Mrs. Huffstetler as belonging to her husband, the defendant. The bag also contained a bloody crumpled bank envelope from First Union Bank and a pair of gloves identified by the defendant's wife as similar to a pair owned by her husband.

An S.B.I. hair analyst testified that several hairs found on the gloves were microscopically consistent with hairs taken from the victim. An S.B.I. forensic serologist testified that blood samples taken from the clothes found in the bag were consistent with the blood type of the victim and inconsistent with the blood type of the defendant.

Officers found a broken cast-iron skillet and its handle approximately a hundred feet from the defendant's trailer. The skillet was bloodstained and bore hairs microscopically consistent with the hair of the victim. The metal fragment found beside the head of the victim in her trailer fit into the broken skillet.

A pathologist, Dr. Phillip Leone, performed an autopsy on the body of the deceased. He testified that Mrs. Powell had multiple wounds and lacerations about her head, neck and shoulders. He found more than fourteen lacerations on her head and body. Both eyes were massively bruised and swollen shut, and blood was found in both nostrils and in her mouth. The victim's jaws were broken on both sides so that the lower jaw moved freely. The victim's spine and neck were fractured, as was her left collarbone. There was a large head wound behind the right ear in which the skull had been pushed into the brain. The pathologist also described a bilateral skull fracture and a "tremendous"

hemorrhage in the brain. The cause of death in the opinion of the pathologist was skull fractures, hemorrhaging, edema of the brain and injury to major life centers causing cardio-respiratory arrest. The pathologist testified that in his opinion the fourteen lacerations of the head were caused by separate blows and that an object such as a cast-iron skillet could have inflicted the wounds.

The defendant did not testify or offer evidence at the guilt-innocence phase of the trial. The jury found him guilty of murder in the first degree.

Prior to the sentencing hearing, the trial court disallowed the State's attempt to offer evidence that the defendant was involved in an armed robbery on the day of the murder. The State offered no further evidence but requested that the trial court submit as an aggravating circumstance that the killing was an especially heinous, atrocious or cruel murder under N.C.G.S. 15A-2000(e)(9).

The defendant testified in his own behalf at the sentencing hearing. He stated that he was taking $150 to $200 worth of the drug dilaudid per day at the time of the murder. He supported himself with money he got shoplifting and working.

On December 31, 1982, he went to the Yellow Cab Company and drank some liquor with employee Bill Wilde. He stole some money from the Yellow Cab Company at that time. He then went to a house in East Gastonia and injected two crushed up dilaudid pills. He got a ride home to his trailer on Highway 161 at about 10:00 p.m. on December 31. He drank some whiskey after arriving home and went to sleep. On rising the following morning, he injected two more dilaudid pills and drank more liquor.

The defendant testified that about 8:00 a.m. on January 1, 1983, he went next door to visit the deceased, his mother-in-law. After talking with Mrs. Powell a little, the defendant asked her whether she knew where his wife was. Mrs. Powell said that she did not and asked whether the defendant had been drinking. The defendant told Mrs. Powell that he had to have a drink around there to find out where his wife was because nobody would tell him anything. Mrs. Powell replied, "David, you're a darned liar. I don't know where she's at. All I know is you called me and said all hell was going to break loose if somebody didn't come and pick

you up." The defendant said, "I know I didn't say no such thing." Mrs. Powell replied, "I know you did."

The defendant testified that "we was just arguing, and I grabbed a frying pan and started hitting her." The defendant did not remember how many times he struck Mrs. Powell but testified that he was not angry with her. He stated that "it just happened in an argument." The defendant then left the trailer, went to his own trailer to change clothes and got a pair of gloves. He went back to his mother-in-law's trailer, picked up the frying pan while wearing the gloves, and threw the pan away. He put his bloodied clothes in a plastic trash bag and threw the trash bag away nearby. He then got a ride to the house where Alice Cantrell was staying. He stayed with Ms. Cantrell until his arrest on January 3.

Other members of the defendant's family testified that the defendant was not a violent or mean man when he was growing up. They had noticed little animosity between the defendant and his mother-in-law Mrs. Powell, the deceased.

The trial court instructed the jury that it could find as an aggravating circumstance that the murder was especially heinous, atrocious, or cruel. The trial court instructed that the jury could find in mitigation that: (a) the defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired; (b) the killing occurred contemporaneously with an argument between the defendant and the victim, a person whom he knew by virtue of the domestic relationship, and by means of an instrument acquired at the scene and not taken there; (c) the defendant did not have a history of violent conduct; and (d) any other mitigating circumstance arising from the evidence.

The jury found the murder of Edna Powell to be especially heinous, atrocious or cruel. They found the existence of the following mitigating circumstances: (1) that the defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired; (2) that the killing occurred contemporaneously to an argument and by means of an instrument acquired at the scene and not taken there; (3) that the defendant did not have a history of violent conduct. The jury specifically found that there were no other circumstances which it

deemed to have mitigating value. The jury returned a recommendation of death.

GUILT-INNOCENCE PHASE

[1] The defendant first contends that the trial court erred when it denied his motions for individual *voir dire* of the jury venire and for sequestration of the jury venire. He also contends that the trial court erred when it denied his motion to prohibit jury dispersal. The defendant concedes that these matters are within the trial court's discretion and that error may be found only upon a showing of abuse of discretion. *State v. Stokes*, 308 N.C. 634, 304 S.E. 2d 184 (1983). The defendant acknowledges that he has shown no abuse of discretion. These contentions of error are without merit.

[2] The defendant next contends that the procedure of "death qualifying" the jury for the guilt-innocence phase of his trial resulted in a guilt prone jury and deprived him of a fair trial. We have repeatedly rejected such arguments. *E.g. State v. Murray*, 310 N.C. 541, 313 S.E. 2d 523 (1984). This contention of error is without merit.

The defendant also contends that the trial court erred by its failure to hold unconstitutional the North Carolina statutes providing for the imposition of the death penalty. On numerous occasions we have upheld the constitutionality of our death penalty statutes. *E.g. State v. Jackson*, 309 N.C. 26, 305 S.E. 2d 703 (1983); *State v. Rook*, 304 N.C. 201, 283 S.E. 2d 732 (1981), *cert. denied*, 455 U.S. 1038 (1982). This contention of error is without merit.

[3] The defendant next contends that the trial court made an inaccurate and prejudicial statement in its opening remarks to potential jurors. The trial court's statements were as follows:

> Now, members of the jury, first degree murder is a crime for which the death penalty may be imposed. Should the defendant be found guilty of first-degree murder by the jury, then in such event *the court will be required* to conduct a separate sentencing hearing before the trial jury to determine whether the defendant shall be sentenced to death or life imprisonment. It would be your duty to, after such sentencing hearing, recommend to the court whether the

> defendant shall be sentenced to death or life imprisonment. Such a recommendation would be binding upon the court and that would be the sentence of the court. Before that time should occur, however, the sole responsibility of the trial jury is to determine from the evidence, beyond a reasonable doubt, that being the burden upon the State, whether the defendant is guilty of first degree murder or some lesser included offense about which the jury may be instructed, or not guilty.

(Emphasis added.) The defendant argues that this statement was inaccurate as it assumed that evidence of aggravating circumstances would be presented and a sentencing hearing required.

Although N.C.G.S. 15A-2000(a)(1) states that upon the adjudication of guilt of a capital felony, the trial court "shall" conduct a separate sentencing hearing, the trial court is not required to hold a separate sentencing hearing if it is clear that no evidence of aggravating circumstances has been or will be introduced. *State v. Johnson*, 298 N.C. 47, 257 S.E. 2d 597 (1979). In such cases the trial court may proceed to pronounce a sentence of life imprisonment without the intervention of the jury. *Id.*

The defendant has not shown how the statement of the trial court complained of in any way prejudiced him. The statement by the trial court merely had the effect of informing potential jurors that the jury's function might involve both a determination of guilt or innocence and a determination of the appropriate sentence. Since a sentencing hearing in fact was required, it is clear that the statement complained of did not prejudice the defendant. It is apparent that counsel for the defendant did not think the substance of this statement by the trial court harmful to his client, since he made almost identical statements to certain prospective jurors during the selection of the jury. The defendant having failed to show any prejudice resulting from the trial court's statement, his contentions concerning it are without merit and are rejected.

[4] The defendant next contends that the trial court erred in excluding certain prospective jurors for cause as a result of answers they gave concerning their views on capital punishment. The defendant argues that the questions asked these prospective jurors by the prosecutor did not address the issue of whether the pro-

spective jurors were irrevocably committed to vote against the penalty of death regardless of the evidence that might emerge in the course of the proceedings.

Although the prosecutor's questions included the incorrect assumption that under current North Carolina law a verdict of guilty of murder in the first degree standing alone might result in the imposition of the death penalty, the trial court did not err in excusing the prospective jurors for cause. The transcript of the jury *voir dire* reveals that each juror excused for cause as a result of his or her views on capital punishment clearly indicated that he or she would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed in the present case. Therefore, the trial court properly excused these jurors for cause. *Witherspoon v. Illinois*, 391 U.S. 510, 522-23, n. 21 (1968); N.C.G.S. 15A-1212(8).

[5] The defendant next contends that the trial court erred by preventing counsel for the defendant from discussing the meaning of a bill of indictment during the *voir dire* examination of prospective jurors. The defendant attempted several times to inform prospective jurors about the significance of a bill of indictment. Each time the trial court sustained the State's objection.

It is well established that the extent of the inquiry of a prospective juror rests within the trial court's discretion and will not be found to be reversible error unless an abuse of discretion is shown. *State v. Phillips*, 300 N.C. 678, 268 S.E. 2d 452 (1980). The defendant in the present case has failed to discuss with any specificity how he contends he was prejudiced by the trial court's rulings or how the trial court abused its discretion in this regard. We do not perceive how the ruling by the trial court in any manner involved an abuse of its discretion or prejudice to the defendant. The statements by counsel for the defendant concerning the significance of bills of indictment were not questions designed to reveal bias or questions at all. Instead, they were efforts by counsel to instruct the jury concerning the legal significance of bills of indictment. It was well within the discretion of the trial court to prohibit such attempts by counsel to give instructions on the law to prospective jurors during the *voir dire* examination. The trial court did not err in doing so in this case.

[6] The defendant also contends that the trial court erred in refusing to permit the defendant to question prospective jurors concerning the positions leaders of their churches held on the death penalty. Each juror the defendant sought to question in this manner had previously indicated that he or she had no moral or religious scruples concerning the death penalty. Positions held by leaders of their churches would be remotely relevant at best for purposes of determining their fitness as jurors. The trial court did not abuse its discretion in the present case by refusing to allow such questions.

The defendant further contends that the trial court erred in sustaining an objection to his question to a prospective juror as to whether she had previously had any occasion to discuss her views on the death penalty. The question was repetitious, since the prospective juror had already given a negative answer. The trial court did not abuse its discretion or commit error by preventing repetitious questions to prospective jurors.

[7] The defendant next contends that the trial court erred by admitting into evidence two photographs which depict the area in the victim's trailer where her body was found. The photographs, although gruesome, illustrate the testimony of Officer Richard G. Redding as to conditions at the crime scene when he arrived there shortly after the body was discovered. The fact that a photograph shows a horrible and gruesome scene does not render it incompetent. When properly authenticated, "photographs showing the condition of the body when found, its location when found, and the surrounding scene at the time the body was found are not rendered incompetent by the portrayal of gruesome events which the witness testifies they accurately portray." *State v. Elkerson*, 304 N.C. 658, 665, 285 S.E. 2d 784, 789 (1982). This contention is without merit.

[8] The defendant next contends the trial court erred by admitting into evidence items of clothing which allegedly belonged to the defendant. The defendant argues that his wife did not identify the items as the defendant's with sufficient certainty to make them admissible.

It is axiomatic that any evidence calculated to throw any light upon the crime charged is admissible in criminal cases. *State v. Hunt*, 297 N.C. 258, 254 S.E. 2d 591 (1979); *State v. Sledge*, 297

N.C. 227, 254 S.E. 2d 579 (1979). The objects of clothing in question were found in a plastic bag not far from the scene of the murder and were covered with blood of a type consistent with that of the victim. The relevancy and admissibility of these items of clothing is obvious.

The real thrust of the defendant's arguments in support of his assignments and contentions concerning these items of clothing, however, seems to be that the defendant's wife should not have been permitted to testify that the clothing belonged to him, because her identification of the clothing as his was not sufficiently certain. This argument is equally without merit.

As to two of the items of clothing, a shirt and a pair of trousers, the defendant's wife could not have testified more clearly and unequivocally that they were the defendant's. There was no error in the admission of her testimony in this regard.

As to the remaining clothing, a pair of brown cotton gloves, the defendant's wife stated that: "David had a pair like that." No objection or motion to strike this testimony was made at trial. Therefore, the defendant is deemed to have waived the right to raise this alleged error on appeal. *State v. Oliver*, 309 N.C. 326, 307 S.E. 2d 304 (1983). We will not review or consider assignments of error on appeal in such situations unless it is shown that the trial court committed "plain error" within the meaning of *State v. Black*, 308 N.C. 736, 303 S.E. 2d 804 (1983). Here, it is clear that the testimony of the defendant's wife that he had a pair of gloves "like" those which had been introduced into evidence did not amount to "plain error." *See State v. Bass*, 280 N.C. 435, 186 S.E. 2d 384 (1972) (testimony that a jacket introduced into evidence was "similar" to one worn by the defendant held admissible).

[9] The defendant next contends that the trial court's admission into evidence of the opinion testimony of forensic serologist Brenda Bissette was error. After being properly qualified as an expert in the field of forensic serology, Ms. Bissette testified that based on the results of ten blood tests performed at the S.B.I. laboratory, her opinion was that the blood found on the clothing identified as the defendant's was consistent with the blood of the victim. She further stated that six-tenths of one percent of the population of the United States is known to share the characteris-

tics of the victim's blood. On cross-examination the serologist testified that although she had personally performed the test yielding the blood grouping, another individual in the S.B.I. lab performed tests requiring a process called electrophoreses. She stated that she could interpret and visually scan those tests results and determine that the electrophoreses tests had been properly conducted.

The defendant objected to the opinion testimony on grounds that the expert had not actually conducted some of the tests. The defendant contends that because he could not cross-examine the person who actually performed some of the tests, he was deprived of the right to confront his accusers guaranteed by the Sixth Amendment to the Constitution of the United States.

It has been held traditionally that an expert's opinion is not admissible if based on hearsay evidence. *Cogdill v. North Carolina State Highway Commission*, 279 N.C. 313, 182 S.E. 2d 373 (1971). That general rule has undergone significant modification in recent years, especially in the area of expert medical testimony. *See generally* Blakey, *Examination of Expert Witnesses in North Carolina*, 61 N.C. L. Rev. 2 (1982); 1 *Brandis on North Carolina Evidence*, § 136 notes 23 to 27 (2d rev. ed. 1982).

In *State v. DeGregory*, 285 N.C. 122, 203 S.E. 2d 794 (1974) this Court held admissible a psychiatrist's opinion based in part on information compiled in hospital records. The Court, through Justice Huskins, stated that "an expert witness has wide latitude in gathering information and may base his opinion on evidence not otherwise admissible." *Id.* at 132, 203 S.E. 2d at 801. In *State v. Wade*, 296 N.C. 454, 251 S.E. 2d 407 (1979), this Court stated:

> (1) A physician, as an expert witness, may give his opinion, including a diagnosis, based either on personal knowledge or observation or on information supplied him by others, including the patient, *if such information is inherently reliable even though it is not independently admissible into evidence.* The opinion, of course, may be based on information gained in both ways. (2) If his opinion is admissible the expert *may testify to the information he relied on in forming it* for the purpose of showing the basis of his opinion.

296 N.C. at 462, 251 S.E. 2d at 412. (Emphasis added.) Further, we have held that testimony as to information relied upon by an expert when offered to show the basis for the expert's opinion is not hearsay, since it is not offered as substantive evidence. *State v. Wood*, 306 N.C. 510, 294 S.E. 2d 310 (1982). Such evidence is admissible due to the limited purpose for which it is offered and not due to an exception to the hearsay rule. *Id.*

In general, the admission of "inherently reliable" information to show the basis for an expert's opinion has occurred in cases involving medical or psychiatric experts. *See, e.g. State v. Jackson*, 302 N.C. 101, 273 S.E. 2d 666 (1981) (psychiatrist based opinion on tests not personally administered by him); *State v. Franks*, 300 N.C. 1, 265 S.E. 2d 177 (1980) (psychiatrist's opinion based on examination as well as patient's statements); *Booker v. Duke Medical Center*, 297 N.C. 458, 256 S.E. 2d 189 (1979) (no error in allowing physician to testify based on medical history obtained from a treating physician and the patient). In at least two cases decided prior to the pronouncement of the inherent reliability rule in *Wade*, however, this Court upheld the admission of non-medical expert opinion based on information not otherwise admissible. In *State v. Louchheim*, 296 N.C. 314, 250 S.E. 2d 630, *cert. denied*, 444 U.S. 836 (1979), an expert in the field of accounting gave his opinion based on documents not in evidence. The auditor testified about where he got the documents, what the documents contained and how he used them. This Court found no error in the admission of the testimony. In *State Highway Commission v. Conrad*, 263 N.C. 394, 139 S.E. 2d 553 (1965) this Court found no error in the admission of an opinion of a real estate appraiser, even though the opinion was based on information not admissible as substantive evidence.

The rule permitting experts to testify to opinions they have formed based on information not itself admissible as substantive evidence is not limited to opinions of physicians and other medical experts. Under the standard set forth in *Wade*, the standard applicable to this case, the tests forming the basis of the serologist's testimony are sufficiently reliable to support the admission of her expert opinion based upon those tests.

We note here that, effective July 1, 1984, N.C.G.S. 8C-1, Rule 703 provides that:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type *reasonably relied upon* by experts in the particular field in forming opinions or inferences upon the subject, the facts or data *need not be admissible in evidence.*

(Emphasis added.) Several commentators have suggested that there is little difference in the "inherently reliable" standard adopted by this Court in *Wade* and the "reasonably relied upon" standard of the new rule. *See* Blakey, *Examination of Expert Witnesses in North Carolina*, 61 N.C. L. Rev. 2, 26-27 (1982); 1 *Brandis on North Carolina Evidence*, § 136 (2d rev. ed. Supp. 1983). It is also clear that the new rule is not confined in its application to medical and psychiatric expert testimony.

The admission into evidence of expert opinion based upon information not itself admissible into evidence does not violate the Sixth Amendment guarantee of the right of an accused to confront his accusers where the expert is available for cross-examination. *U.S. v. Williams*, 447 F. 2d 1285 (5th Cir. 1971) (en banc), *cert. denied*, 405 U.S. 954, *reh. denied*, 405 U.S. 1048 (1972). *Cf. U.S. v. Lawson*, 653 F. 2d 299 (7th Cir. 1981) (where it was recognized that the introduction of expert testimony based largely on hearsay may create constitutional problems if there is no adequate opportunity to cross-examine the expert and the defendant does not have access to the information relied upon by the witness), *cert. denied*, 454 U.S. 1150 (1982). In such cases the defendant will have the right to fully cross-examine the expert witness who testifies against him. He will be free to vigorously cross-examine the expert witness, as did the defendant in the present case, concerning the procedures followed in gathering information and the reliability of information upon which the expert relies in forming his opinion. The jury will have plenary opportunity, as did the jury in this case, to understand the basis for the expert's opinion and to determine whether that opinion should be found credible. The opportunity to fully cross-examine the expert witness testifying against him will insure, as in the present case, that the defendant's right to confront and cross-examine his accusers guaranteed by the Sixth Amendment is not denied. The trial court did not err in admitting the expert testimony complained of here.

[10] The defendant next contends that the trial court erred when it denied his motions to dismiss at the close of the State's case and at the close of all of the evidence. He argues that the State did not offer sufficient evidence of premeditation and deliberation to permit submission of the charge of first degree murder to the jury.

Before the question of a defendant's guilt may be submitted to the jury for its consideration, the trial court must find that substantial evidence has been introduced tending to prove each essential element of the offense charged and that the defendant was the perpetrator. *State v. Powell*, 299 N.C. 95, 261 S.E. 2d 114 (1980). Substantial evidence must be existing and real but need not exclude every reasonable hypothesis of innocence. *State v. Williams*, 308 N.C. 47, 301 S.E. 2d 335 (1983), *cert. denied*, --- U.S. ---, 78 L.Ed. 2d 177 (1983). The evidence must be viewed in the light most favorable to the State. The State is entitled to every reasonable intendment and inference to be drawn therefrom. Contradictions and discrepancies are for the jury to resolve and do not warrant dismissal. *State v. Powell*, 299 N.C. 95, 261 S.E. 2d 114 (1980).

First degree murder is the intentional and unlawful killing of a human being with malice and with premeditation and deliberation. N.C.G.S. 14-17. *State v. Fleming*, 296 N.C. 559, 251 S.E. 2d 430 (1979). Premeditation has been defined as thought beforehand for some length of time however short. *State v. Biggs*, 292 N.C. 328, 233 S.E. 2d 512 (1977). No particular amount of time is required for premeditation. *State v. Myers*, 299 N.C. 671, 263 S.E. 2d 768 (1980). Deliberation is an intention to kill executed in a cool state of blood in furtherance of a fixed design, to gratify a feeling of revenge or to accomplish some unlawful purpose and not under the influence of a violent passion suddenly aroused by some lawful or justifiable cause. *Id.*

Since premeditation and deliberation are processes of the mind, they are not ordinarily subject to direct proof but generally must be proved if at all by circumstantial evidence. *State v. Buchanan*, 287 N.C. 408, 215 S.E. 2d 80 (1975). Among other circumstances which will tend to show that a killing was with premeditation and deliberation are: (1) want of provocation on the part of the deceased; (2) the conduct and statements of the de-

fendant before and after the killing; (3) threats and declarations of the defendant before and during the course of the occurrence giving rise to the death of the deceased; (4) ill-will or previous difficulty between the parties; (5) the dealing of lethal blows after the deceased has been felled and rendered helpless; and (6) evidence that the killing was done in a brutal manner. *State v. Williams*, 308 N.C. 47, 69, 301 S.E. 2d 335, 349, *cert. denied*, --- U.S. ---, 78 L.Ed. 2d 177 (1983).

The evidence in the present case shows the extremely brutal slaying of a sixty-five year old woman in her home. Mrs. Powell died as a result of numerous wounds to her face, head, neck and shoulders inflicted over a period of some time. There is substantial evidence from which it is reasonable to infer that many of the blows were inflicted after the deceased had been felled and rendered helpless. There is no evidence of provocation on the part of the deceased. The removal of the telephone from its socket is further evidence tending to support an inference of premeditation or deliberation.

The evidence in support of premeditation and deliberation justified submission of the charge of first degree murder to the jury. The defendant's contention is without merit.

[11] The defendant next contends that prejudicial error occurred during the prosecutor's closing argument before the jury. The defendant argues that the prosecutor's comments constituted improper references to the defendant's decision not to testify during the guilt-innocence phase of his trial. During the closing arguments the attorney for the defendant argued as follows:

> Now, of course, when a defendant is accused of a crime and he is brought to trial, if the State—if the defendant does not present any evidence the defendant doesn't present any evidence, then his counsel has the right of the opening argument, just as I am doing now, and closing argument. That is, Mr. Hill will argue to you after I'm finished here. Then Mr. Clark will argue to you, a closing argument for the defendant. The defense argues this is a very important argument and certainly something the defendant considers when he decides not to present any evidence.

When the State's turn to present an argument came, the prosecutor argued:

> Mr. Harris, when he opened his argument to you, gave to you some reasons that he made up, but yet you haven't heard any evidence as to why. That he must have a great value on his, he and Mr. Clark's, ability to stand before you and orate, make a great moving speech which will outweigh the evidence you heard last week in this trial. It's just pure vanity, ladies and gentlemen. This is not a game, as he indicated to you. When you came to sit as a juror in this case, it was said to you individually and you heard us repeat it to other jurors, that you could consider in your deliberations only that evidence that you hear here in the courtroom, and the only evidence that you heard was the evidence presented by the State. It would seem to me a rather vain thing on behalf of Mr. Harris and Mr. Clark to get up and to argue to you that the reason that they did not offer evidence was so that they could have the final argument. I don't think—believe—that you're such short-minded people—
>
> MR. HARRIS: Objection.
>
> THE COURT: Overruled.
>
> MR. HILL: —that you can't remember thirty minutes what occurred and they can talk to you and explain the evidence that they contend is consistent with his innocence. Ladies and gentlemen, there is no evidence that you heard in this case that is consistent with his innocence. No reasonable theory that is consistent with his innocence.

Arguments of counsel are largely in the control and discretion of the trial court. The appellate courts ordinarily will not review the exercise of that discretion unless the impropriety of counsel's remarks is extreme and is clearly calculated to prejudice the jury. *State v. Taylor*, 289 N.C. 223, 221 S.E. 2d 359 (1976). Nonetheless, N.C.G.S. 8-54 has been interpreted as prohibiting comment on a defendant's failure to testify. *State v. Taylor*, 289 N.C. 223, 221 S.E. 2d 359 (1976).

Having reviewed the arguments of both parties, we hold that the argument of the prosecutor did not improperly refer to the defendant's failure to testify. The prosecutor argued that "there

is no evidence that you heard in this case that is consistent with [the defendant's] innocence." This Court has held that the State properly may bring to the jury's attention a failure to produce exculpatory evidence, since exculpatory evidence need not come solely from a defendant's testimony. *State v. Foust*, 311 N.C. 351, 317 S.E. 2d 385 (1984); *State v. Smith*, 290 N.C. 148, 226 S.E. 2d 10, *cert. denied*, 429 U.S. 932 (1976). The prosecutor's comments in this regard did not go beyond direct rebuttal of the argument made previously by the defense attorney. Any impropriety was invited by the defense attorney's suggestion that one of the factors in the defendant's decision not to present evidence was the importance of the final argument. *See State v. Moose*, 310 N.C. 482, 313 S.E. 2d 507 (1984); *State v. McCall*, 289 N.C. 512, 223 S.E. 2d 303, *vacated in part*, 429 U.S. 912 (1976). We also note that the defense attorneys in their arguments as well as the trial court in its instructions, reminded the jury that the defendant's silence created no presumption against him and should not be considered in any way.

[12] The defendant also contends that another argument made by the prosecutor was prejudicial error. The defendant's contention centers on the prosecutor's argument that the defendant "didn't have the common decency to leave Alice Cantrell long enough to bury his mother-in-law."

As we have stated, counsel will be allowed wide latitude in the argument of hotly contested cases. *State v. McKenna*, 289 N.C. 668, 224 S.E. 2d 537, *death sentence vacated on other grounds*, 429 U.S. 912 (1976). Counsel for each side may argue to the jury the facts in evidence and all reasonable inferences to be drawn therefrom together with the relevant law so as to present his or her side of the case. *State v. Taylor*, 289 N.C. 223, 221 S.E. 2d 359 (1976). Decisions as to whether an advocate has abused this privilege must be left largely to the sound discretion of the trial court.

The trial court in this instance acted within the bounds of its sound discretion in allowing the contested argument. Alice Cantrell's testimony was that at approximately 10:00 a.m. on the day of the murder, the defendant came to be with her. The two stayed together constantly from that time until the defendant's arrest two days later. The prosecutor's remarks, although touching upon

matters not directly testified to, were reasonable inferences based on the evidence and were within the wide latitude properly afforded counsel in argument. *Id.* The trial court did not err in the manner in which it controlled the arguments of counsel. The defendant's contentions in this regard are without merit.

[13] The defendant next contends that the trial court erred in its final instructions to the jury during the guilt-innocence phase of the trial. The defendant's contention is that the court erred in failing to mention that a sentencing hearing would be held only if there was evidence of an aggravating circumstance. The defendant did not object to the instructions. Where a defendant fails to object to jury instructions prior to the jury's retiring, our review is limited to examining the record for "plain error" or error so fundamental or prejudicial that justice cannot have been done. *State v. Oliver*, 309 N.C. 326, 307 S.E. 2d 304 (1983). Because this is a capital case, however, we have reviewed thoroughly the trial court's instructions. We find no error. As we stated in our discussion of the trial court's remarks to jury veniremen during *voir dire* examination, a sentencing hearing in fact was required and held in the present case. The defendant has failed to show any prejudice caused by the trial court's action in this regard, and his contention is without merit.

[14] The defendant next argues that the trial court committed prejudicial error during the guilt-innocence phase of the trial when it allowed the jury to take photographs which had been admitted into evidence to the jury room over the defendant's objection. After retiring to deliberate in the guilt-innocence phase of the trial, the jury returned and requested "the pictures of the trailers" and a repetition of the definitions of first and second degree murder. The trial court repeated the requested instructions and ordered that the requested photographs be sent to the jury room. The defendant made a timely objection.

Exhibits 6, 8, 9, 10, 14 and 20 were sent to the jury room. Exhibits 6, 8 and 20 were outdoor photographs showing, respectively, the place where a plastic bag containing clothing was found, the trailers inhabited by the defendant and the victim, and the thicket where parts of the metal skillet were found. Exhibits 9, 10 and 14 were photographs which showed, respectively, the overall view of the interior of the victim's trailer and the location of the

body, a metal fragment found on the floor, and the false teeth found near the body.

The defendant cites N.C.G.S. 15A-1233(b) for his argument that the trial court erred in allowing the jury to take the pictures into the jury room over his objection. That statute provides:

> (b) Upon request by the jury *and with consent of all parties*, the judge may in his discretion permit the jury to take to the jury room exhibits and writings which have been received in evidence. If the judge permits the jury to take to the jury room requested exhibits and writings, he may have the jury take additional material or first review other evidence relating to the same issue so as not to give undue prominence to the exhibits or writings taken to the jury room. If the judge permits an exhibit to be taken to the jury room, he must, upon request, instruct the jury not to conduct any experiments with the exhibit.

(Emphasis added.) In *dicta*, this Court in *State v. Barnett*, 307 N.C. 608, 300 S.E. 2d 340 (1983), interpreted the statute to mean that the consent of all parties is required before the jury may take evidence to the jury room. The Court of Appeals has similarly interpreted the statute and held it to be error to allow the jury to take evidence into the jury room over a party's objection. *State v. Taylor*, 56 N.C. App. 113, 287 S.E. 2d 129 (1982); *State v. Prince*, 49 N.C. App. 145, 270 S.E. 2d 521 (1980); *State v. Bell*, 48 N.C. App. 356, 269 S.E. 2d 201, *disc. rev. denied*, 301 N.C. 528, 273 S.E. 2d 455 (1980). We hold that the trial court erred in allowing the jury to take these photographs to the jury room without the consent of all parties. Therefore, our inquiry must turn to whether the error was prejudicial. *Id.*

Under N.C.G.S. 15A-1443(a), a defendant is prejudiced by errors relating to rights arising other than under the Constitution of the United States only when "there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises. The burden of showing such prejudice under this subsection is upon the defendant." We are not persuaded that the defendant has met his burden of showing such prejudice.

The photographs in question had been previously admitted into evidence and shown to the jury to illustrate the testimony of a law enforcement officer. Furthermore, the trial court had the discretion under N.C.G.S. 15A-1232(a) to permit the jury to reexamine the pictures closely and at length in the courtroom. Other evidence introduced during the guilt-innocence phase of the trial linking the murder with the defendant was circumstantial, but compelling. The defendant has not shown a reasonable possibility that had this error not been committed a different result would have been reached. *See State v. Taylor*, 56 N.C. App. 113, 287 S.E. 2d 129 (1982) (no prejudice shown where, over objection, jury while deliberating viewed photographs which had already been admitted into evidence). This contention is without merit.

SENTENCING PHASE

[15] The defendant contends that the trial court erred during the sentencing phase in this case by submitting for the jury's consideration as an aggravating circumstance that the killing was especially heinous, atrocious or cruel. N.C.G.S. 15A-2000(e)(9). It is the defendant's contention that this aggravating circumstance could not be submitted to the jury because the State offered no evidence as to whether the victim was alive or conscious during any substantial portion of the assault. We do not agree.

In *State v. Oliver*, 309 N.C. 326, 307 S.E. 2d 304 (1983), we declined to limit the definition of an especially heinous, atrocious or cruel murder to include only those which involve physical injury or torture prior to death. In *State v. Brown*, 306 N.C. 151, 293 S.E. 2d 569, *cert. denied*, 459 U.S. 1080 (1982), we upheld the submission of this aggravating circumstance even though the evidence did not establish at what point during a brutal attack the victim's death occurred. *See also State v. Johnson*, 298 N.C. 47, 257 S.E. 2d 597 (1979) (aggravating circumstance properly submitted although victim rendered unconscious before she was raped and stabbed to death). We hold that the evidence presented by the State in the present case was sufficient to permit the jury to consider whether the murder of Edna Powell was "especially heinous, atrocious or cruel." Edna Powell died as a result of being battered to death by what can only have been a prolonged series of blows, blows with a cast-iron skillet so severe as to fracture her skull, neck, jaws, and collarbone and to cause her skull to be

pushed into her brain. The severity and the brutality of the numerous wounds inflicted amply justified submission of this aggravating circumstance to the jury.

[16] The defendant next contends that the trial court erred in the sentencing hearing in refusing to permit the defendant's sister to testify to his nonviolent nature. This contention is without merit. Even if it is assumed *arguendo* that it was error to exclude this testimony, the error was harmless beyond all doubt. Both the defendant's mother and his wife testified that the defendant was not violent. His sister's testimony would have been repetitive. More significantly, the jury was convinced by the evidence admitted and found the defendant's nonviolent past to be a mitigating circumstance.

[17] The defendant also contends that the trial court erred by its refusal to charge the jury that it could find as a mitigating circumstance: "That during the sentencing phase, the defendant testified under oath and admitted his role in the victim's death. That this admission of wrongdoing reflects a potential for rehabilitation." In *State v. Pinch*, 306 N.C. 1, 292 S.E. 2d 203 (1982) we held that a defendant demonstrates reversible error in the trial court's omission of timely requested mitigating circumstances only if he establishes three things: (1) that the factor is one the jury could have reasonably deemed to have mitigating value; (2) that there is sufficient evidence of the existence of the factor; and (3) that considering the case as a whole, the exclusion of the factor resulted in ascertainable prejudice. We find no error here.

The defendant maintains that his testimony during the sentencing phase is evidence of a first step toward his rehabilitation. A review of the defendant's testimony and the evidence presented in the sentencing hearing does not support this view. The defendant's testimony, though a confession of guilt, came only after a jury had convicted him of first degree murder and was deciding between a life sentence and the death penalty. Much of his testimony sought to limit his personal responsibility by showing that drugs and alcohol played a part in his killing of his mother-in-law. The defendant indicated during his testimony that he had wanted to keep quiet during the sentencing hearing but that his wife and family wanted him to tell the truth. The evidence was not sufficient to require the submission of the re-

quested mitigating circumstance to the jury. *See State v. Craig*, 308 N.C. 446, 302 S.E. 2d 740, *cert. denied*, --- U.S. ---, 78 L.Ed. 2d 247 (1983) (failure to submit as a mitigating circumstance the defendant's willingness to take a polygraph test was not error since it was self-serving and did not show willingness to cooperate with the police). We hold that the trial court properly refused to submit the requested mitigating circumstance for consideration.

STATUTORY REVIEW OF SENTENCE BY SUPREME COURT

[18] Having found no prejudicial error by the trial court during either the guilt-innocence or sentencing phases of the trial, we turn to the duties reserved by statute exclusively for this Court in reviewing the judgment and sentence of death. Under N.C.G.S. 15A-2000(d)(2) we must determine whether the record supports a finding of the aggravating circumstance on which the sentencing court based its sentence of death; whether the sentence was imposed under the influence of passion, prejudice or any other arbitrary factor; and whether the sentence is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

We have thoroughly examined the record, transcripts and briefs in this case. As stated previously, we find the record supports the submission of the aggravating circumstance which was considered and found by the jury. Further, we find no indication at all that the death penalty was imposed under the influence of passion, prejudice or arbitrary factors.

We turn then to our final statutory duty of proportionality review. This duty requires us to determine whether the sentence of death in this case is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. For purposes of proportionality review, we use all of the cases in the "pool" of similar cases announced in *State v. Williams*, 308 N.C. 47, 301 S.E. 2d 335, *cert. denied*, --- U.S. ---, 78 L.Ed. 2d 177 (1983).

Having compared the crime and the defendant in this case to those in the pool of similar cases, we do not find the sentence of death entered here to be disproportionate. The evidence presented at trial supports the view that the sixty-five year old female

victim was brutally beaten to death during a prolonged attack in her own home. The defendant struck the victim with a cast-iron skillet at least fourteen times, breaking her jaws, collarbone and spine and fracturing her skull in several places. The deceased was struck repeatedly with enough force to spatter blood throughout the room in which she was killed. The blows struck were with sufficient force to push a portion of the victim's skull into her brain and expose brain tissue.

No evidence was introduced tending to show that the victim made any threat or assaulted the defendant in any way before he beat her to death with the skillet. The defendant himself testified that he was not angry at the time he beat the victim to death.

After beating the victim, the defendant went to his trailer next door to change his bloody clothes. He put on a pair of gloves before returning to the scene so that he would leave no fingerprints. After disposing of his clothes and the skillet he used as the murder weapon, the defendant left the victim on the floor in a pool of her own blood and went to visit a woman with whom he had previously engaged in shoplifting. He spent the night of the murder in a motel with this woman and stayed with her until his arrest two days later.

Thus, the record before us reveals a senseless, unprovoked, exceptionally brutal, prolonged and murderous assault by an adult male upon a sixty-five year old female in her home. Having compared the defendant and the crime in this case to others in the pool of similar cases, we conclude that the sentence of death entered by the trial court is not disproportionate.

We hold that no prejudicial error was committed in either the guilt-innocence phase or the sentencing phase of the trial and that the sentence of death entered by the trial court was not disproportionate. Further, we hold that this is not a proper case in which to exercise our statutory authority to set aside the sentence of death. We leave the sentence of death undisturbed.

No error.

Justice MARTIN concurring.

Except as herein set out, I concur in the well reasoned majority opinion and in the result reached. With respect to the ruling of the trial judge allowing the jury to take certain exhibits to the jury room, counsel did not brief or argue the constitutionality of N.C.G.S. 15A-1233(b). However, upon considering that issue, I find the statute constitutionally suspect as a violation of the doctrine of separation of powers. N.C. Const. art. I, § 6 and art. IV, § 1. The legislature cannot control the actions of the courts over what exhibits, properly admitted, can be carried by the jury into its jury room during its deliberations. Such action by the legislature is an unconstitutional intrusion and interference with the internal workings of the trial of a jury case. What evidence should or should not be taken to the jury room is a matter peculiarly within the knowledge and discretion of the trial judge on a case by case basis. The trial judge's duty to seek after justice should not be hampered by requirements that evidence cannot be taken into the jury room except by consent of all counsel. It is the duty and responsibility of the trial judge to supervise and control a trial in order that injustice to any party may be prevented. *State v. Spaulding*, 288 N.C. 397, 219 S.E. 2d 178 (1975), *vacated on other grounds*, 428 U.S. 904, 49 L.Ed. 2d 1210 (1976). To this end the court has broad discretionary powers.

I repeat my views concerning the extension of the plain error doctrine to evidentiary matters. *State v. Black*, 308 N.C. 736, 303 S.E. 2d 804 (1983) (Martin, J., concurring).

Justice EXUM dissenting as to sentence.

Believing there is reversible error in the trial court's failure to submit a requested mitigating circumstance and that the death penalty is disproportionate, I respectfully dissent from so much of the majority opinion which concludes to the contrary.

I.

Defendant testified during the sentencing hearing that he had known Mrs. Powell, his mother-in-law and the victim, "way before my marriage, probably about all my life." He said, "Me and my mother-in-law had a good relationship." At this point in the testimony defendant lost his composure and was excused "for a

few minutes to regain" it. Defendant told of his life of drug and alcohol abuse, saying, "Most of my life I've been on and off drugs. This time I've been back on them about two years." On the night before the murder defendant had injected into his veins two dilaudid tablets and drunk a bottle of whiskey. On the morning of the murder he had injected two more dilaudid tablets. He then went to his mother-in-law's trailer, was admitted by her, and sat down on the couch. The two conversed cordially until defendant asked Mrs. Powell if she knew where his wife was. Mrs. Powell replied that she didn't. Defendant testified, "So I got up to leave, and I stood up, and she said, 'David, you've been drinking. You ought to go on up there to jail.' " David replied that he "had to drink around here to find out where [his] wife is cause nobody won't tell you nothing," whereupon Mrs. Powell said, "David, you're just a darn liar. I don't know where she's at. All I know is you called me and said all hell was going to break loose if somebody didn't come and pick you up." Defendant testified, "I said, 'I know I didn't say no such thing.' She said, 'I know you did.' We was just arguing, and I grabbed the frying pan and started hitting her."

Defendant's wife, daughter of the victim, testified that defendant and her mother "got along real well. They only argued over me. That wasn't that much because I always insisted mother let me live my own life, and what David did was between me and him." The witness said, "David's not mean and he's not vicious. He's got a drug habit that he couldn't control, but he was not mean." She said David had sought professional help for his habit a number of times but that the help had been unsuccessful. The witness said that after defendant's arrest and while he was in jail, he told her about the murder. The following colloquy ensued:

Q. Do you recall when he told you what happened?

A. It has been since he's been in jail, and it has just been in bits and pieces, virtually what he has said today, but a two-minute conversation, there can't be much said.

Q. Did you have to force David or talk David into telling you the truth about what happened?

A. No, I did not.

Q. How did it come about?

A. He just called me one day, and I answered the phone and he started crying and saying he was sorry, and then after that, when he would call, if I answered the phone, we talked whatever length of time he had.

II.

Defendant requested in writing at the sentencing hearing that the trial court submit, among others which were submitted, the following mitigating circumstance:

> That during the sentencing phase, the defendant testified under oath and admitted his role in the victim's death. That this admission of wrongdoing reflects a potential for rehabilitation.

The trial court refused to submit the circumstance. I am satisfied this was error entitling defendant to a new sentencing hearing.

Not to permit a jury to consider any relevant mitigating circumstance is an error of constitutional dimension. *Eddings v. Oklahoma*, 455 U.S. 104 (1982); *Lockett v. Ohio*, 438 U.S. 586 (1978). In *Eddings* the United States Supreme Court reversed a sentence of death and remanded for further sentencing proceedings because the sentencing judge "would not consider in mitigation the circumstances of Eddings' unhappy upbringing and emotional disturbance. . . ." 455 U.S. at 109. This Court recognized as much in *State v. Pinch*, 306 N.C. 1, 27, 292 S.E. 2d 203, 223 (1982), where we held that an error in failing to submit a mitigating circumstance is reversible unless the failure to submit it is "*harmless beyond a reasonable* doubt. G.S. 15A-1443(b)." (Emphasis original.) This is the statutory standard for reversible errors of constitutional dimension. *Compare* sections (a) and (b) of N.C.G.S. 15A-1443. A defendant is entitled to have a mitigating circumstance not listed in the statute, N.C.G.S. 15A-2000(f), if he makes a timely written request for it, if it is supported by the evidence, and if the jury could reasonably deem it to have mitigating value. *State v. Johnson*, 298 N.C. 47, 72-74, 257 S.E. 2d 597, 616-17 (1979); *accord, State v. Pinch*, 306 N.C. at 26-27, 292 S.E. 2d at 223.

Defendant here exercised his Fifth Amendment right not to testify in the guilt phase. At the sentencing phase, however, he did testify and admitted his guilt to the jury. So far as the transcript of his testimony, both on direct and cross, reveals, it was straightforward, unequivocal, and truthful. A jury could reasonably find that defendant's admission of his guilt was a first step toward recognition of his wrongdoing and his ultimate potential rehabilitation. It was, therefore, error of constitutional dimension for the trial court not to submit this mitigating circumstance.

Whether this murder was premeditated and deliberated is a close question, although I agree with the majority that there is enough evidence in the guilt phase to carry the question to the jury. Further, even if one concludes, as does the majority, that a sentence of death is not disproportionate, a conclusion with which I disagree, this is not a compelling case for the death penalty. Therefore I cannot say that failure to submit the tendered mitigating circumstance was harmless beyond a reasonable doubt.

The majority says that because defendant admitted his guilt only after he had been convicted by a jury, told the jury that he was under the influence of drugs and alcohol when he committed the murder, and had indicated to his family that he did not want to testify, the fact that he ultimately did testify and admit his guilt cannot as a matter of law be considered a mitigating circumstance.

I disagree. Defendant was exercising his Fifth Amendment right not to be a witness against himself during the guilt phase. He should not be penalized for the exercise of this right when at the penalty phase he decides to forego the right and admit his guilt. There was plenary corroborative evidence of defendant's addiction to drugs and alcohol other than defendant's own testimony. This formed the basis of the mitigating circumstance that defendant's capacity to appreciate the criminality of his conduct was impaired. That defendant so testified is no reason to say that his admission of guilt cannot be considered as a mitigating circumstance. Finally, defendant's admission that he had not at first wanted to testify is no reason to hold as a matter of law that his ultimate decision "to tell the truth" cannot be considered by the jury as a mitigating circumstance.

The question is not whether this Court thinks defendant's admission is or is not a mitigating circumstance. The question is whether a jury could reasonably find it to be one. The factors mentioned in the majority opinion at most might be urged upon a jury in an effort to persuade it not to find defendant's testimony to be mitigating. They do not render the testimony non-mitigating as a matter of law.

III.

I conclude that the death sentence is excessive and disproportionate "to the penalty imposed in similar cases, considering both the crime and the defendant." N.C.G.S. 15A-2000(d)(2).

The majority deals with this aspect of the case perfunctorily. It refers to the "pool" of similar cases and says that it has compared the defendant and the crime to these cases without saying which of the cases in the pool it finds similar or to which cases it has compared the instant case. The majority simply describes the crime, without describing the defendant, and concludes that the sentence of death is not disproportionate. The majority seems to treat the issue as being one exclusively within this Court's unbridled discretion.

I think the question of proportionality of any death sentence is more serious than this. It is not a question for the unbridled discretion of this Court. We do not sit as a super jury on this issue. Whether a death sentence in any case is disproportionate is a question of law. In *State v. Jackson*, 309 N.C. 26, 46, 305 S.E. 2d 703, 717 (1983), the Court declared the death penalty imposed in that case disproportionate "as a matter of law." In *Jackson* and *State v. Hill*, 311 N.C. 465, 319 S.E. 2d 163 (1984), this Court took pains to note that our responsibility in conducting a proportionality review was serious indeed. Justice Martin, writing for the Court in *Jackson*, said, 309 N.C. at 46, 305 S.E. 2d at 717:

> The purpose of proportionality review is to serve as a check against the capricious or random imposition of the death penalty. *State v. Hutchins*, 303 N.C. 321, 279 S.E. 2d 788 (1981). We repeat that we consider the responsibility placed upon us by N.C.G.S. 15A-2000(d)(2) to be as serious as any responsibility placed upon an appellate court. *State v. Rook*, 304 N.C. 201, 283 S.E. 2d 732 (1981), *cert. denied*, 455

> U.S. 1038 (1982). In carrying out our duties under the statute, we must be sensitive not only to the mandate of our legislature but also to the constitutional dimensions of our review. *Id.* We have, therefore, carefully reviewed the record, briefs, and oral arguments presented.

The foregoing was quoted with approval in *Hill*, 311 N.C. at 476, 319 S.E. 2d at 170, where the Court, in an opinion by Chief Justice Branch, said, "We have recognized, and continue to recognize the gravity of the duty imposed upon us by statute."

In both *Hill* and *State v. Lawson*, 310 N.C. 632, 314 S.E. 2d 493 (1984), the Court was careful to select similar cases with regard to the nature of the defendant and the nature of the crime from the available "pool" of cases for comparison purposes in conducting its proportionality review. *Hill* involved the murder of a policeman. The Court concluded the death penalty was disproportionate. The Court compared the case first to other cases involving the killing of law enforcement officers and second to other cases in which the death penalty had been affirmed on appeal for the purpose of demonstrating that the murder in *Hill* was not as egregious as in those other cases. It also emphasized the defendant's lack of past criminal activity, his being gainfully employed and his cooperation during the investigation. In *Lawson* the Court said:

> In essence, our task on proportionality review is to compare the case at bar with other cases in the pool which are roughly similar with regard to the crime and the defendant, such as, for example, the manner in which the crime was committed and defendant's character, background, and physical and mental condition. If, after making such a comparison, we find that juries have consistently been returning death sentences in the similar cases, then we will have a strong basis for concluding that a death sentence in the case under review is not excessive or disproportionate. On the other hand if we find that juries have consistently been returning life sentences in the similar cases, we will have a strong basis for concluding that a death sentence in the case under review is excessive or disproportionate.

310 N.C. at 648, 314 S.E. 2d at 503.

Lawson involved a murder committed during a burglary. In sustaining the death sentence as proportionate, we compared *Lawson* with other cases involving robbery-murders in which life imprisonment had been imposed and distinguished *Lawson* from those cases. We also demonstrated how the circumstances in *Lawson* were similar with regard to both the crime *and* the defendant to circumstances in a number of cases in which the death penalty had been affirmed on appeal.

I think the approach used on proportionality review in *Hill*, *Lawson*, and *Jackson* is the proper one. When it is employed here, the conclusion is inescapable that the death sentence is disproportionate.

Although I concur in the majority's conclusion that the evidence at the guilt phase, considered alone, is enough to be submitted to the jury on the element of premeditation and deliberation, defendant's testimony at the sentencing hearing, if believed, goes a long way toward depriving this crime of that essential element of first degree murder. The jury believed this testimony because they found as a mitigating circumstance that the killing occurred "contemporaneously to an argument between the defendant and the victim, a person whom he knew by virtue of a domestic relationship, and by means of an instrument acquired at the scene and not taken there."

For deliberation, a necessary element of first degree murder, to be present, the specific intent to kill, also a necessary element of the crime, "must arise from 'a fixed determination previously formed after weighing the matter.'" *Hill*, 311 N.C. at 470, 319 S.E. 2d at 167, quoting *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). The provocation necessary to reduce first degree murder to second degree murder is less than the provocation required to reduce second degree murder to manslaughter. *State v. Thomas*, 118 N.C. 1113, 24 S.E. 431 (1896). In *Thomas*, defendant was convicted of the first degree murder of his wife and sentenced to death. There was some evidence that the killing occurred during a verbal argument. This Court on appeal held

that it was error not to submit to the jury the lesser included offense of second degree murder. The Court said:

> There being no actual evidence of a fight between the prisoner and deceased, the jury were left to grope in the dark as to their duty in case they were not satisfied by the State beyond a reasonable doubt that the prisoner acted upon a fixed purpose to kill, distinctly formed in his mind. If [the jury] concluded that there was a quarrel or argument, and in the heat of sudden passion, engendered by disagreeable language, which would not have been provocation sufficient to bring the offense within the definition of manslaughter, the crime . . . was murder in the second degree.

Id. at 1124, 24 S.E. at 435. Thus if the intent to kill is suddenly formed in the course of a quarrel with another and is the product of that quarrel, it is not formed in a cool state of blood and there is no deliberation sufficient to support a conviction of first degree murder. *Corn*, 303 N.C. at 297, 278 S.E. 2d at 223; *Misenheimer*, 304 N.C. at 113-14, 282 S.E. 2d at 795; *Thomas*, 118 N.C. at 1125, 24 S.E. at 435.

The jury's conclusion after the sentencing hearing that this killing occurred "contemporaneously to an argument between the defendant and the victim" makes this case, for proportionality review purposes, much like *Hill*, 311 N.C. 465, 319 S.E. 2d 163 (1984), in which a police officer was killed by defendant during a struggle. A majority of the Court concluded that there was sufficient evidence of first degree murder, but it reversed a sentence of death on proportionality grounds principally because the evidence regarding precisely how the murder occurred "admits of some confusion and is certainly speculative at best." *Id.* at 479, 319 S.E. 2d at 172. The Court said in conducting its proportionality review, "[T]here is no evidence that defendant coldly calculated or planned the commission of this crime over a period of time. . . ." *Id.* at 478, 319 S.E. 2d at 171. In concluding its proportionality review, the Court said:

> 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).

Id. at 479, 319 S.E. 2d at 172.

The jury here found as mitigating circumstances that defendant did not have a history of violent conduct, that his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired, and that the victim in this case was a person whom defendant knew by virtue of a domestic relationship.

In every case so far, affirmed on appeal, where murders have arisen out of prior close or domestic relationships and where there was evidence of impaired capacity arising from drug or alcohol abuse, except for *State v. Noland*, 312 N.C. 1, 320 S.E. 2d 642 (1984), our juries have returned a sentence of life imprisonment. *State v. Anderson*, 303 N.C. 185, 278 S.E. 2d 238 (1981) (defendant killed woman with whom he had previously lived but from whom he was separated at the time of the murder; evidence that defendant suffered from passive-aggressive personality disorder and alcohol and drug abuse); *State v. Clark*, 300 N.C. 116, 265 S.E. 2d 204 (1980) (defendant killed father in a rage; evidence of alcohol and drug abuse); *State v. Franks*, 300 N.C. 1, 265 S.E. 2d 177 (1980) (defendant killed girlfriend; evidence that defendant suffered from alcohol and drug abuse). In *Noland* defendant was convicted of first degree murder of both his sister-in-law and her husband. He was also convicted of first degree burglary of their home, first degree burglary of the home of his parents-in-law and felonious assault upon his mother-in-law. There was no question concerning the element of premeditation and deliberation. There was substantial evidence of defendant's mental and emotional disturbance, but the jury did not indicate whether it believed this evidence. The aggravating circumstance in *Noland* was that the murder "was part of a course of conduct [of defendant] which included the commission by the defendant of other crimes of violence against other person or persons." As we noted in our affirmation of a death sentence on proportionality review in

State v. Lawson, 310 N.C. 632, 650-51, 314 S.E. 2d 493, 504-05 (1984), the aggravating factor that defendant engaged in a course of conduct involving violence against others was common to seven out of the fourteen cases then in the pool in which this Court affirmed the death sentence. It was likewise present in *Lawson* and was an important consideration in our affirmation of the death sentence in that case.

In every case so far, affirmed on appeal, where murders have arisen out of prior close or domestic relationships, except *State v. Boyd*, 311 N.C. 408, 319 S.E. 2d 189 (1984), and *State v. Martin*, 303 N.C. 246, 278 S.E. 2d 214, *cert. denied*, 454 U.S. 933, *reh'g denied*, 454 U.S. 1117 (1981), our juries have returned sentences of life imprisonment. *State v. Hinson*, 310 N.C. 245, 311 S.E. 2d 256 (1984) (defendant killed husband); *State v. Woods*, 307 N.C. 213, 297 S.E. 2d 574 (1982) (wife killed husband); *State v. Parton*, 303 N.C. 55, 277 S.E. 2d 410 (1981) (defendant killed girlfriend with whom he had gone fishing); *State v. Colvin*, 297 N.C. 691, 256 S.E. 2d 689 (1979) (defendant killed wife after marital difficulties and after threatening her "before he would allow her to take his children away from him"); *State v. Myers*, 299 N.C. 671, 263 S.E. 2d 768 (1980) (defendant killed estranged wife).

Boyd and *Martin* are easily distinguishable from the instant case. In *Boyd*, the victim (defendant's girlfriend) died as a result of thirty-seven stab wounds inflicted by defendant. In addition to the especially heinous aggravating circumstance, the jury found that defendant had previously been convicted of a violent felony. Most importantly, the Court in *Boyd* said at the close of its proportionality review that "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." 311 N.C. at 436, 319 S.E. 2d at 207. In *Martin*, likewise, the murder of defendant's estanged wife was particularly brutal. Defendant shot her twice, disabling her. He then dragged her across the room while she was still alive, held her up with one hand while he struck her four or five times with the pistol, threw her against the wall and hit her several times with the pistol while she begged him not to hit her any more. Then in the presence of her small child and with the victim pleading for her life and asking for forgiveness, defendant fired three more shots, two

of which, entering her head, were fatal. The jury in *Boyd* expressly found that defendant was *not* under the influence of a mental or emotional disturbance and that his capacity to appreciate the criminality of his conduct was *not* impaired.

In summary, this case, because of the closeness of the deliberation issue and the absence of any prior violent conduct of defendant, is quite similar to *Hill* in which we set aside the death penalty as disproportionate. It is much like all the other cases where the killing arose out of a close or domestic relationship and was the product, in part, of drug and alcohol abuse, in which our juries have consistently imposed life imprisonment. The death sentence here, therefore, is disproportionate.

For the reasons given I vote for a new sentencing hearing and, failing that, I vote to remand the case for entry of a sentence of life imprisonment.

Justice FRYE joins in this dissenting opinion.

STATE OF NORTH CAROLINA v. VONNIE RAY BULLARD

No. 252A82

(Filed 6 November 1984)

1. **Criminal Law § 51— expert testimony—qualification of witness—absence of findings of fact**

The trial court did not err in permitting a physical anthropologist to testify as an expert in bare footprint comparison without making findings of fact as to her qualifications as an expert where defense counsel did not specifically request the court to make findings of fact; the trial judge implicitly found that the witness was qualified when he overruled defense counsel's objection to the State's offer of the witness as an expert in the comparison of footprint impressions; and there was evidence to support a finding by the trial judge that the witness was qualified to testify as an expert in footprint comparison.

2. **Criminal Law § 50— expert testimony—effect of novelty of scientific method**

The single fact that a scientific method employed by a witness is novel and suffers from a dearth of recognition does not *per se* prohibit testimony concerning such method.

3. Criminal Law § 50— new scientific evidence—general acceptance not required

The North Carolina Supreme Court does not adhere exclusively to the "general acceptance" formula in determining the admissibility of new scientific evidence.

4. Criminal Law § 61.2— footprint identification—admissibility of new scientific method

Expert testimony by a physical anthropologist identifying a bloody bare footprint by comparing known and unknown footprint impressions by size and shape of the heel, arch, ball and toe regions without relying on ridge detail was reliable because of the witness's explanatory testimony, professional background, independent research, and use of established measurement techniques relied upon in the field of physical anthropology.

5. Criminal Law § 61.2— footprint comparisons—new scientific method

Expert testimony by a physical anthropologist identifying a footprint by comparing known and unknown footprint impressions by size and shape was not inadmissible on the ground that the method of analysis is comparable to hypnosis or polygraph testing since the anthropologist relied on visual comparisons rather than on the interpretation of mechanical data, and there was no effort to explore the workings of the mind.

6. Criminal Law § 61.2— relevancy of footprint evidence

Expert testimony that defendant's bloody footprint was found at a murder scene was relevant to connect defendant with the crime. Rebuttal testimony by two defense witnesses that they did not agree that defendant's footprint matched the footprint found at the crime scene goes to the weight of the expert testimony, not to its admissibility.

7. Criminal Law § 96— possession of knife year before crime—striking of testimony—absence of prejudice

The defendant in a murder case was not prejudiced by the admission of testimony that defendant possessed a pocketknife a year before the victim's death where the trial court struck such testimony and instructed the jury not to consider it, and where the deleterious effect of the testimony was diminished by cross-examination establishing that the possession of a pocketknife was a common practice in the farming and hunting area in which the crime occurred.

8. Criminal Law § 39; Homicide § 15— shooting pistol three months before murder—competency for contradiction—opening door to testimony

Testimony that defendant pulled a pistol from his pocket and shot it into the ground three months before the murder in question was competent to contradict defendant's testimony that he kept the pistol in his truck and did not carry it on his person. Further, defendant "opened the door" to the State's evidence that defendant had shot in the direction of a mentally retarded boy whom defendant or defendant's son had been teasing when defense counsel attempted to show that no one was shot at or scared and that defendant was shooting at snakes.

9. Criminal Law § 15— crime on river which is boundary between counties— venue

Where a murder occurred on a bridge over a river which forms a boundary between Bladen and Sampson counties, either of those counties was a proper venue for the murder trial although physical evidence indicated that the crime was committed closer to the Bladen County side of the river. G.S. 15-129.

10. Homicide § 4— first degree murder defined

First degree murder is the unlawful killing of a human being with malice and with premeditation and deliberation.

11. Homicide § 14— presumptions from use of deadly weapon

The intentional use of a deadly weapon gives rise to a presumption that the killing was unlawful and that it was with malice. A pistol is a deadly weapon *per se*, and a knife can be a deadly weapon if, under the circumstances of its use, it is likely to produce death or great bodily harm.

12. Homicide § 18— proof of premeditation and deliberation

Premeditation and deliberation must ordinarily be proved by circumstantial evidence, and among the circumstances to be considered are: (1) want of provocation on the part of the deceased, (2) conduct and statements of the defendant before and after the killing, (3) threats made against the victim by the defendant, ill will or previous difficulty between the parties, and (4) evidence that the killing was done in a brutal manner.

13. Homicide § 21.5— first degree murder—sufficiency of evidence

The State's evidence was sufficient for the jury in a prosecution for first degree murder where it tended to show that defendant and the victim had previously experienced ill will resulting from the victim's shooting and wounding of defendant's son; defendant had repeatedly threatened the victim's life; defendant and the victim were seen together earlier in the evening of the murder, and defendant was observed angrily addressing the victim; at this time, defendant was observed with a .22 caliber gun; witnesses later saw defendant in the same general vicinity where the victim was last seen alive, and defendant's truck was observed on the evening of the crime on a bridge where the murder occurred; defendant admitted that only he had possession of his truck the entire evening of the crime; the victim's wounds were basically inflicted in a left to right direction, an angle consistent with shots fired from the driver's seat of a vehicle toward a passenger; and a seat belt assembly in defendant's truck contained a small bullet hole at the head level.

APPEAL by defendant from judgment entered by *Jolly, J.*, at the 4 January 1982 Criminal Session of Superior Court, DUPLIN County. The defendant, Vonnie Ray Bullard, was charged with the murder of Luke Pedro Hales in a bill of indictment returned by the SAMPSON County Grand Jury. The case, upon motion of defendant, was transferred for trial from SAMPSON to DUPLIN Coun-

ty. The jury found the defendant guilty of first degree murder on 27 January 1982 and recommended a sentence of life imprisonment. Based upon the jury's recommendation, the trial court, on 28 January 1982, entered judgment sentencing the defendant to life imprisonment. The defendant appealed to the Supreme Court pursuant to G.S. 7A-27(a).

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

Carl A. Barrington, Jr., for the defendant-appellant.

FRYE, Justice.

The defendant raises several assignments of error. Both parties agree, however, that the dispositive and crucial issue to this appeal is whether the trial court improperly allowed Dr. Louise Robbins, a physical anthropologist, to testify as an expert in the identification of a bloody bare footprint. This issue is one of first impression in this State. It is our conclusion, after carefully reviewing the entire record, the parties' arguments, and the relevant law, that the trial court correctly allowed Dr. Robbins to testify and render her opinion. First, we will consider the issue involving the expert testimony. The remaining assignments of error, also considered to be without merit, will be addressed later in this opinion.

The trial of Vonnie Ray Bullard was complicated. Eighty-one witnesses testified, and more than half of them possessed the surname Bullard. Exhibits in excess of 1,000 were also introduced into evidence. The testimony revolved around the sequence of events during the evening of 25 August 1981. The events during that evening occurred within the Beaverdam Community and were concentrated primarily within a three-mile stretch of State Road 210, where the defendant and Pedro Hales lived. The majority of this testimony concerned the location of Pedro Hales (the decedent), Vonnie Ray Bullard (the defendant) and defendant's truck during various times on 25 and 26 August 1981. The evidence, which is mostly circumstantial, is summarized as follows:

Pedro Hales and the defendant were neighbors in the community of Beaverdam in Cumberland County, which clusters around the intersection of State Roads 210 and 242. In October

1978, Pedro Hales had shot and wounded the defendant's son and was found not guilty by a jury on the basis of self-defense. Since that time, Vonnie Ray Bullard had made threatening statements about Pedro Hales to several witnesses. Defendant had specifically stated during 1978 or 1979 that he intended to kill Pedro Hales. During April 1981, the defendant continued to threaten that he would get Pedro and that every time he saw Pedro he thought about shooting him.

At approximately 8:30 p.m. on 25 August 1981, the defendant and Pedro were seen riding in Pedro's truck and talking at a local store. Several witnesses stated that they observed the defendant addressing Pedro in a loud and angry voice but could not determine what was being said. Later that evening, prior to Pedro's disappearance, the defendant was seen with a small pistol in his watch pocket. Defendant acknowledged that he owned a .22 caliber pistol, but claimed he had lost it several days before Pedro's death. The defendant was not wearing shoes when he was seen during this time.

Pedro was last seen alive without apparent injuries at approximately 11:00 p.m. on 25 August 1981. A local neighbor, who had seen Pedro on the side of the road and suspected he was drunk, went to Pedro's mother's house to tell Pedro's brother, Carson Hales, about Pedro. The neighbor and Carson both observed the defendant's red truck going by as they stood on Carson Hales' porch at approximately 11:05 p.m. Immediately thereafter, they went back to where Pedro had last been seen but could not find him. Fruitlessly, they began to search in the general area for Pedro. Carson Hales and his mother also went to defendant's home at approximately 11:30 p.m. to inquire whether the defendant had seen Pedro, since the defendant had driven earlier in the general direction where Pedro was last seen. However, no one was home and defendant's red truck was not there.

Meanwhile, at approximately the same time of 11:30 p.m., two witnesses observed a vehicle stopped on Melvin's Bridge, located approximately four miles from where Pedro was last seen. These witnesses pulled over on the side of the road as they approached the bridge. After about forty-five seconds, the vehicle drove away from the bridge, toward the two witnesses, who described the

vehicle as the distinctive red truck owned by the defendant. The witnesses could not see who was driving the truck.

The defendant's truck was next observed at approximately 12 midnight, traveling at a rapid rate of speed. He was seen pulling his truck behind his house, which is not where he normally parks it. The defendant was observed turning his headlights off as soon as his truck entered the driveway. Approximately ten minutes later, the defendant spoke with several witnesses, who testified that defendant's hair was wet and freshly combed and that he looked as though he had just changed clothes and showered.

The following day, 26 August 1981, a large amount of blood, a .22 bullet, glass, bloody bare footprints, a bare footprint in sand, tire tracks, and a piece of red plastic safety belt assembly were found on Melvin's Bridge. During a search of defendant's truck that same day, a blood smear matching the victim's, but different from the defendant's, was found on the floorboard. The back window on defendant's truck was broken. The safety belt assembly on the passenger's side was missing. Scientific comparisons of the glass found at the crime scene and the glass from defendant's truck showed the glass was of a common origin. The sections of the seat belt assembly still present in the passenger's side of the truck revealed a small hole at approximately the head level of a passenger. The particles in the hole were found to be lead which is consistent with a lead bullet passing through the seat belt assembly. Also, the safety belt assembly found at the scene was identical to the seat belt assembly in defendant's truck.

A detective from the Sampson County Sheriff's Department testified that he took a series of photographs with a 35mm camera at varying shutter speeds of a bloody bare footprint on the asphalt and another bare footprint in sand. He also testified that he had brushed some sand away from the bloody footprint before he photographed it. This same footprint was later sprayed with luminol reagent, which enhances the footprint and illuminates the bloody areas. Photographs of the luminol-enhanced footprint were also taken. Additionally, the detective testified that as he was trying to remove the piece of asphalt with the bloody footprint, the asphalt broke primarily in the heel region of the footprint.

A supervisor of the latent evidence section of the SBI laboratory testified that he took ink and latex paint impressions of the defendant's feet and that he gave the impressions and copies of the photographs of the unknown footprint (both natural light and luminol enhanced) to Dr. Louise Robbins. He also testified that he observed no ridge details on the unknown footprints found on the bridge and could not make a comparison with known footprints of the defendant. He also testified he would not make an identification of the footprints based on shape alone.

Dr. Louise Robbins, a physical anthropologist employed at the University of North Carolina at Greensboro, testified, over objection and after a lengthy *voir dire* hearing, about her background, qualifications, and independent studies in bare footprint comparisons. She explained her methodology for comparing known and unknown bare footprints by size and shape, without relying on ridge detail in the bare footprints. She testified that in her opinion a bloody bare footprint found on Melvin's Bridge was that of the defendant.

Pedro's body was found several days later in the South River. An autopsy revealed he had been stabbed seventeen times and shot three times. A .22 bullet was removed from his body. The first bullet had entered the left side of the head exiting at the center of the back. The second bullet had entered the right side of the back near the shoulder, and there was no exit wound. A .22 caliber bullet was found in this back wound. The third bullet entered in the left shoulder and exited a short distance later. Basically, the wounds were inflicted in a left to right direction.

During the search for Pedro's body, the defendant stated, "Do you think he deserved to live after he shot my son?" He also made the statement, "What would you do if someone had shot your young'un and the law had turned him loose?" The defendant, when questioned by authorities, stated that he did not know of anyone else who had his truck on the evening of 25 August 1981. He admitted driving over Melvin's Bridge on 25 August 1981 at approximately 10:30 p.m. and seeing an old Volkswagen. Defendant's house and vehicle were searched and no .22 caliber pistol was found. The defendant claimed that he lost his pocketknife and pistol several days prior to the killing. Defendant and another

witness testified that defendant broke his window in his truck earlier during the day of the killing. Defendant also stated that he had been at a local roadside market from 10:45 until 11:45 p.m. on the evening of Pedro's disappearance. The defendant's sister testified that defendant was with her from 10:40 to 11:40 p.m. on 25 August 1981. Afterwards, defendant's wife testified that defendant arrived home at 11:45 p.m. and that she remained with him the rest of the night.

Defendant denied killing Pedro and stated that they were friends. Defendant admitted he was with Pedro earlier on the evening of 25 August 1981. He also stated that no one else used his truck during the entire evening. Evidence was presented that three people went over Melvin's Bridge earlier during the morning of 26 August 1981 and no blood was observed by these three people. A deputy with the Cumberland County Sheriff's Department did observe the blood on the north side of Melvin's Bridge at approximately 10:30 a.m. that same morning. Several character witnesses testified on behalf of the defendant. The defense also presented testimony of Professors Cartmill and Robertson of the Duke University Medical School, Department of Anatomy, who stated that Dr. Louise Robbins' method of footprint analysis was inaccurate and that the unknown footprints did not, in their opinion, belong to the defendant.

I.

EXPERT TESTIMONY

We first consider defendant's challenge to the introduction of the testimony of Dr. Louise Robbins, a physical anthropologist.[1] The defendant's objection to Dr. Robbins' testimony is premised on the following specifically alleged errors by the trial court:

> 1. The trial court erred in allowing Dr. Robbins to testify as an expert in the field of footprint identification when, in fact, as shown by the evidence adduced in *voir dire*

1. Dr. Robbins testified that physical anthropology is a subdivision of anthropology in which the focus is on the biological makeup of people, namely, the similarities and differences in people around the world. More specifically, Dr. Robbins has been involved in forensic anthropology, which is the application of anthropological techniques and methods to problems pertaining to law enforcement.

hearing prior to her testimony, there is no such area of such expertise recognized by our law.

2. The trial court erred in failing to exclude or suppress Dr. Robbins' testimony because it has no basis or recognition whatever in the scientific community and is not sufficiently reliable or acceptable by the court.

3. The trial court erred by failing to grant defendant's motion to strike the opinion testimony of Dr. Robbins because she was not properly qualified to give such an opinion, and her testimony was too speculative and had no basis in science or fact.

4. The trial court erred in allowing Dr. Robbins to testify as an expert and give her opinion because the court did not make findings of fact as to her expertise.

The first three contentions by defendant primarily deal with the application of a technique utilized by Dr. Robbins which is allegedly unprecedented in North Carolina and the United States.[2] In Part A we will address defendant's fourth assignment of error. The remaining errors will be the focus of Part B. Before beginning our analyses and conclusions, however, some attention to Dr. Robbins' professional background and her challenged methodology is in order.

Dr. Robbins testified during *voir dire* and on direct examination about her qualifications and achievements in the field of physical anthropology.[3] During direct examination, she explained,

2. Dr. Robbins testified that she is the only person in this country to attempt the kind of analysis undertaken to identify the footprints in question. She has been in contact with Owen Macey of Scotland Yard and Arly Claus of Germany who employ the same technique and analysis. Also there are several persons in India who engage in footprint analysis consistent with her analysis.

3. Dr. Robbins has been a professor in the Physical Anthropology Department at the University of North Carolina at Greensboro since September 1974. Before then, she was a Professor at Mississippi State University, University of Kentucky, and University of Nebraska. She obtained her Bachelor's, Master's and Ph.D. Degrees from Indiana University. Her Ph.D. was in anthropology, with a minor in physiology. She has taught courses in forensic anthropology and written an article entitled "The Individuality of Footprints," which is to be published in the *Journal of Forensic Science. See, e.g.*, Robbins, *Anthropological Methodologies Applied to Medicolegal Problems*, 7 Crim. Just. Rev. 1 (Spring, 1982). She is expected to have

by utilizing colored slides, how she examines unknown footprints for purposes of trying to determine if they are made by a particular individual.[4]

The method of comparison employed by Dr. Robbins does not involve ridge detail as does traditional fingerprint analysis. Instead, she relies upon a technique of comparison pertaining to the size and shape of the footprint in four areas: namely, the heel, arch, ball, and toe regions. The footprint size and shape reflect the size and shape of the internal bone structure of the foot, so the bones indirectly play a major part in the analysis of the footprint, according to Dr. Robbins. Dr. Robbins explains that since each person's foot size and shape are unique, she can identify a footprint represented by a clearly definable print of whatever part of the foot touches the ground. By examining the sides, front, and rear ends of each region of the foot, Dr. Robbins explains that she can compare known footprints with unknown footprints and determine if they are made by the same person.[5]

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a book published soon also dealing with human footprints. In addition, Dr. Robbins has presented papers at the American Academy of Forensic Sciences Annual Meeting and is consulted by the FBI in cases dealing with footprints. She is a member of the American Academy of Forensic Science, with membership premised on experience in working with law enforcement problems. Dr. Robbins' forensic experience includes analyzing and testifying in at least four other states.

4. This testimony consisted of a scholarly presentation describing the bone structure and internal structure of the human foot. Dr. Robbins explained in detail the anatomy of the foot, with six pages in the transcript being devoted to this presentation. She also testified that she began her study of footprints in 1971 when she analyzed prehistoric prints in the caves of Kentucky and Tennessee. Although she had never had formal training in the study of footprints, she began collecting footprints and formulating her own study because there was no scientific literature or studies available at that time. Dr. Robbins has collected over 1,200 footprints impressed in dust and lifted by means of a hardening agent. During the course of her studies, she testified that she has had occasion to examine thousands of footprints.

5. On direct, Dr. Robbins further explained the basis for her technique:

Q. When you started working with these living footprints, were you . . . the footprints of living human beings, were you doing something new, or were you building on something other people had done?

A. Well, here in the United States, no previous studies of footprints had been done for the collection of information about footprints had been conducted. However, in England, a forensic scientist, Sir Sidney Smith, had used footprints in some of his own work, both when he was employed in Cairo, Egypt and . . . especially in Egypt. The footprints have been used in the British

At the time of the trial Dr. Robbins stated that she had testified as an expert in Oklahoma, California, Pennsylvania, and Florida.[6] The only reported decision from Florida did not refer to Dr. Robbins; however, her name did appear in the transcript as an expert.

A.

[1] Initially, we will address defendant's fourth assignment of error. In determining whether Dr. Robbins was properly allowed to testify as an expert and give her opinion, it is important to consider certain legal fundamentals in the area of expert testimony. It is undisputed that expert testimony is properly admissible when such testimony can assist the jury to draw certain inferences from facts because the expert is better qualified. *Cogdill v. Highway Commission*, 279 N.C. 313, 182 S.E. 2d 373 (1971). G.S. 8-58.13 (1981) further provides:

Leather Industry, and also the American Military, in the development of shoes that would not hurt the feet of soldiers. The measurement of footprints had been taken by the early French in the early nineteen hundreds. But, a man by the name of Alphonse Bertillon started working with footprints, and then the discovery of fingerprints came in and he did not pursue the footprints.

Q. Have you studied the work of these people?

A. Yes, Sir, I have.

6. The defendant filed a memorandum of additional authority after his original brief was filed with this Court but prior to oral arguments. The defendant vigorously attacked the State's assertion that there was legal authority reported in the national reporting system where Dr. Robbins' testimony had been considered. The State cited *People v. Puluti*, 120 Cal. App. 3d 357, 174 Cal. Rep. 597 (1981) where Dr. Robbins testified as an expert. She examined a pair of shoes found near the deceased's grave. Dr. Robbins testified that the defendant, Puluti, had worn the shoes found at the gravesite. She had made a comparison between the defendant's footprints and the impression of a footprint that was impressed in the intersole of the shoe.

Defendant correctly identified *Puluti* as an unpublished opinion, pursuant to an Order of the California Supreme Court dated 13 August 1981. Rule 977(a) of the California Rules of Court requires that unpublished opinions are not valid legal authority in any legal proceeding, thus this opinion cannot be cited as authority for anything in California. And, *ipso facto*, it cannot be considered persuasive authority within this State.

It is worth noting that Dr. Robbins testified in a trial court of North Carolina as an expert in the field of physical anthropology in the case of *State v. Maccia*, 311 N.C. 222, 316 S.E. 2d 241 (1984). Shoes found at the crime scene contained imprints on the insole of footprints. Dr. Robbins prepared a cast of the imprints and com-

Opinion testimony permitted.

> 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.[7]

It is not necessary that an expert be experienced with the identical subject area in a particular case or that the expert be a specialist, licensed, or even engaged in a specific profession. *State v. Phifer*, 290 N.C. 203, 225 S.E. 2d 786 (1976), *cert. denied*, 492 U.S. 1123 (1977); *Shaw v. Sylvester*, 253 N.C. 176, 116 S.E. 2d 351 (1960). Furthermore, the trial judge is afforded wide latitude of discretion when making a determination about the admissibility of expert testimony. Justice Moore stated in *State v. King*, 287 N.C. 645, 215 S.E. 2d 540, *death sentence vacated*, 428 U.S. 903 (1976):

> Whether the witness has the requisite skill to qualify him as an expert is chiefly a question of fact, the determination of which is ordinarily within the exclusive province of the trial judge. . . .
>
> A finding by the trial judge that the witness possesses the requisite skill will not be reversed on appeal unless there is no evidence to support it.

Id. at 658, 215 S.E. 2d at 548-49; *accord State v. Combs*, 200 N.C. 671, 158 S.E. 252 (1931); *see, e.g.*, 1 Brandis on North Carolina Evidence, § 133 (2d rev. ed. 1982).

Dr. Robbins was clearly in a superior position and better qualified to compare the bloody bare footprint found on the bridge with those of the defendant. The expertise to make the comparisons involved a certain knowledge which was beyond

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pared them with footprints made in paint and ink by the defendant. She concluded that "the defendant's feet made the imprints inside the shoes found at the scene of the crime." *Id.* at 225, 316 S.E. 2d at 243. This is sometimes referred to as a "Cinderella analysis." The expert testimony by Dr. Robbins was not an issue on appeal.

7. G.S. 8C-1, Rule 702, effective July 1, 1984, is identical to the present statute.

the realm of that of the average juror. Her testimony indicated that there were unusual and distinct features observed by Dr. Robbins when she examined the photograph of the bloodstained footprint on the bridge, the crime scene.[8] In examining the footprints, Dr. Robbins made acetate overlays by tracing the photographed footprints. She made visual comparisons by observing these footprints with her naked eye and with a magnifying glass. After Dr. Robbins had observed the footprints and prepared the acetate tracing overlays, she used the tracings of the left and right footprints in the photographs to compare them with the footprints made by the defendant on several rolls of brown paper. In explaining her observations,[9] Dr. Robbins testified on direct as follows:

> Q. Can you point out to the jurors what, if any, features you observed when you were making the comparison?
>
> A. The particular features that I was observing in the photograph pertaining to the left footprint and the acetate tracings of the left footprint was with the footprint of the left foot on the brown paper here. Again, I was looking at the toe region, the ball, the arch region and the heel region. The most noticeable features were the inner balls on the inside of the big toe pads, the absence of the stem or the big toe and the absence of the inside ball of the left footprint. Also, the position relative to one another of toes two, three and four; toe four's position, in turn, relative to

8. Dr. Robbins explained that the SBI had given her photographs of a bloodstained right footprint on asphalt and a bare left footprint in sand, taken at varying shutter speeds. The bloody bare footprint was subsequently treated by the SBI with a chemical substance called luminol, which enhances the detail of the photographed footprint. She was asked to compare both the natural light and luminol-enhanced photographs with the footprints appearing on six rolls of paper. The footprints on the six rolls of paper were made by a person (unknown to Dr. Robbins, all of these footprints were those of the defendant) whose feet had been smeared on the bottom with ink and latex paint. The footprints were made on the paper when the defendant walked from one end of the paper to the other, turned around and then impressed his prints in the opposite direction.

9. Dr. Robbins' detailed, precise, and exhaustive explanations and responses to similar questions propounded by both attorneys concerning her comparisons comprised over 175 pages of transcript testimony. It would be of little value to further reiterate the technical details contained in this testimony.

where toe five is placed, noting that toe five is placed very close to the front margin of the ball and there being a notable space between toe four and the little toe next to it. The other side of the ball was examined, was compared, again noting that only the outer part of the ball is impressed on the paper in many of the left footprints. The outer part of the arch, a rather narrow arch was impressed on the paper; but yet, we get the inside part of the heel as well as the outer part of the heel impressed on the paper.

Q. Any of the other features that you observed on both the rolls that are up there and the photographs?

A. Looking at the right footprint, using the acetate tracing that had been made of the right footprint, and the photograph, I compared the heel region. It has a long, oval shape to it. The narrow to moderately wide arch. You will notice that there is some variation in width of the arch region in the different footprints on the brown paper. Also, the outer margin along the arch and the ball showing a rather long, slightly bulging margin up to a rather sharp point behind toe five where the outer margin meets with the front margin of the ball. The front margin has this long, kind of indenting contour here behind the little toe. The little toe is positioned very close to the front edge of the ball. It is separated a little bit from toe four, which is more full in some right footprints than in others. And toes three and four cluster together along with toe two. But, three and four, in particular, show up in front of this peaking part that is in the front margin of the ball.

Certainly, Dr. Robbins' testimony assisted the jury in making certain inferences about the footprints on the bridge, which could not have been made without the testimony of someone with the qualifications of Dr. Robbins. Even though Dr. Robbins has no formal training in footprint identification,[10] she testified at length

10. In North Carolina, even a lay person can testify that in that person's opinion a shoe print at a crime scene corresponds to those of the accused. *State v. Pratt*, 306 N.C. 673, 295 S.E. 2d 462 (1982).

concerning her independent study and research which spanned the last fourteen years. In addition, she is an expert in the field of physical anthropology and has received extensive formal training in this area. During *voir dire* the judge stated:

> THE COURT: It is clear that she is certainly an expert in the field of physical anthropology. She has testified that there are four areas of the human foot from which she is able to ascertain the identity of the particular individual who made the particular footprints, and that that footprint is unique from all others.

Finally, the trial judge, in his discretion, chose to overrule defense counsel's objection to the State's offer of Dr. Robbins as an expert in the comparison of footprint impressions. During *voir dire* the following dialogue took place:

> THE COURT: You are propounding her as an expert in this field of physical anthropology?
>
> MR. ANDREWS: I would not offer her as an expert in anything since the court . . . I would offer her as an expert in the comparison and identification of unknown footprints with known footprints, footprint impressions.
>
> MR. BARRINGTON: That is exactly what we object to.
>
> THE COURT: The objection is overruled. I'm going to make up my mind as to whether to make findings of facts, or whether to listen to the questions as they are propounded.
>
> . . . .
>
> THE COURT: I think you're going to be able to get it in. The question is whether I make some findings of fact as to her expertise, or rule on the individual questions as you ask them. I think it's a matter of weight for the jury to determine, based on Mr. Barrington's objection.

Afterwards, defense counsel did not specifically request the court to make specific findings concerning the qualifications of Dr. Robbins. This Court has stated:

> In the absence of a request by the appellant for a finding by the trial court as to the qualification of a witness as an ex-

pert, it is not essential that the record show a specific finding on this matter, the finding being deemed implicit in the ruling admitting or rejecting the opinion testimony of the witness. *State v. Perry*, 275 N.C. 565, 169 S.E. 2d 839.

And in *State v. Moore*, 245 N.C. 158, 95 S.E. 2d 548 (1956) the Court stated: "Regardless of the professional label, it is for the court to say whether the witness is qualified to testify as one skilled in the matter at issue, and his finding will not be disturbed when there is evidence to support it, and the discretion has not been abused." *Id.* at 164, 95 S.E. 2d at 552; *accord Cogdill*, 279 N.C. 313, 182 S.E. 2d 373; *Apex Tire and Rubber Company v. Merritt Tire Company*, 270 N.C. 50, 153 S.E. 2d 737 (1967). Without a specific objection, the court was not required to make specific findings of fact concerning Dr. Robbins' qualifications in bare footprint comparison. Furthermore, there was evidence to support the trial judge's finding that she was qualified to testify about the subject footprints. *See* note 3 *supra*. Therefore, the judge in his discretion chose not to disqualify Dr. Robbins, and it does not appear that he abused this discretion. The trial judge properly concluded, absent a specific finding of facts, that Dr. Robbins' field of expertise was a proper subject for expert testimony and defendant's fourth assignment of error is rejected.

B.

We will now discuss defendant's first three assignments of error, which can be condensed into one issue: Whether scientific evidence which tends to identify an accused by bare footprint comparison is admissible where the expert relies upon methods other than ridge detail in making such comparison. This is an issue of first impression in this jurisdiction. Counsel for the defense strenuously argues that to allow the expert testimony of Dr. Robbins would require the jury to make a "leap of faith," blindly accepting at face value the ultimate opinion of a person who professes to be the only one skilled in a particular subject area. Defendant argues that the fundamental differences between the method of identification used in existing case law and that which was propounded by the State in this case necessitates an independent determination by this Court that the method used by Dr. Robbins is itself reliable and sufficiently established to have gained general acceptance in its field.

[2] The single fact that the application of the method employed by Dr. Robbins suffers a dearth of recognition does not *per se* prevent the admissibility of her testimony. This general proposition was implicitly acknowledged by this Court in *State v. Rogers*, 233 N.C. 390, 64 S.E. 2d 572 (1951). In that case the comparison of a bare footprint was made with that of the defendant's. *See generally*, Annot., 28 A.L.R. 2d 1104 (1953) (citing this case and others in a discussion of the admissibility of bare footprint marks). An S.B.I. agent testified about his study of the science of taking and comparing footprints and fingerprints of human beings at various schools and of his practical experience. He also testified that footprints yield identifiable characteristics just as fingerprints do. The court found the agent to be an expert in footprint analysis.

The Court took judicial notice of the fact that fingerprinting was sufficiently established and since the technique involved in comparing the bare footprint was essentially the same as identifying fingerprints, then the footprint evidence should also be admissible. However, in this case defendant counters with the argument that the identification process in *Rogers* was based upon ridge detail of the print, as is also true in fingerprint analysis. In the case *sub judice*, Dr. Robbins does not use ridge detail to make her comparisons. *Ipso facto*, defendant contends that this distinction alone should bar the admissibility of this particular method of footprint analysis.

The salient kernel to be gleaned from *Rogers* is that this Court in 1951 was faced with a technique which was in its infancy, as is Dr. Robbins' technique. The expert in *Rogers* analyzed the bare footprints by studying enlarged photographs of a bare footprint that was imprinted on the front page of a newspaper left at the crime scene. The expert witness testified that he compared these enlarged photographs with those of the defendant's. Because he also testified that he analyzed ridge detail, which was the same technique employed in identifying fingerprints, the court accepted his testimony based on this similarity to the established technique of fingerprinting analysis.

Ultimately, this Court admitted expert testimony that a photograph of a barefoot imprint on newspaper was identical to that of the defendant's when the two prints were compared. This

testimony was admitted without the court conducting a head count to determine if the method was recognized. Similarly, we have here the development of a scientific method that is in its infancy. Admittedly, the method utilized by Dr. Robbins has not been cited in any reported decision. Justice Ervin noted in *Rogers* that "[d]iligent search has failed to uncover a single decision in any jurisdiction involving the admissibility of this precise type of footprint evidence." *Id.* at 397, 64 S.E. 2d at 577. However, that fact alone did not prevent the *Rogers* court from accepting the expert testimony.

In varying degrees all courts have sometimes been reluctant to admit unique scientific testimony. In fact, the use of fingerprinting as a means of identification, which existed prior to the time of Christ,[11] was itself the subject of doubt and speculation. This form of scientific evidence, though universally accepted now, had to make its appearance for acceptance in some court. In *People v. Jennings*, 252 Ill. 534, 96 N.E. 1077 (1911), the admission of fingerprint evidence was a case of first impression, but the court accepted this novel and unique method. In *Jennings*, the court stated:

> When photography was first introduced, it was seriously questioned whether pictures thus created could properly be introduced into evidence, but this method of proof, as well as by means of x-rays and the microscope, is now admitted without question.

Id. at 548, 96 N.E. at 1082.

As with most scientific phenomena, the passage of time can serve, as it has in fingerprinting, to demonstrate the reliability and acceptance of a once speculative and unproved premise. Thus, the novelty of a chosen technique does not justify rejecting its admissibility into evidence.

[3] Defendant in this case further argues that this Court has adopted a test that would prevent Dr. Robbins' scientific testimony because it is unreliable and not generally accepted. The

11. *Stacy v. State*, 49 Ok. Cr. 154, 292 Pac. 885 (1930) ("an allusion to finger print impressions for the purpose of identification is referred to in writings as early as 650 A.D. and they are traced back to a period some 100 years before Christ." *Id.* at 157, 292 Pac. at 887).

courts of this nation, including our own, have struggled to enunciate a formula for ruling on the admission of new and untested scientific principles. *See* McCormick, *Scientific Evidence: Defining a New Approach to Admissibility*, 67 Iowa L. Rev. 879 (1982); Gianelli, *The Admissibility of Novel Scientific Evidence: Frye v. United States, A Half Century Later*, 80 Col. L. Rev. 1197 (1980). Defendant contends that the *Frye*[12] formula for determining the admissibility of new scientific evidence must be applied in this case. Defendant argues that the *Frye* test has been chosen by the courts of this State to determine admissibility,[13] citing *State v. Temple*, 302 N.C. 1, 273 S.E. 2d 273 (1981) and *State v. Peoples*, 311 N.C. 515, 319 S.E. 2d 177. However, in *Peoples* this Court stated that "we have not specifically adopted the *Frye* test in this jurisdiction (but) we have used the theory underlying that decision." *Id.* at 532, 319 S.E. 2d at 187. Nowhere in *State v. Temple* did the court even intimate that the *Frye* formula was adopted by this Court. Plainly, our Court does not adhere exclusively to the *Frye* formula.

In *Temple*, however, the Court stated a general rule for admitting new scientific methods:

> This Court is of the opinion, that we should favor the adoption of scientific methods of crime detection, where the demonstrated accuracy and reliability has become established and recognized. Justice is truth in action, and any instrumen-

12. *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923) dealt with the forerunner of the polygraph machines. The court stated the following rule in excluding the admission of such expert testimony regarding the results of this machine: "Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs." *Id.* at 1014.

13. This formula envisions that before a technique can be admitted, it must be "generally acceptable." But by whom or what scientific field? What must be accepted? How is general acceptance established? All of these questions and more have been the focus in a continuing debate and confusion among courts and scholars concerning the *Frye* formula. For a thorough discussion, refer to McCormick, *Scientific Evidence: Defining a New Approach to Admissibility*, 67 Iowa L. Rev. 879 (1982); Gianelli, *The Admissibility of Novel Scientific Evidence: Frye v. United States, A Half Century Later*, 80 Col. L. Rev. 1197 (1980).

> tality, which aids justice in the ascertainment of truth, should be embraced without delay.

Id. at 12, 273 S.E. 2d 280. A second general principle regarding admissibility of such evidence in this State is as follows:

> In general, when no specific precedent exists, scientifically accepted reliability justifies admission of the testimony of qualified witnesses, and such reliability may be found either by judicial notice or from the testimony of scientists who are expert in the subject matter, or by a combination of the two.

1 Brandis on North Carolina Evidence, § 86, at 323 (footnote citations omitted).

We will examine the law in this area, beginning with *Temple*, in an effort to synthesize the significant factors relied upon by the courts when evaluating whether a scientific method in its infancy is reliable and whether it should be adopted or rejected. In *Temple*, the admission of bite mark identification was a question of first impression also. The expert witness had prepared plaster casts and overlays of the impressions of the defendant's teeth and matched these overlays with a bite mark on the upper left chest area of the victim. He testified to various identifiable areas of dentition between the bite mark and the overlays. The court relied upon *People v. Marx*,[14] 54 Cal. App. 3d 100, 126 Cal. Rptr. 350 (1975) and held that the evidence was properly admissible. This Court, citing from *Marx*, stated:

> [T]he basic data on which the experts based their conclusions were verifiable by the court. Further, in making their painstaking comparisons and reaching their conclusions, the experts did not rely on untested methods, unproved hypotheses, intuition or revelation. Rather, they applied scientifically and professionally established techniques— x-rays, models, microscopy, photography—to the solution of a particular

14. This was the first reported case dealing with bite mark evidence. About seven weeks after the victim was buried, her body was exhumed so that impressions of bite marks on the victim's nose could be taken. The court observed that no established technique existed for identifying a person from his bite marks. The *Frye* "general acceptance" standard was not a barrier to admissibility of this novel technique since the expert relied upon established techniques in the field of dentistry and demonstrated his comparisons by use of models, photographs, x-rays, and slides.

> problem which, though novel, was well within the capability of those techniques. In short, in admitting the evidence, the court did not have to sacrifice its independence and common sense in evaluating it.

Temple, 302 N.C. at 11, 273 S.E. 2d at 280 (quoting *Marx*, 54 Cal. App. 3d at 111, 126 Cal. Rep. at 356).

This Court in *Temple* determined that the expert had utilized established techniques in dentistry and photography to solve a novel problem. The expert made visual comparisons, as did Dr. Robbins in this case, of physical items of evidence. Furthermore, the expert testified that he had, over the years in practice, examined thousands of persons' teeth and concluded that each had unique dentition. This Court concluded that "the expert testimony in this case was based upon established scientific methods, and is admissible as an instrument which aids justice in the ascertainment of the truth." *Id.* at 13, 273 S.E. 2d at 280.

There was no conclusion or explanation within *Temple* concerning whether and by whom these scientific methods had become established, recognized or generally accepted. *See* Note, *Criminal Law—Expert Testimony on Bite Marks—State v. Temple*, 302 N.C. 1, 273 S.E. 2d 273 (1981), 4 Campbell L. Rev. 179 (1981). Instead, the Court in *Temple* focused on the "reliability" of the test, rather than its "establishment and recognition."[15] This seems to be in accord with Professor Brandis' emphasis on the reliability of the scientific method and not its popularity within a scientific community. Brandis, *supra* at § 86.

15. In *McCormick on Evidence*, there is a discussion about the varying interpretations of the *Frye* formula by various courts and how the formula has been the subject of criticism and applied in sundry fashion. *Id.* § 203, at 606 (3d ed. 1984). *Marx*, cited in *Temple*, was recognized as one case which did not question the validity of the *Frye* standard but chose to diminish the "general acceptance" requirement of the test. *Marx* held that general acceptance goes to the weight rather than the admissibility of the evidence. *See McCormick*, *supra* at 606. A more flexible approach is endorsed by these authorities in applying the *Frye* formula: "Not every scrap of scientific evidence carries with it an aura of infallibility. Some methods, like bite mark identification, . . . are demonstrable in the courtroom. Where the methods involve principles and procedures that are comprehensible to a jury, the concerns over the evidence exerting undue influence and inducing a battle of the experts have little force." *McCormick*, *supra*, § 203, at 606 (citing *Marx* to support this proposition).

A year after *Temple* was decided, this Court in *State v. Green*, 305 N.C. 463, 290 S.E. 2d 625 (1982) again accepted the expert's testimony alone to substantiate the reliability of bite mark identification, further expanding the method employed in *Temple*. The expert in *Green* made his comparisons by using photographs of the victim's bite wound rather than making his comparisons with the actual bite wounds on the victim's body, as was performed by the expert in *Temple* the year before. In *Green*, the Court rejected defendant's argument that the distinction between the two methods of comparison, one using photographs of the wound and the other the actual wound itself, precluded the admissibility of the expert's testimony. The Court briefly reviewed how the expert used photographs made to approximate scale of the victim's wound to identify points of identification in his visual comparison of the two. The Court concluded that there was "no reason to suspect that the methodology employed by this expert was anything less than scientifically sound and reliable." *Id.* at 471, 290 S.E. 2d at 630. The Court also mentioned, without elaborating, that the methodology had been approved recently in three other jurisdictions. *Id.* at 471-72, 290 S.E. 2d at 630.

An earlier North Carolina case, *State v. Crowder*, 285 N.C. 42, 203 S.E. 2d 38 (1974) also reviewed a novel scientific method. The defendant argued that an expert who conducted a gunshot residue test utilizing flameless atomic absorption spectrophotometry should not have been allowed to testify because such method was "speculative and highly unreliable." *Id.* at 53, 203 S.E. 2d at 45. In determining the reliability of this test, the Court considered the expert's professed experience in that field, the fact that the expert had presented technical papers on the subject to various associations of forensic scientists, and his independent research. These facts rendered this expert's testimony both reliable and competent as viewed by this Court.

[4] In matching threads among the cases and analogizing them to the present one, we determine that the method employed by Dr. Robbins is reliable. As in *Temple* and *Marx*, the expert in this case used scientifically established measurement techniques relied upon in the established field of physical anthropology to make her measurements. The Court in *Crowder* reviewed the professional background and involvement of the expert in forensic science and determined that his testimony was reliable. Certainly, the exten-

sive professional achievements and endeavors of Dr. Robbins should render her testimony reliable as was the expert's in *Crowder*. Additionally, the experts in *Temple* and *Green* used photographs, models, slides and overlays that were before the court and verifiable by the jury. So, too, did Dr. Robbins. She did not ask the jury to sacrifice its independence by accepting her scientific hypotheses on faith. Rather, she explained in detail to the jury the basis of her measurements and the interrelationships of the various portions of the foot and how her visual comparisons enabled her to identify unknown footprints and compare them with known footprints.

She explained the number of footprints she had collected to justify why she believed each footprint is unique, just as the expert in *Temple* explained how he had examined the teeth of thousands of people and believed that each person possessed an individual and unique dentition. All of the foregoing factors relative to an expert's testimony based on a novel scientific method have been accepted by this Court as cogent to its determination that the expert's method was reliable and his testimony admissible. We also have determined that Dr. Robbins' unique scientific method is reliable because of her explanatory testimony, professional background, independent research, and use of established procedures to make her visual comparisons of bare footprints.

[5] The technique utilized here is not comparable to the art of hypnosis, recently rejected by this Court as an unreliable scientific process when used to elicit testimony from a witness. *State v. Peoples*, 311 N.C. 515, 319 S.E. 2d 177. Therefore, our decision in *Peoples* does not command a similar conclusion herein. In reviewing the state of the art of hypnosis in *Peoples*, this Court recognized inherent problems in such a 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. . . ." *Peoples*, 311 N.C. at 532, 319 S.E. 2d at 187. All of these factors made such hypnotically induced testimony unreliable. Justice Exum, after acknowledging that the State has not adopted the *Frye* formula, explained that

the theory underlying the formula has been utilized in this State when the courts rendered inadmissible the results of polygraph examinations. *State v. Foye*, 254 N.C. 704, 120 S.E. 2d 169 (1961); *accord, State v. Brunson*, 287 N.C. 436, 215 S.E. 2d 94 (1975).

In the polygraph cases, this Court stressed the fact that the polygraph "had not yet attained scientific acceptance as a reliable and accurate means of ascertaining the truth or deception." *Foye*, 254 N.C. at 708, 120 S.E. 2d at 172; *Brunson*, 287 N.C. at 445, 215 S.E. 2d at 100. This "lack of general scientific recognition" was a major factor in excluding polygraph results. However, the polygraph, unlike the method involved in bite mark and barefoot print analyses, does not employ visual comparisons that are comprehensible to a jury. In fact, the expert's use of mechanical equipment in polygraph testing distinguishes that method from one in which visual comparisons are made by an expert who does not rely on a machine in rendering an opinion. Indeed, a similar distinction among the types of scientific evidence and their admissibility has also been espoused by reputable legal scholars:

> On the other hand, when the nature of the technique is more esoteric, as with some types of statistical analyses and serological tests, or when inferences from the scientific evidence sweep broadly or cut deeply into sensitive areas, a stronger showing of probative value should be required.

McCormick On Evidence, § 203, at 606 (3d ed. 1984) (citing *State v. Catanese*, 368 So. 2d 975, 981 (La. 1979) (dealing with the admission of polygraph results). Hypnosis, like the polygraph, is related to "attempts to prove the workings of the mind and human behavior." *Id.* at 622, n. 4. These areas involve matters concerned with particularly sensitive areas. *Id.* at 633. This same premise was acknowledged in *Peoples* when the Court stated, "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 may assign undue credibility to hypnotically refreshed testimony." 311 N.C. at 526, 319 S.E. 2d at 184. (Citations omitted.)

A similar distinction between polygraph and handprint analyses was recognized by the court in *People v. Columbo*, 118 Ill. App. 3d 882, 74 Ill. Dec. 304, 455 N.E. 2d 733 (1983), *cert. denied*, 104 S.Ct. 2394 (1984). The expert in that case had com-

pared gloved handprints that had been placed on the fender and trunk of a car with the handprint of the defendant who was missing his left index finger. The expert found the prints comparable. The technique employed by the expert was novel because the handprint itself had been made while the person was wearing a pair of gloves, thus leaving no ridge detail. However, the expert testified that based upon his specialized knowledge of the human skeletal structure, he could determine that the handprint on the fender and another handprint on the trunk were those of a person who was missing the index finger on his left hand. The court recognized that this technique was not the traditional method employed when handprint analysis is made because the prints on the car were not compared with prints on file at the police headquarters to determine comparable size and measurements of the handprints. The defendant argued that this form of evidence was novel and lacked foundational requirement of general acceptance and therefore should have been inadmissible.

The defendant in *Columbo*, in an attempt to challenge the admissibility of the method of identifying the gloved handprint, cited as authority a case that had rejected the results of polygraph testing. *People v. Monigan*, 72 Ill. App. 3d 87, 28 Ill. Dec. 395, 390 N.E. 2d 562 (1979). The *Columbo* court rebuffed the defendant's analogy and instead compared the expert's analysis of the gloved handprints with the analysis made of bite mark impressions, both involving a visual comparison. In distinguishing the handprint analysis from polygraph evidence, the court stated that "Monigan (polygraph machine) . . . concern(s) the admissibility of evidence derived from the interpretation of mechanical data rather than visual comparisons." *Columbo*, 118 Ill. App. 3d at ---, 74 Ill. Dec. at ---, 455 N.E. 2d at 788 (citation omitted).

Therefore, unlike the methods of hypnosis and polygraph testing employed by the experts in the North Carolina cases of *Peoples*, *Foye*, and *Brunson*, the Court here is dealing with a scientific method which can be considered reliable based on the testimony of the expert while displaying to the jury visual aids used in making observable visual comparisons. Dr. Robbins did rely upon established techniques in physical anthropology, according to her own testimony. Furthermore, she did not engage a polygraph machine or perform hypnosis, techniques that possess a scientific aura and that sweep broadly into sensitive areas. Nor

is there any effort by Dr. Robbins to explore the workings of the mind, as do experts in hypnosis and polygraph testing. For these reasons, we reject any argument that the expert testimony before this Court should be inadmissible because the method of analysis is comparable to hypnosis or polygraph testing.

C.

[6] After determining that this evidence is sufficiently reliable, the next question is whether it is also relevant. Relevant evidence is admissible if it "has any logical tendency however slight to prove the fact at issue in the case." *State v. Pratt*, 306 N.C. 673, 678, 295 S.E. 2d 462, 466 (1982). In that case Chief Justice Branch, writing for the majority, admitted evidence of the similarity of shoe prints found at the crime scene with the shoes of the defendant. He stated that "[e]vidence of shoe prints at the scene of the crime corresponding to those of the accused may always be admitted as tending more or less strongly to connect the accused with the crime." *Id.* at 677-78, 295 S.E. 2d at 465.

It is also true in this case that defendant introduced the testimony of two witnesses who contradicted the testimony of Dr. Robbins by stating that they did not agree that defendant's footprint matched the footprint at the crime scene.[16] This rebuttal testimony goes to the weight of the evidence, not to its admissibility. "What the evidence proves or fails to prove is a question of fact for the jury." *State v. Stephens*, 244 N.C. 380, 384, 93 S.E. 2d 431, 433-34 (1956) (citations omitted). The differing views of the experts concerning the comparisons of the footprints were properly submitted to the jury for their determination. The reliability and credibility of Dr. Robbins' opinion were subject to refutation, and the weight of her testimony was fairly presented to the jury.

16. Dr. Matthew Cartmill and Dr. James Robertson testified for the defense to rebut Dr. Robbins' testimony. Dr. Cartmill is a Professor in the Anatomy Department and is Associate Professor in the Anthropology Department at Duke University. Dr. James Robertson is both a medical doctor and Chairman of the Department of Anatomy at Duke University Medical Center. Neither of these witnesses had conducted any independent research in the area of footprint comparison as had Dr. Robbins.

II.

EVIDENCE OF WEAPON POSSESSION

Defendant contends that the trial court erred in allowing into evidence testimony that the defendant possessed a five-inch pocketknife a year before the victim's death and that the defendant possessed and shot a small pistol near a mentally retarded boy approximately three months before the victim's death. We find no error regarding this evidence because the evidence concerning the knife was stricken from the record, the possession of the small pistol was relevant, and the details of the shooting incident were admitted only after the defendant "opened the door" during redirect examination of the defense witness.

[7] The State sought to introduce evidence that about a year prior to the victim's death the defendant had threatened a witness with a five-inch pocketknife. Before admitting any testimony about the alleged threat by the defendant, there was an in-chambers proceeding to determine whether the witness would be allowed to testify about the incident. During the proceeding in chambers, the State cited to the court *State v. Stanfield*, 292 N.C. 357, 233 S.E. 2d 574 (1977) where this Court held it was not error for the trial court, in a murder prosecution where the deceased was killed with a shotgun, to allow into testimony that one month earlier the defendant had threatened and assaulted his landlord's son with a shotgun. In *Stanfield*, these threats were made approximately one month prior to the victim's death. In the instant case, the trial judge, citing *State v. McClain*, 240 N.C. 171, 81 S.E. 2d 364 (1954), specifically denied the State's request to allow any testimony about the threats made a year prior to the victim's death. The only testimony allowed was that which established that the defendant was seen with a pocketknife in his pocket a year earlier and that the witness saw the defendant take it out and open it.

During direct examination by the State, the witness testified only that he had seen the defendant a year earlier in possession of a five-inch pocketknife, within the perimeters of the judge's instructions. On cross-examination, defense counsel asked the witness the following:

> Q. You're very familiar with the farming out there, aren't you?

A. Yes, Sir.

Q. During the farming season you know that almost everybody out there connected with farming carries some sort of pocket knife, don't you?

A. I would not know that, but some people do carry knives.

Q. Most of the people actively engaged in farming carry a knife.

A. Yes, Sir.

. . . .

Q. That's quite an area for hunting and fishing out there, isn't it?

A. Yes, sir.

Q. And most of the people involved in hunting or fishing carry knives, regularly, out there.

A. Yes, sir.

After asking several other questions concerning when the witness observed the knife in defendant's possession, defense counsel made a motion to strike the witness's testimony, which was granted. The court stated: "Don't consider the testimony of the witness concerning whether he saw a knife in the possession of the defendant."

Generally, an error in admission of evidence is cured when the jury is instructed to disregard stricken evidence and such evidence is withdrawn from the jury's consideration. *State v. Craig and Anthony*, 308 N.C. 446, 302 S.E. 2d 740 (1983). Furthermore, the defendant was not prejudiced by the initial admission of this evidence in view of the fact that defense counsel effectively diminished any deleterious effect during cross-examination of the witness by eliciting facts which tended to establish that defendant's possession of the pocketknife was a usual and common practice among persons in this farming and hunting area. This assignment of error is overruled.

[8] The court likewise committed no error in allowing certain evidence concerning the alleged use and possession by the defendant of a small pistol less than three months before the victim's

death. During cross-examination of defense witness, Thelwyn Bullard, the defendant's first cousin, the State elicited, without objection, that the defendant pulled a pistol from his pocket and shot it into the ground when the witness, the defendant, and other people were in a squash field. Generally, defendant's failure to enter a timely objection to evidence results in a waiver of his right to assert the alleged error on appeal. N.C. Gen. Stat. § 15A-1446(b) (1978); *State v. McDougall*, 308 N.C. 1, 301 S.E. 2d 308 (1983). In reviewing the testimony challenged by the defendant, we find no plain error in the trial court's allowing such evidence. Even if defendant had made a timely objection, this evidence is relevant and competent to contradict the defendant's testimony that he kept the little pistol in his truck before the pistol was lost and did not generally carry the pistol on his person.

On redirect of this same witness, the defendant endeavored to minimize the effect of the testimony about the defendant carrying the gun and shooting it into the ground three months earlier. Defense counsel sought to accomplish this by asking the witness a series of questions concerning how many people carry guns on racks in their pickup trucks and in their glove compartments. On recross, the State, without objection, asked the following questions:

Q. He didn't go back to his truck and pull a gun out of his gun rack, did he?

A. No, sir.

Q. There was something going on there, and all of a sudden you saw his hand and heard a shot.

A. Yes, sir.

On redirect, the defendant then asked the witness the following:

Q. He didn't shoot at anybody, did he?

A. No, sir.

Q. Didn't scare anybody, did he?

A. No, sir.

Q. Do you know whether he was shooting at a snake or not?

A. No, I don't.

Q. Snakes out there in June, aren't there?

A. Yes, sir.

After defense counsel's attempt to suggest to the jury that no one was shot at or scared and that the defendant was shooting at snakes, the State in recross brought out that the defendant had shot in the direction of a mentally retarded boy whom the defendant or the defendant's son had been teasing and that when the shot was fired the defendant was standing within seven or eight steps of the boy. Thus, during redirect examination of this witness, the defendant "opened the door" to the introduction of the State's evidence about the details of the shooting. *State v. Small*, 301 N.C. 407, 272 S.E. 2d 128 (1980). Therefore, the introduction of this evidence also does not constitute reversible error.

III.

VENUE

[9] The next assignment of error, admittedly minor as conceded by defense counsel, challenges the propriety of venue being in Sampson County rather than in Bladen County. During one of the pre-trial motions to dismiss, the issue of proper venue was heard by Judge Henry Stevens during the 20 November 1981 session of Sampson County Superior Court. Judge Stevens found, on the basis of the evidence presented, that the South River forms the boundary between Bladen and Sampson Counties in the area where Melvin's Bridge crosses the river, that the victim was found floating in the South River, that a large quantity of blood of the same type as the victim's was found on Melvin's Bridge over the normal channel of the South River, but closer to the Bladen County side than the Sampson County side, that bare footprints, pieces of glass, and other objects allegedly from the defendant's truck were found on the bridge in the same area as the blood, and that the victim had been shot and stabbed.

When a defendant makes a motion to dismiss for improper venue, the burden is on the State to prove by a preponderance of the evidence that the offense occurred in the county named in the indictment. *State v. Loucheim*, 296 N.C. 314, 250 S.E. 2d 630, *cert.*

denied, 444 U.S. 836 (1979). G.S. 15-129 (1975) is controlling on the issue of venue when a crime is committed on a watercourse, which forms a county boundary. This statute reads as follows:

> When any offense is committed on any water, or watercourse whether at high or low water, which water or watercourse, or the sides or shores thereof, divides counties, such offense may be dealt with, inquired of, tried and determined, and punished at the discretion of the court, in either of the two counties which may be nearest to the place where the offense was committed.

This statute has been interpreted by this Court to allow venue to lie in either county bordering the waterway, regardless of where on the watercourse the crime took place and regardless of whether the midpoint of the river or its shoreline formed the county boundary. *Martin County v. Trust Company*, 178 N.C. 26, 100 S.E. 134 (1919); *see, e.g.*, Coates, *Crime is Local*, 14 N.C. L. Rev. 313 (1936).

All the evidence indicates that at least a portion of the murder took place on Melvin's Bridge which spans the South River between Sampson and Bladen Counties. G.S. 15-129 and the cases interpreting it indicate that there is no legal significance to the fact that the crime committed on Melvin's Bridge was somewhat closer to the Bladen County than the Sampson County side of the river. Since the crime apparently took place over the boundary watercourse, either Bladen or Sampson County was a proper location for venue for the trial of this case. Accordingly, defendant's assignment of error is without merit and overruled because the judge could find by a preponderance of the evidence that the offense did occur in the county named in the indictment.

IV.

MOTION TO DISMISS

Finally, defendant contends that the trial court erred when it refused to grant the defendant's motion to dismiss at the end of the State's evidence and again at the end of all of the evidence. Because the defendant introduced evidence on his own behalf, he waived his right to argue on appeal the motion for the directed verdict at the end of the State's case. N.C. Gen. Stat. § 15-173 (1983); *State v. Leonard*, 300 N.C. 223, 266 S.E. 2d 631, *cert.*

denied, 449 U.S. 960 (1980). Therefore, the sufficiency of the evidence at the conclusion of both parties' evidence is the sole issue before this Court.

When a defendant moves for dismissal, the trial court must determine whether there is substantial evidence of each essential element of the offense charged (or of a lesser offense included therein), and of the defendant being the one who committed the crime. If that evidence is present, the motion to dismiss is properly denied. *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). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79; 265 S.E. 2d 164, 169 (1980) (citation omitted).

In ruling on a motion to dismiss, the evidence must be considered by the court in the light most favorable to the State, and the State is entitled to every reasonable inference to be drawn from the evidence. *State v. Earnhardt*, 307 N.C. 62, 296 S.E. 2d 649. Contradictions and discrepancies must be resolved in favor of the State, and the defendant's evidence, unless favorable to the State, is not to be taken into consideration. *Earnhardt*, 307 N.C. 62, 296 S.E. 2d 649; *State v. Jones*, 280 N.C. 60, 184 S.E. 2d 862 (1971). The test of the sufficiency of the evidence on a motion to dismiss is the same whether the evidence is direct, circumstantial, or both. *State v. Powell*, 299 N.C. 95, 261 S.E. 2d 114. All evidence actually admitted, both competent and incompetent, which is favorable to the State must be considered. *State v. McKinney*, 288 N.C. 113, 215 S.E. 2d 578 (1975).

[10-12] The defendant in this case was charged with and convicted of first degree murder. First degree murder is the unlawful killing of a human being with malice and with premeditation and deliberation. *State v. Judge*, 308 N.C. 658, 303 S.E. 2d 817 (1983); *State v. Fleming*, 296 N.C. 559, 251 S.E. 2d 430 (1979). The intentional use of a deadly weapon gives rise to a presumption that the killing was unlawful and that it was done with malice. *State v. Judge*, 308 N.C. 658, 303 S.E. 2d 817. A pistol is a deadly weapon *per se*. *State v. Powell*, 238 N.C. 527, 78 S.E. 2d 248 (1953). A knive can be a deadly weapon if, under the circumstances of its use, it is likely to produce death or great bodily harm. *State v. Randolph*, 228 N.C. 228, 45 S.E. 2d 132 (1947).

Premeditation and deliberation must ordinarily be proved by circumstantial evidence. Among the circumstances to be considered are: (1) want of provocation on the part of the deceased, (2) conduct and statements of the defendant before and after the killing, (3) threats made against the victim by the defendant, ill will or previous difficulty between the parties, and (4) evidence that the killing was done in a brutal manner. *State v. Calloway*, 305 N.C. 747, 291 S.E. 2d 622 (1982). The nature and number of the victim's wounds is certainly a circumstance from which an inference of premeditation and deliberation can be drawn. *State v. Brown*, 306 N.C. 151, 293 S.E. 2d 569, *cert. denied*, 459 U.S. 1080 (1982).

[13] In applying the foregoing principles of law to the facts in this case, this Court does not find error in the trial court's refusal to dismiss at the end of all the evidence. Viewed in the light most favorable to the State and acknowledging that the State is entitled to every reasonable inference, the evidence tends to prove the necessary elements of first degree murder and that defendant perpetrated the crime. This evidence can be summarized thusly:

The defendant and Pedro Hales had previously experienced ill will resulting from Pedro's shooting and wounding defendant's son. Defendant had repeatedly threatened Pedro's life. This evidence clearly tends to prove that defendant had a motive to kill Pedro. Defendant and Pedro were seen together earlier in the evening of 25 August 1981, the last night Pedro was seen alive; and defendant was observed angrily addressing Pedro. At this time, defendant was observed with a .22 caliber gun. Admittedly, defendant had an opportunity to kill Pedro. Later witnesses saw defendant in the same general vicinity where Pedro was last seen alive, and defendant's truck was also observed on Melvin's Bridge, the scene of the crime, during the evening of 25 August 1981. Defendant admitted that no one else had possession of his truck, except himself, the entire evening. The wounds were basically inflicted in a left to right direction, an angle consistent with shots fired from the driver's seat toward a passenger. The seat belt assembly in defendant's truck contained a small bullet hole at head level. This evidence circumstantially links the defendant and his truck to the crime scene, Melvin's Bridge.

All of the physical evidence was identified as originating from defendant or his truck. The type and number of wounds

received by Pedro, the hostile comments made by defendant when Pedro was missing, coupled with the prior threats and lack of evidence tending to show any provocation by Pedro are all facts tending to prove the elements of unlawfulness, malice, premeditation and deliberation. *State v. Calloway*, 305 N.C. 747, 291 S.E. 2d 622; *State v. Judge*, 308 N.C. 658, 303 S.E. 2d 817. Thus, substantial evidence was presented to show the elements of first degree murder and that the defendant committed that murder.

Accordingly, this assignment of error is overruled. In the defendant's trial, we find

No error.

STATE OF NORTH CAROLINA v. JEROME HAMLET, JR.

No. 228A83

(Filed 6 November 1984)

1. Homicide § 4— first degree murder defined

Murder in the first degree is the intentional and unlawful killing of a human being with malice and with premeditation and deliberation. G.S. 14-17.

2. Homicide § 4.3— premeditation and deliberation defined

Premeditation means that the act was thought out beforehand for some length of time, however short, but no particular amount of time is necessary for the mental process of premeditation. Deliberation means an intent to kill carried out by the defendant in a cool state of blood, in furtherance of a fixed design for revenge or to accomplish an unlawful purpose and not under the influence of a violent passion, suddenly aroused by lawful or just cause or legal provocation, and the phrase "cool state of blood" means that the defendant's anger or emotion must not have been such as to overcome defendant's reason.

3. Homicide § 18— proof of premeditation and deliberation

Among circumstances to be considered in determining whether a killing was with premeditation and deliberation are: (1) want of provocation on the part of the deceased; (2) the conduct and statements of the defendant before and after the killing; (3) threats and declarations of the defendant before and during the course of the occurrence giving rise to the death of the deceased; (4) ill will or previous difficulty between the parties; (5) the dealing of lethal blows after the deceased has been felled and rendered helpless; (6) evidence that the killing was done in a brutal manner; and (7) the nature and number of the victim's wounds.

4. Criminal Law § 21.5— first degree murder—sufficient evidence of premeditation and deliberation

The State's evidence of premeditation and deliberation was sufficient to support conviction of defendant for first degree murder where it tended to show that a witness saw defendant holding a gun as the victim entered the vestibule of a club; during the course of the shooting, the defendant, upon hearing a question as to who fired the shots, replied that he did and asked whether anyone had anything to say about it; after making this statement, defendant reloaded his gun and continued the shooting; there was ill will between the parties because defendant and the victim had fought less than a week before the killing and the victim had been bragging about knocking defendant out; and the physical evidence showed that defendant fired a number of the shots into the victim after he had been felled and rendered unconscious.

5. Criminal Law § 163— effect of failure to object to court's instructions

Where defendant failed to object to the trial court's final instructions to the jury, the defendant is deemed to have waived his right to assign error in the instructions and is entitled to relief only if he can show that the instructions complained of contained error amounting to "plain error." App. Rule 10(b)(2).

6. Homicide § 25.2— instructions on premeditation

The trial court clearly instructed the jury that they were required to find that the intent to kill was formed before the victim was shot in order to find the existence of premeditation, and the instructions thus could not have caused the jury to believe it could convict if it found that premeditation occurred after the fatal shot was fired.

7. Criminal Law § 165— failure to object to jury argument—appellate review

Where defendant failed to object to statements made by the prosecutor in his final argument at the guilt determination phase of the trial, appellate review must be limited to the question of whether the statements were so grossly improper that the trial judge should have corrected the argument *ex mero motu*.

8. Criminal Law § 102.9— jury argument—defendant as "bad" man—supporting evidence

The evidence in a first degree murder case was sufficient to support jury arguments by the prosecutor that defendant "is the baddest on the block and everybody knows it" and that defendant killed the victim to regain his reputation as a "bad" man following an earlier attack by the victim on defendant.

9. Criminal Law § 102.9— jury argument—credibility of defendant

The prosecutor's jury argument that defendant's testimony that he was shocked by the killing was not true and that this was a way of life with defendant was supported by evidence of defendant's prior criminal history and by testimony that, when asked who had shot the victim, defendant replied that he did and asked whether anyone had anything to say about it.

10. Criminal Law § 102.9— jury argument—references to defendant as an "animal"

The prosecutor's references to defendant in his jury argument as an "animal" and to his environment as a "jungle" were not so improper as to require action by the trial court *ex mero motu* given defendant's failure to object and defense counsel's similar statements referring to defendant's neighborhood as a "jungle" and to defendant and his peers as "bulls" and "leaders of the pack."

11. Criminal Law § 102.12— jury argument—deterrent effect of death penalty

Although the prosecutor improperly injected his personal viewpoint concerning the deterrent effect of the death penalty in his jury argument during the guilt phase of a first degree murder trial, such argument was not so grossly improper as to require action by the trial court *ex mero motu.*

12. Constitutional Law § 62; Criminal Law § 135.3— first degree murder—death qualification of jurors

Death qualifying the jury before the guilt phase of a first degree murder trial did not result in a jury biased in favor of the prosecution on the issue of guilt and deprive defendant of a fair trial.

13. Criminal Law § 135.8— especially heinous, atrocious, or cruel aggravating circumstance

A finding that the especially heinous, atrocious, or cruel aggravating circumstance exists in a first degree murder case is permissible only when the level of brutality involved exceeds that normally found in first degree murder or when the first degree murder in question was conscienceless, pitiless, or unnecessarily torturous to the victim. G.S. 15A-2000(e)(9).

14. Criminal Law § 135.8— first degree murder—especially heinous, atrocious, or cruel aggravating circumstance—insufficient evidence

The evidence in a first degree murder case was insufficient to support submission to the jury of the especially heinous, atrocious, or cruel aggravating circumstance where it showed that the victim was unaware of defendant's presence until the victim entered the vestibule of a club where he was shot immediately, and that the victim was rendered unconscious by the first shot that struck him and thereafter was completely unaware of additional shots fired by defendant and suffered no pain.

Justice MARTIN dissenting in part.

Justices COPELAND and MEYER join in this dissenting opinion.

APPEAL from judgment and sentence of death entered by *Judge Franklin R. Brown* at the April 25, 1983 Criminal Session of Superior Court, NEW HANOVER County.

The defendant was charged in a bill of indictment, proper in form, with the murder of Asa Earl Bramlett. The jury found the defendant guilty of murder in the first degree and recommended

that he be sentenced to death. Based upon the jury recommendation, the trial court entered judgment sentencing the defendant to death. The defendant appealed to the Supreme Court as a matter of right under N.C.G.S. 7A-27(a). Heard in the Supreme Court September 11, 1984.

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

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

MITCHELL, Justice.

The defendant brings forward assignments of error relating to the guilt-innocence determination phase and to the sentencing phase of his trial. We find no prejudicial error in the guilt-innocence determination phase of the defendant's trial. After a careful review of the facts and our prior decisions, we hold, however, that the jury should not have been permitted to consider whether the murder was "especially heinous, atrocious, or cruel," under N.C.G.S. 15A-2000(e)(9). Since this was the only aggravating circumstance found by the jury, we vacate the sentence of death and impose a life sentence.

The evidence presented by the State during the guilt-innocence determination phase of the trial tended to show that about 1:45 a.m. on February 12, 1983, the defendant, Jerome Hamlet, Jr., entered the vestibule at the Club Ebony in Wilmington. He was recognized and greeted by Sheila Mallette, an employee of the club. A few moments later Asa Bramlett walked into the vestibule from the lobby of the club. Sheila Mallette was standing at the door between the lobby and the vestibule and saw a gun in the defendant's hand. He shot once but did not hit anyone. His second shot struck Bramlett in the head. Sheila Mallette then ran out of the club. A number of shots were heard coming from the vestibule.

Etta Allen, the owner of the Club Ebony, was told by Mallette that Asa Bramlett had been shot. Allen asked who did it and a voice from the vestibule replied, "I did. Does anyone have anything to say about it?" More shots were then fired in the vestibule. Sheila Mallette circled around to the front of the club

and saw the defendant reloading a pistol at the outside door of the club. She then saw him reenter the vestibule and more shots rang out. The defendant then fled the scene firing shots in the air as he ran.

The police and rescue squad were called to the scene. When the rescue squad arrived the victim Bramlett was alive but unconscious. He was transported to New Hanover Memorial Hospital. When his clothing was removed, a three-inch hawkbill knife was discovered in one of his pockets.

Dr. Robert Moore, a neurosurgeon, performed surgery on Bramlett. He found that Bramlett had a bullet wound to the head that went from above the right ear through the head and brain. Bramlett died on the operating table at approximately 7:10 a.m. February 12, 1984. He never regained consciousness.

Dr. Walter Gable, an Onslow County medical examiner, performed an autopsy on the body of the victim. During the course of the autopsy he discovered a bullet wound to the brain, six other bullets in the torso of the victim, and five bullet exit wounds in the back of the body. Dr. Gable testified that in his opinion the bullet wound to the head caused Bramlett's death and that it rendered him unconscious and unable to feel any pain.

As a result of information given them by the defendant, the police contacted a friend of the defendant who turned over a .32 caliber revolver to them. Robert Cerwin, an S.B.I. firearms expert, testified that though he could not positively match the bullets found in the victim to the gun obtained by the police, ten discharged shells discovered in the vestibule did come from the weapon.

The defendant took the stand and testified that he had known the victim for approximately two years and that they had used and dealt drugs together. The defendant said he knew a number of people, including one D.D. Johnson, who had been attacked by Bramlett. Five days prior to the shooting the defendant and Bramlett had argued over drugs, and Bramlett had attacked the defendant with a pipe rendering him unconscious for half an hour. The defendant began carrying a gun following the altercation.

On the day of the shooting the defendant had used heroin and cocaine and had been drinking wine. However, at the time of the shooting he was thinking clearly. The defendant stated that he did not go to the Club Ebony with the intent to kill Bramlett and was surprised to see him there. The defendant testified that soon after he entered the vestibule, Bramlett came toward him with a "vicious look on his face" while reaching for his pocket. The defendant was afraid of the victim Bramlett and fired one shot over his head in an attempt to scare him off. When this failed to halt the victim's advance, the defendant Hamlet shot him. The defendant testified that he did not recall what happened after the first shot struck Bramlett and he didn't remember how many times he had shot the victim. Following his arrest, the defendant gave a statement to the police in which he admitted shooting Bramlett. He also told the police where the gun was located.

Alexander Wilder testified for the defendant and stated that he had been present when Bramlett had attacked the defendant Hamlet five days before the shooting. Donald Johnson testified that he had previously been assaulted by Bramlett as the defendant had testified.

At the conclusion of the guilt-innocence determination phase of the trial, the jury returned a verdict finding the defendant guilty of murder in the first degree. The trial court then convened a sentencing hearing to determine the sentence to be imposed. The State indicated that it would rely upon the evidence presented at the guilt-innocence determination phase of the trial to support the aggravating circumstance that the murder was especially heinous, atrocious, or cruel. The State presented no additional evidence at the sentencing hearing.

The defendant offered the testimony of his father who stated that the defendant is a loving son and was the product of a broken home. The father also stated that he knew the defendant used drugs. The defendant testified that he was sorry he had killed Bramlett and expressed sympathy for Bramlett's family. No further evidence was presented at the sentencing hearing on behalf of the defendant.

Based upon the evidence introduced during the sentencing phase of the trial, the trial court instructed the jury on one possi-

ble aggravating circumstance and six possible mitigating circumstances. The possible aggravating circumstance the jury was permitted to consider was whether the murder was especially heinous, atrocious, or cruel. The jury was instructed that they need not specify which particular mitigating circumstances they found, if they found any of the mitigating circumstances to exist.

The written issues put to the jury concerning aggravating and mitigating circumstances and the jury's answers thereto were as follows:

ISSUES

Issue One:

Do you unanimously find from the evidence, beyond a reasonable doubt, that the following aggravating circumstance existed at the time of the commission of this murder?

Was this murder especially heinous, atrocious, or cruel?

Answer: Yes.

Issue Two:

Do you unanimously find beyond a reasonable doubt that the aggravating circumstance found by you is sufficiently substantial to call for the imposition of the death penalty?

Answer: Yes.

Issue Three:

Do you find one or more mitigating circumstances?

Answer: Yes.

Issue Four:

Do you unanimously find beyond a reasonable doubt that the aggravating circumstance outweigh the mitigating circumstances?

Answer: Yes.

Based upon their answers to these issues, the jury recommended the death sentence. Following the recommendation the trial court

entered judgment sentencing the defendant to death. The defendant appealed.

I.

Guilt-Innocence Determination Phase

The defendant has brought forward several assignments of error and supporting contentions concerning the guilt-innocence determination phase of the trial.

At the close of the State's evidence and at the close of all evidence the defendant moved to dismiss the charge of first degree murder. The motions were denied. The defendant contends that it was error for the trial court to submit the charge of first degree murder based on premeditation and deliberation for the jury's consideration. The defendant argues that there was no substantial evidence to support a reasonable inference of premeditation and deliberation.

Before the issue of a defendant's guilt may be submitted to the jury, the trial court must be satisfied that substantial evidence has been introduced tending to prove each essential element of the offense charged and that the defendant was the perpetrator. *State v. Powell*, 299 N.C. 95, 261 S.E. 2d 114 (1980). Substantial evidence must be existing and real but need not exclude every reasonable hypothesis of innocence. *State v. Williams*, 308 N.C. 47, 301 S.E. 2d 335, *cert. denied*, --- U.S. ---, 78 L.Ed. 2d 177 (1983). In considering a motion to dismiss, the trial court must examine the evidence in the light most favorable to the State, and the State is entitled to every reasonable intendment and inference to be drawn therefrom. *State v. Bright*, 301 N.C. 243, 271 S.E. 2d 368 (1980). Contradictions and discrepancies are for the jury to resolve and do not warrant dismissal. *State v. Powell*, 299 N.C. 95, 261 S.E. 2d 114 (1980).

[1, 2] Murder in the first degree is the intentional and unlawful killing of a human being with malice and with premeditation and deliberation. N.C.G.S. 14-17; *State v. Fleming*, 296 N.C. 559, 251 S.E. 2d 430 (1979). Premeditation means that the act was thought out beforehand for some length of time, however short, but no particular amount of time is necessary for the mental process of premeditation. *State v. Britt*, 285 N.C. 256, 204 S.E. 2d 817 (1974).

Deliberation means an intent to kill carried out by the defendant in a cool state of blood, in furtherance of a fixed design for revenge or to accomplish an unlawful purpose and not under the influence of a violent passion, suddenly aroused by lawful or just cause or legal provocation. *State v. Bush*, 307 N.C. 152, 297 S.E. 2d 563 (1982). The phrase "cool state of blood" means that the defendant's anger or emotion must not have been such as to overcome the defendant's reason. *State v. Myers*, 299 N.C. 671, 263 S.E. 2d 768 (1980).

[3] Premeditation and deliberation relate to mental processes and ordinarily are not readily susceptible to proof by direct evidence. Instead they usually must be proved by circumstantial evidence. *State v. Buchanan*, 287 N.C. 408, 215 S.E. 2d 80 (1975). Among other circumstances to be considered in determining whether a killing was with premeditation and deliberation are: (1) want of provocation on the part of the deceased; (2) the conduct and statements of the defendant before and after the killing; (3) threats and declarations of the defendant before and during the course of the occurrence giving rise to the death of the deceased; (4) ill will or previous difficulty between the parties; (5) the dealing of lethal blows after the deceased has been felled and rendered helpless; and (6) evidence that the killing was done in a brutal manner. *State v. Williams*, 308 N.C. 47, 301 S.E. 2d 335, *cert. denied*, --- U.S. ---, 78 L.Ed. 2d 177 (1983). We have also held that the nature and number of the victim's wounds is a circumstance from which premeditation and deliberation can be inferred. *State v. Brown*, 306 N.C. 151, 293 S.E. 2d 569, *cert. denied*, 459 U.S. 1080 (1982).

[4] We conclude in the present case that there was substantial evidence that the killing was premeditated and deliberate and that it was not error to submit to the jury the question of the defendant's guilt on the first degree murder charge. Sheila Mallette testified that she saw the defendant holding a gun as the victim entered the vestibule. This would tend to rebut the defendant's claim of self-defense and raises an inference that there was no provocation by the deceased. During the course of the shooting, the defendant, upon hearing a question as to who fired the shots, replied "I did. Does anyone have anything to say about it?" After making this statement, he reloaded the gun and continued the shooting. This conduct and statement by the defendant during

the course of the event supports a reasonable inference that the defendant was acting in a cool state of blood and in furtherance of a fixed design to kill the victim by a previously planned attack.

There was also evidence that the defendant and the deceased had fought less than a week before the killing and that the victim had been bragging about knocking the defendant out. This tended to show ill will between the parties. Further, the physical evidence tended to show that the defendant fired a number of shots into the victim after he had been felled and rendered unconscious. In light of such evidence, we hold that there was sufficient evidence of premeditation and deliberation to support the defendant's conviction for first degree murder.

The defendant next contends that the trial court's instructions coupled with the prosecutor's argument led the jury to believe that the defendant could be convicted of first degree murder if the premeditation occurred after he fired the fatal shot. This contention is without merit.

[5] The defendant failed to object to the trial court's final instructions to the jury. Therefore, under Rule 10(b)(2), Rules of Appellate Procedure, the defendant is deemed to have waived his right to assign error in the instructions. In such cases the defendant is entitled to relief only if he can show that the instructions complained of contained error amounting to "plain error" as that term is defined in *State v. Odom*, 307 N.C. 655, 300 S.E. 2d 375 (1983). No such error appears in the present case.

[6] In its instructions to the jury on the elements of first degree murder, the trial court specifically stated that the State must prove:

> Fourth, that the defendant acted with premeditation. That is, that he formed the intent to kill Asa Earl Bramlett, Jr., over some period of time, however short, *before he shot Asa Earl Bramlett, Jr.*

(Emphasis added.) There was no error in this instruction. The trial court clearly instructed the jury that they were required to find that the intent to kill was formed *before the victim was shot* in order to find the existence of premeditation. We hold that the quoted instruction cured any suggestion to the contrary in the

prosecutor's argument to the jury. The trial court's instructions could not have caused the jury to believe it could convict if it found that premeditation occurred after the fatal shot was fired. Therefore, it is clear that the instruction did not involve "plain error" as that term is defined in *Odom*.

[7] The defendant next argues that the prosecutor made certain prejudicial statements during his final argument at the guilt-innocence determination phase which require a new trial. Initially, we note that the defendant failed to object to these statements. Therefore, our review must be limited to the question of whether the statements were so grossly improper that the trial judge should have corrected the argument *ex mero motu*. *State v. Craig*, 308 N.C. 446, 302 S.E. 2d 740, *cert. denied*, --- U.S. ---, 78 L.Ed. 2d 247 (1983).

In hotly contested cases counsel will be given wide latitude in arguments to the jury and are permitted to argue the facts which have been presented as well as all reasonable inferences which can be drawn from them. *State v. Lynch*, 300 N.C. 534, 268 S.E. 2d 161 (1980). Counsel, however, may not raise incompetent and prejudicial matters nor refer to facts and personal opinions not in evidence. *Id.*

[8] The defendant argues that the trial court erred in permitting the prosecutor to argue that "the [defendant] is the baddest on the block and everybody knows it." The defendant also says it was error to allow argument that he killed Bramlett to regain his reputation as a "bad" man following the earlier attack by Bramlett. The defendant contends that there was no evidence to support these arguments. We disagree.

We first note that the defendant admitted to having committed a number of crimes including assault with a deadly weapon with intent to kill, carrying a dangerous weapon, assault on a female, and various drug offenses. He also admitted to shooting his father-in-law. There is evidence that at least one acquaintance of the defendant saw him attacked by Bramlett. The defendant testified that prior to the shooting the deceased had bragged about knocking him out. The evidence supports a reasonable inference that the defendant was known in the community as a man prone to violence and that his aggressive reputation had been weakened in the eyes of the community as a result of the pre-

vious fight with Bramlett. Defense counsel appeared to acknowledge the importance to the defendant of such a reputation when in closing argument he stated that the atmosphere of the defendant's environment is one where Hamlet and his peers "prance around . . . spouting off who is the best, who is the meanest, who is the low downest." The evidence presented supported a reasonable inference that the defendant committed the murder in order to redeem his reputation as a violent man. The prosecutor's statements in this regard were not improper.

[9] The next argument complained of related to the defendant's testimony that he was shocked by the killing. The prosecutor stated, "Bull, Bull. It is not true at all. Not true at all. This is a way of life with Jerome Hamlet, a way of life." The defendant contends that there was no evidence to support this claim. While there was no evidence that the defendant had ever killed anyone, his prior criminal history supported an inference that the defendant was a violent man with criminal tendencies who would not be shocked or dismayed by this killing. Furthermore, when asked who had shot Bramlett, the defendant replied, "I did. Does anyone have anything to say about it?" This statement lent additional support to an inference that the defendant was in control of his emotions and not shocked by the killing. The defendant's argument on this point is without merit.

[10] The defendant next contends references by the prosecutor to the defendant as an "animal" and to his environment as a "jungle" were so prejudicial as to warrant a new trial. We do not agree. During his closing argument the defense counsel himself referred to the defendant's neighborhood as a "jungle" and to the defendant and his peers as "bulls" and "leaders of the pack." We do not condone comparisons of criminal defendants to members of the animal kingdom. *See State v. Smith*, 279 N.C. 163, 181 S.E. 2d 458 (1971). However, reference by the prosecutor to the defendant as an "animal" was not so improper as to require action by the trial court *ex mero motu* given the defendant's failure to object and defense counsel's similar statements.

[11] The defendant also claims that it was improper for the prosecutor to argue that convicting the defendant of first degree murder and executing him would deter other crime in the community. During his closing argument the prosecutor stated:

> I don't know when the killing will stop. I have represented people who have done gross acts and I have appeared with the State as prosecutor and prosecuted people who have murdered people before January the 1st, and I do not know when it will stop. It probably will, but as long as these people are allowed to operate within society with almost total immunity insofar as the ultimate punishment it will continue. If unabated it will not only continue, it will get worse . . . .

We have held in a number of cases that it is permissible for a prosecutor to ask the jury to return the highest degree of conviction and the most severe punishment available for the offense charged. *See State v. Johnson*, 298 N.C. 355, 259 S.E. 2d 752 (1979); *State v. Christopher*, 258 N.C. 249, 128 S.E. 2d 667 (1962). Here, however, during the guilt-innocence determination phase of the trial, the prosecutor injected his personal viewpoint concerning the deterrent effect of the death penalty. We have held that such statements are improper. *State v. Kirkley*, 308 N.C. 196, 302 S.E. 2d 144 (1983). Though the statement was improper it was not objected to, and we hold that it was not so grossly improper as to require action by the trial court *ex mero motu. See id.*

[12] The defendant next contends that the practice of "death qualifying" the jury before the guilt-innocence phase of his trial resulted in a jury biased in favor of the prosecution on the issue of guilt and deprived him of a fair trial. We have repeatedly rejected such arguments. *E.g., State v. Murray*, 310 N.C. 541, 313 S.E. 2d 523 (1984). This assignment of error is without merit.

II.

Sentencing Phase

The defendant presents numerous assignments of error relative to the sentencing phase of his trial. The dispositive assignment of error, however, concerns the submission for consideration by the jury of the aggravating circumstance that the killing "was especially heinous, atrocious, or cruel." N.C.G.S. 15A-2000(e)(9). The defendant contends that the evidence did not support the existence of this aggravating circumstance, which was the only aggravating circumstance submitted to the jury and found to exist.

[13] In deciding whether this aggravating circumstance was properly submitted to the jury, we must first take note of certain

established principles. Though every murder is heinous, atrocious, and cruel, the legislature made it clear that it did not intend for this aggravating circumstance to apply in every first degree murder case. Instead, the legislature specifically provided that this aggravating circumstance may be found only in cases in which the first degree murder committed was *especially* heinous, *especially* atrocious, or *especially* cruel. N.C.G.S. 15A-2000(e)(9). Therefore, a finding that this aggravating circumstance exists is only permissible when the level of brutality involved exceeds that normally found in first degree murder or when the first degree murder in question was conscienceless, pitiless, or unnecessarily torturous to the victim. *State v. Goodman*, 298 N.C. 1, 257 S.E. 2d 569 (1979).

In *State v. Oliver*, 309 N.C. 326, 307 S.E. 2d 304 (1983), we identified two types of murder as included in the category of murders which would warrant the submission of the especially heinous, atrocious, or cruel aggravating circumstance to the jury. One type involved killings which are physically agonizing for the victim or which were in some other way dehumanizing. The other type consists of those killings which are less violent, but involve infliction of psychological torture by leaving the victim in his last moments aware of but helpless to prevent impending death.

The State contends that there was sufficient evidence to allow the jury to find that: (1) the victim suffered a violent and torturous death at the hands of the defendant; and (2) he suffered psychological torture as a result of the "ambush" slaying. Therefore, the State argues that the murder falls into either or both of the categories set out in *Oliver*. We do not agree.

[14] In determining whether the evidence is sufficient to support a finding of essential facts which would support a determination that a murder was "especially heinous, atrocious, or cruel" the evidence must be considered in the light most favorable to the State, and the State is entitled to every reasonable inference to be drawn therefrom. *State v. Stanley*, 310 N.C. 332, 312 S.E. 2d 393 (1984). *See State v. Cutler*, 271 N.C. 379, 156 S.E. 2d 679 (1967). Under such an analysis, the evidence in the present case was insufficient to support the submission of the aggravating factor to the jury. The evidence showed that the defendant fired almost immediately upon the victim entering the vestibule. The

first shot to strike Bramlett hit him in the head. Dr. Gable, the Medical Examiner, testified that the victim had only one bullet wound to the head, and that in his opinion this wound caused the victim's death. The victim was unconscious and unable to feel any pain after the shot to his head. He died approximately five hours after the shooting without regaining consciousness. Though death was not instantaneous, the victim did not linger for any extended period of time following the shooting. *See State v. Hamlette*, 302 N.C. 490, 276 S.E. 2d 338 (1981). Further, there was no evidence that the victim suffered an unusually torturous death as a result of the multiple gunshot wounds. In fact the State's own uncontradicted evidence showed that the victim was rendered unconscious by the first shot that struck him and thereafter was completely unaware of the additional shots and suffered no pain.

The State also contends that there was evidence to support an inference that the victim suffered psychological torture prior to the killing. We disagree. The evidence in the present case tended to show that the victim was unaware of the assailant's presence until the victim entered the vestibule where he was shot immediately. There was no evidence upon which to base an inference that Bramlett was left "in his last moments as a sentient being, aware but helpless to prevent impending death." *State v. Oliver*, 309 N.C. 326, 346, 307 S.E. 2d 304, 318 (1983).

Two cases, one decided by the Supreme Court of the United States and the other decided by this Court, control the present case. Each requires a holding that the trial court erred in permitting the jury to find in the present case that the murder was especially heinous, atrocious, or cruel.

In *Godfrey v. Georgia*, 446 U.S. 420 (1980), the defendant went to the home of his mother-in-law where his wife and eleven year old daughter were staying. He peered through the window and observed his wife, mother-in-law and daughter playing a card game. He pointed a shotgun through a window and shot his wife in the forehead killing her instantly. He immediately entered the home and struck and injured his fleeing daughter with the barrel of the shotgun. He then shot his mother-in-law in the head killing her instantly. The jury found as an aggravating factor that the murder "was outrageously or wantonly vile, horrible and inhuman." The Supreme Court of Georgia affirmed the death sen-

tence holding that the verdict was "factually substantiated." The Supreme Court of the United States held that the Supreme Court of Georgia had unconstitutionally construed the aggravating factor. The Supreme Court of the United States specifically stated that:

> There is no principled way to distinguish this case, in which the death penalty was imposed, from the many cases in which it was not. Accordingly, the judgment of the Georgia Supreme Court insofar as it leaves standing the petitioner's death sentences is reversed, and the case is remanded to that court for further proceedings.

Id. at 433. The *Godfrey* decision compels a similar holding in the present case. *See Eddings v. Oklahoma*, 455 U.S. 104, 109, n. 4 (1982) (application of Oklahoma "heinous, atrocious or cruel" aggravating circumstance most likely violated *Godfrey*).

In *State v. Stanley*, 310 N.C. 332, 312 S.E. 2d 393 (1984), the defendant stopped his wife on the street in the presence of other family members. Upon seeing the defendant with a gun, the wife said "Please, Stan." The defendant then shot her nine times. Although she ultimately died from the wounds inflicted by the defendant, she remained conscious throughout the entire attack. This Court, relying in large measure upon the holding of the Supreme Court of the United States in *Godfrey*, held that the trial court erred in permitting the jury to find as an aggravating circumstance that the murder was especially heinous, atrocious, or cruel.

The murder in the present case was certainly a vicious and pitiless crime. The holdings of *Godfrey* and *Stanley* compel the conclusion, however, that the trial court erred in permitting the jury to find as an aggravating circumstance that the murder was *especially* heinous, atrocious, or cruel. Since this was the only aggravating circumstance submitted or found, this Court must vacate the sentence of death and impose a sentence of life imprisonment. N.C.G.S. 15A-2000(d)(2).

The death sentence is vacated and the defendant is hereby sentenced to imprisonment in the State's prison for the remainder of his natural life. The defendant is entitled to credit for days spent in confinement prior to the date of this judgment. The

Clerk of the Superior Court, New Hanover County, shall issue a commitment accordingly.

Guilt-Innocence Determination Phase: No error.

Sentencing Phase: Death sentence vacated and sentence of life imprisonment imposed.

Justice MARTIN dissenting in part.

I cannot find as a matter of law that the evidence in this case is insufficient to submit the issue of whether the killing was especially heinous, atrocious, or cruel to the jury. Therefore, I must dissent from the majority's holding with respect to this issue. I concur in the majority's opinion with respect to the guilt or innocence phase of the trial.

> The question before us is whether, as a matter of law, there is sufficient evidence to submit the issue to the jury for its determination. In making this decision, we must view the evidence in the light most favorable to the state, discrepancies and contradictions are disregarded, the state's evidence is taken as true, and the state is entitled to every inference of fact that may be reasonably deduced therefrom. *State v. Lester*, 294 N.C. 220, 240 S.E. 2d 391 (1978); *State v. Witherspoon*, 293 N.C. 321, 237 S.E. 2d 822 (1977). The defendant's evidence, unless favorable to the state, is not to be considered in deciding the question. *State v. Earnhardt*, 307 N.C. 62, 296 S.E. 2d 649 (1982). If there is substantial evidence of each element of the issue under consideration, the issue must be submitted to the jury for its determination. *State v. Roseman*, 279 N.C. 573, 184 S.E. 2d 289 (1971). If the evidence only raises a suspicion or conjecture as to the existence of the fact to be found, the issue should not be submitted. *State v. Cutler*, 271 N.C. 379, 156 S.E. 2d 679 (1967).
>
> Chief Justice Stacy stated the applicable rule as follows:
>
> [I]f there be any evidence tending to prove the fact in issue, or which reasonably conduces to its conclusion as a fairly logical and legitimate deduction, and not merely such as raises a suspicion or conjecture in regard to it, the case should be submitted to the jury.

State v. Johnson, 199 N.C. 429, 431, 154 S.E. 730, 731 (1930).

State v. Stanley, 310 N.C. 332, 347, 312 S.E. 2d 393, 401-02 (1984) (Martin, J., dissenting).

The majority relies to a large extent upon the theory that the first shot to strike Bramlett rendered him unconscious and he did not suffer any pain from the infliction of the additional six bullet wounds. This theory is based upon the following testimony of Dr. Gable:

> Q. Dr. Gable, in your medical expert opinion, if in fact the gunshot wound to the head was the first shot that hit the victim Asa Bramlett, would he have been rendered unconscious and not feeling any pain thereafter?
>
> A. In my opinion he probably would have been rendered unconscious, yes, sir.
>
> Q. And that would mean he wouldn't feel any pain?
>
> A. Yes, sir.

The majority jumps from this testimony to the conclusion that "it *rendered* him unconscious and unable to feel any pain." "The victim *was* unconscious and unable to feel any pain after the shot to his head." (Emphases ours.)

Dr. Gable's testimony just does not support the majority's conclusion. The jury could infer that the shot rendered Bramlett unconscious or it could decline to do so. The point is that it was a question for the jury to decide, not the court. The doctor said all that he could, that in his opinion the shot to the head *probably* rendered the victim unconscious. Whether it did was a question of fact for the jury.

The evidence discloses an appreciable interval of time between the first shot, which missed Bramlett, and the next shot that struck him in the head. Etta Allen testified:

> Q. After you heard that shot what did you hear or see?
>
> A. Well, after the first shot I didn't hear anything for awhile.

Q. For awhile? What do you mean? What do you mean, "For a while."

A. Well, moments passed before I heard anything else.

Q. What did you hear after moments passed?

A. I heard another—other shots.

From this testimony, the jury could reasonably infer that Bramlett endured psychological torture during those moments as he faced defendant's pistol, awaiting the next shot. *State v. Oliver*, 309 N.C. 326, 307 S.E. 2d 304 (1983). Likewise, as in *Oliver*, it is significant that after the witness Etta Allen inquired "Who did it?" the defendant replied "I did. Does anyone have anything to say about it?" Defendant then reloaded his revolver and fired more bullets into Bramlett, lying prostrate on the floor.

This statement and the additional wounding of Bramlett as he lay helpless indicates a conscienceless and pitiless murder with excessive brutality. *State v. Stanley*, 310 N.C. 332, 312 S.E. 2d 393. The majority concedes that this murder was "certainly a vicious and pitiless crime."

The correct standard to be applied in determining whether the evidence is sufficient to be submitted to the jury on this issue is expressed in

> *State v. Pinch*, 306 N.C. 1, 292 S.E. 2d 203, *cert. denied*, 74 L.Ed. 2d 622 (1982). The aggravating circumstance " 'does not arise in cases in which death was immediate and in which there was no unusual infliction of suffering upon the victim.' " *Id.* at 34, 292 S.E. 2d at 228 (citation omitted). It is appropriate only when there is evidence of "excessive brutality, beyond that normally present in any killing, or when the facts as a whole portray the commission of a crime which was conscienceless, pitiless or unnecessarily torturous to the victim." *Id. See State v. Rook*, 304 N.C. 201, 283 S.E. 2d 732 (1981), *cert. denied*, 455 U.S. 1038 (1982); *State v. Goodman*, 298 N.C. 1, 257 S.E. 2d 569 (1979).

State v. Stanley, 310 N.C. at 350-51, 312 S.E. 2d at 403 (Martin, J., dissenting).

It is true that not every murder is especially heinous, atrocious, or cruel. However, I find the evidence here sufficient to submit the issue to the jury for its determination within the guidelines of *Godfrey v. Georgia*, 446 U.S. 420, 64 L.Ed. 2d 398 (1980), and the decisions of this Court. The evidence is sufficient for the jury to find that the killing was excessively brutal, beyond that normally present in a killing, and that it was conscienceless, pitiless, or unnecessarily torturous to Asa Bramlett and therefore especially heinous, atrocious, or cruel. *State v. Pinch*, 306 N.C. 1, 292 S.E. 2d 203, *cert. denied*, 459 U.S. 1056 (1982). The jury under proper instructions remains free to reject or find the circumstance. *State v. Cherry*, 298 N.C. 86, 257 S.E. 2d 551 (1979), *cert. denied*, 446 U.S. 941 (1980). Certainly, in resolving the question of law as to whether this aggravating circumstance should be submitted to the jury, it is not our province to consider how the jury should have answered the issue. That is the proper function of the jury under proper instructions from the trial court. The evidence supporting the jury's finding that the murder was especially heinous, atrocious, or cruel goes far beyond mere speculation or conjecture and the issue was properly submitted to the jury. My vote is to find no error in the sentencing phase of the trial, and the Court should then conduct its proportionality review. N.C. Gen. Stat. § 15A-2000(d)(2) (1977).

Justices COPELAND and MEYER join in this dissenting opinion.

JOE H. ADAMS v. HAZEL Z. MILLS

No. 282A84

(Filed 6 November 1984)

1. Automobiles and Other Vehicles §§ 11.5, 75.1— hitting parked vehicle—contributory negligence—evidence sufficient

There was sufficient evidence from which a jury could find contributory negligence by plaintiff on the basis of negligence *per se* or ordinary common law negligence where defendant's evidence tended to show that plaintiff's truck was standing at least two feet onto the paved portion of the highway; that it was possible for defendant to park his truck on the opposite shoulder, which was more than wide enough to accommodate the entire width of the

truck; that the stop was not for a necessary purpose under G.S. 20-161(a) as a matter of law; and that the accident occurred on a rural road outside a municipality.

2. **Automobiles and Other Vehicles §§ 11.5, 75.1— hitting parked vehicle—contributory negligence per se—proximate cause**

The trial court erred in failing to submit to the jury the issue of causation based on plaintiff's negligence *per se* where a jury could reasonably infer from the facts that plaintiff negligently stopped his truck partially on the main traveled portion of the highway; that without this original negligence, the collision would not have occurred; and that the subsequent injury was clearly foreseeable, given the defendant's failure to keep a proper lookout and decrease his speed to avoid colliding with a vehicle on the highway. G.S. 20-161.

3. **Automobiles and Other Vehicles §§ 11.5, 75.1— hitting parked vehicle—common law contributory negligence—proximate cause**

The trial court erred in failing to submit the issue of causation based on plaintiff's common law negligence where there was evidence from which the jury could find that in the exercise of reasonable care and foresight plaintiff could have foreseen that parking on the narrower shoulder, partly on the pavement on the westbound lane of a two-lane paved highway, at sunset, would result in a collision with a vehicle whose driver was blinded by the bright setting sun, and that he was negligent in not choosing a more favorable place to park and attend to his tailgate. G.S. 20-161.

APPEAL by defendant, pursuant to G.S. 7A-30(2), from the decision of a divided panel of the Court of Appeals, reported at 68 N.C. App. 256, 314 S.E. 2d 589 (1984). The Court of Appeals affirmed the judgment entered by *Seay, J.*, at the 7 March 1983 Civil Session of Superior Court, ANSON County. Heard in the Supreme Court 13 September 1984.

This is an action for property damages, including the cost of rental of a substitute vehicle, instituted by the plaintiff, Joe H. Adams, on 5 June 1981. The defendant, Hazel Z. Mills, counterclaimed for personal injuries and property damages on 30 September 1981. The action was tried and at the conclusion of all the evidence, the trial court granted the plaintiff's motion under Rule 50 of the Rules of Civil Procedure, for a directed verdict on the defendant's counterclaims and refused to submit the issue of plaintiff's contributory negligence to the jury. Only the issues of defendant's negligence and plaintiff's property damages were submitted to the jury. The issue of defendant's negligence was answered in favor of the plaintiff and against the defendant, and the jury awarded damages in the amount of $3,250.00. Defendant's

motions under Rule 50 for judgment notwithstanding the verdict and under Rule 59 for a new trial were denied. Judgment was entered in the sum of $4,600.00, which included the sum of $1,350.00 stipulated for the plaintiff's loss of use of his vehicle.

Defendant appealed from the trial court's refusal to submit to the jury the issue of contributory negligence. No appeal was taken from the dismissal of defendant's counterclaim, and defendant did not seek a new trial on the issue of damages. The issue of liability as raised by the pleadings and the evidence forms the sole basis of this appeal.

Caudle & Spears, P.A., by Lloyd C. Caudle and Thad A. Throneburg, and Henry T. Drake, for plaintiff-appellee.

Leath, Bynum, Kitchin & Neal, P.A., by Fred W. Bynum, Jr., and Henry L. Kitchin, for defendant-appellant.

MEYER, Justice.

This action arose out of a two-vehicle collision which occurred when a pickup truck operated by the defendant struck the left rear of plaintiff's 1974 Ford F-750 dump truck, which was in a stationary position at the time of the collision. It is the defendant's contention that the plaintiff was contributorily negligent in temporarily letting his dump truck stand with a portion of it extending into the main traveled portion of the highway and that this negligence was a proximate cause of the collision. The sole issue presented on this appeal is the sufficiency of the evidence to support the defendant's affirmative defense of contributory negligence.

The evidence tended to show that on 4 February 1981, the plaintiff was to landscape a house on Rural Paved Road No. 1003 in Anson County. At about 5:00 p.m. he arrived at the house with a load of driveway stone. Plaintiff testified that he pulled up past the driveway, turned on his 4-way flashing lights, and backed his dump truck into the driveway. Plaintiff then climbed out of the dump truck, loosened the dump clamps, raised the dump up partially and started to drive out towards the road, dumping the rock as he went along. After dumping all of the rock, plaintiff pulled his truck out into the highway by turning in a westerly direction. Plaintiff proceeded about 42 feet west of the driveway

with his flashers still on, stopped his truck on the right (northern) shoulder of the road to clean the excess rock off the back of the tailgate and to secure the tailgate. Plaintiff again climbed out of his dump truck and went around to the back. He testified that he was probably stopped there for less than a minute before the collision. As he was fastening the tailgate, plaintiff heard defendant's truck coming down the road. Plaintiff testified that he looked over his right shoulder, saw the truck coming directly toward him, and jumped across the back of the truck to avoid being hit. The plaintiff did not hear the screech of tires or the defendant's horn.

The plaintiff testified further that the highway was a two-lane, paved road with one lane for eastbound traffic and one lane for westbound traffic. From the driveway looking in an easterly direction, there was a clear and unobstructed view for 1,200 to 1,400 feet. In a westerly direction, there was a straight, unobstructed view for 1,100 to 1,200 feet. Defendant's vehicle was coming from the east and heading in the direction of the bright, late afternoon sun which was setting in the west. The collision occurred between 5:00 and 5:15 p.m. When the plaintiff spoke to the defendant after the crash, the defendant told him that he had been blinded by the sun. Jack Painter, who was working with the plaintiff that day, testified that the defendant's truck was traveling at sixty to sixty-five miles per hour.

The evidence as to the exact position of plaintiff's dump truck prior to the collision was conflicting. The plaintiff's evidence was to the effect that the dump truck was resting entirely on the shoulder and that no portion of the dump truck extended onto the paved portion of the highway. On cross-examination, the plaintiff testified that he thought that the shoulder was "better than 8 feet wide" and that his truck was approximately eight feet wide.

> I don't remember any of my truck being on the pavement. To the best of my knowledge, it was not on the pavement but was close to the pavement but I don't remember it being on the pavement.

Plaintiff testified further that the dump truck's tandem set of tires measured eighteen inches to two feet; that after the accident, the left rear end of the dump truck was resting approx-

imately eighteen inches to two feet in the road; the front end was approximately five or six feet off the road; and that the defendant's vehicle "was behind my truck somewhat in line with my truck."

Plaintiff also testified that the shoulder on the opposite side of the road was much wider than it was on the side where the accident occurred. Plaintiff stated that he had parked another truck on the other side of the road which was completely off the pavement and not even close to the pavement. He stated that there was nothing to prevent him from taking the dump truck over to the other side of the road to put the tailgate up, he had simply decided to use the side of the road on which the shoulder was narrower. Finally, plaintiff testified that he could not secure the tailgate of his truck in the private driveway itself because he had dumped rock all the way out to the road.

The defendant's evidence was to the effect that plaintiff's truck was left standing only partially on the shoulder, with at least two feet extending and protruding into the westbound lane of travel. The State Highway patrolman called to the scene, Larry Wayne Whitley, testified that immediately after the accident, plaintiff had stated that he had pulled as far off the road as he could, but that the wheels on the left side of his truck were on the pavement. Whitley testified further that he measured the width of the shoulder at the point of the collision and that it was six feet wide. To the right of the shoulder a ditch swept off into a gutter. On the opposite side of the road directly across from the six foot shoulder was a thirteen foot and five inch shoulder. Both shoulders were more or less level with the pavement. Whitley also testified that there were no skid marks from the defendant's truck and that the defendant stated he had never decreased his speed.

The defendant testified as follows:

> When I topped the hill about a quarter of a mile east of the accident scene, I noticed the sun was bright in front of me. I could see but I couldn't—the sun still kept me from seeing. I am sure you have been in places where the sun is bright. And I couldn't see a long distance ahead of me, as I went on down the hill. When I topped the hill I could see the area and Joe Adams' truck down there but I assumed the

truck was off the road. From that distance I could not tell whether it was on the pavement or not. Then I proceeded on down the hill, and I got about halfway down the hill and the sun got worse. I pulled my sun visor down, and I put my right hand up so I could see the road.

The sun just blinded me. I guess it was through my glass and truck too—the sun blinded me. I was trying to see the road, and I started—I saw the center line. I didn't want to run into anybody. I looked at the center line. I was following the center line as close as I could; yet I was not going to cross the center line because I might run head on into somebody. I don't know how long I did that. I slowed the truck down and I proceeded following the line hoping I was going to run out of the sun. I've run into sunny places, and you'd go a little ways and run out of it.

Well, the next thing I knew I'd done had had the wreck, and the Rescue Squad picked me up whenever I come to where I could realize anything. I am definitely sure I didn't leave the pavement of the road because I was following as close to the line as I could—that's the only thing I had to go by—and hoping I'd run out of the sun to get my vision back on the full vision of the road. I could see the road from a distance out there, but not a long distance ahead of me. I would say I was traveling from 20 to 30 miles an hour. I don't think I exceeded 30. I don't think I'd be up here telling about it if I was driving much faster than that.

The trial court ruled that the foregoing evidence failed to establish the plaintiff's contributory negligence and refused to submit the issue of contributory negligence to the jury. The jury found the defendant negligent and awarded plaintiff property damages for his vehicle.

When charging the jury in a civil case, it is the duty of the trial court to explain the law and to apply it to the evidence on the substantial issues of the action. N.C.G.S. 1A-1, Rule 51(a); *Cockrell v. Transport Co.*, 295 N.C. 444, 245 S.E. 2d 497 (1978). "If a party contends that certain acts or omissions constitute a claim for relief or defense against another, the trial court must submit the issue with appropriate instructions if there is evidence which, when viewed in the light most favorable to the proponent, will

support a reasonable inference of each essential element of the claim or defense asserted." *Id.* at 449, 245 S.E. 2d at 500. *See also Vernon v. Crist*, 291 N.C. 646, 231 S.E. 2d 591 (1977).

Contributory negligence constitutes an affirmative defense; therefore, the defendant had the burden of proving (1) that plaintiff failed to exercise proper care in the performance of a legal duty which plaintiff owed to defendant under the circumstances in which they were placed; and (2) that such negligent breach of duty was a proximate cause of the injury suffered. *See Hairston v. Alexander Tank & Equipment Co.*, 310 N.C. 227, 311 S.E. 2d 559 (1984); *Murray v. R.R.*, 218 N.C. 392, 11 S.E. 2d 326 (1940); *Whitt v. Rand*, 187 N.C. 805, 123 S.E. 84 (1924).

The Court of Appeals held that the trial court was not obligated to charge the jury on contributory negligence or to submit it as an issue because the defendant failed to carry his burden of proving that the plaintiff was negligent and that such contributory negligence was a proximate cause of the collision. The majority specifically found that defendant failed to offer "any evidence that the plaintiff violated [N.C.] G.S. 20-161(a), the basis for [defendant's] contributory negligence claim" because (a) "he has offered no evidence that the stop was not temporary"; (b) "that it was not for a necessary purpose"; and (c) "that the plaintiff parked his truck on the road 'outside municipal corporate limits'." 68 N.C. App. 259, 314 S.E. 2d at 591. The author of the dissent below disagreed on the ground that there was evidence tending to show that the plaintiff parked or left his vehicle standing on the paved portion of the highway and that there was no evidence to show that the stopping was for a statutorily permissible purpose. *Id.* at 260, 314 S.E. 2d at 592.

We find that the evidence was sufficient to take the case to the jury on the issue of plaintiff's contributory negligence on the basis of either negligence per se or ordinary common law negligence. Accordingly, the defendant is entitled to a new trial on the issue of liability.

[1] We will first address the question of whether there was sufficient evidence to take the case to the jury on the issues of (A) contributory negligence per se and (B) proximate cause, and then discuss the additional question of (C) the sufficiency of the evi-

dence to submit the issue of contributory negligence on the basis of ordinary principles of common law negligence.

A.

N.C.G.S. 20-161 is a safety statute which regulates stopping on the highway. *See Sharpe v. Hanline*, 265 N.C. 502, 144 S.E. 2d 574 (1965); *Melton v. Crotts*, 257 N.C. 121, 125 S.E. 2d 396 (1962). N.C.G.S. 20-161 provides that:

> (a) No person shall park or leave standing any vehicle, whether attended or unattended, upon the paved or main-traveled portion of any highway or highway bridge outside municipal corporate limits unless the vehicle is disabled to such an extent that it is impossible to avoid stopping and temporarily leaving the vehicle upon the paved or main-traveled portion of the highway or highway bridge.
>
> (b) No person shall park or leave standing any vehicle upon the shoulder of a public highway outside municipal corporate limits unless the vehicle can be clearly seen by approaching drivers from a distance of 200 feet in both directions and does not obstruct the normal movement of traffic.

It is well established that an unexcused violation of N.C.G.S. 20-161 is negligence per se. *King v. Allred*, 309 N.C. 113, 305 S.E. 2d 554 (1983); *Hughes v. Vestal*, 264 N.C. 500, 142 S.E. 2d 361 (1965). To be actionable, negligence in parking a vehicle on a public highway in violation of this statute must be a proximate cause of the injury in suit. *Burke v. Carolina Coach Co.*, 198 N.C. 8, 150 S.E. 636 (1929).

Except in cases of disablement, it is negligence to park a vehicle on the paved surface of a highway when there is sufficient space to stop on the shoulders. *McNair v. Kilmer & Co.*, 210 N.C. 65, 185 S.E. 481 (1936). We have held that "the provisions of [N.C.] G.S. 20-161 require that no part of a parked vehicle be left protruding into the traveled portion of the highway when there is ample room and it is practicable to park the entire vehicle off the traveled portion of the highway." *Sharpe v. Hanline*, 265 N.C. at 504, 144 S.E. 2d at 576. The statute does not prohibit the emergency parking of a vehicle on the shoulder of a highway where no part of the vehicle extends into the main traveled portion of the highway. *Thomas v. Deloatch and Long v. Deloatch*, 45 N.C. App. 322, 263 S.E. 2d 615, *disc. rev. denied*, 300 N.C. 379, 267 S.E. 2d

685 (1980). Therefore, the preliminary questions which must be addressed in this case are whether plaintiff's dump truck was pulled entirely off or was extending partially into the main traveled portion of the highway, and whether it was practicable for plaintiff to have parked elsewhere.

Although plaintiff's evidence was to the effect that the truck was pulled completely off the main traveled portion of the road, and therefore not parked in violation of the statute, there was also ample evidence to the contrary. The defendant correctly points out that the facts as recited in the majority opinion of the Court of Appeals overlook much of the evidence contained in the record which was favorable to the defendant concerning the position of plaintiff's truck.

The defendant's evidence tended to show that the plaintiff's truck was parked or was standing at least two feet onto the paved portion of the highway immediately preceding and at the time of the accident. The plaintiff had testified that the total width of his truck was eight feet. According to the investigating officer the shoulder of the road was only six feet wide at the place where plaintiff had indicated that the truck was parked prior to the accident. Immediately after the accident, the plaintiff had told the officer that although he had pulled as far off the road as he could, the wheels on the left side of his truck were on the pavement. The width of the truck's tandem set of wheels was, according to plaintiff, eighteen inches to two feet. Other circumstantial evidence supporting the defendant's contention that the plaintiff was partially parked on the highway is the defendant's testimony that he followed the center line all the way down the highway and was certain that his truck never left the road.

Ample evidence was presented which indicated that it was possible in this rural, open area for plaintiff to park his truck on the opposite shoulder which was more than wide enough to accommodate the entire width of the truck. Thus, a factual issue was raised by the evidence presented as to the location of the stationary vehicle and the practicability of parking the entire vehicle off the traveled portion of the highway. Resolution of these factual issues concerning location and practicability should properly have been left to the jury and not the trial judge. *Cole v. Koonce*,

214 N.C. 188, 198 S.E. 637 (1938); *Thomas v. Deloatch and Long v. Deloatch*, 45 N.C. App. at 328-29, 263 S.E. 2d at 620.

In addition, the words "park" and "leave standing" in N.C. G.S. 20-161 have been construed so as to exclude a mere temporary or momentary stoppage for a necessary purpose. *Saunders v. Warren*, 264 N.C. 200, 141 S.E. 2d 308 (1965); *Melton v. Crotts*, 257 N.C. 121, 125 S.E. 2d 396. In the instant case, the plaintiff's evidence showed that the stop was, indeed, a temporary one, made for the purpose of securing the tailgate on his truck. However, defendant strongly contends that the plaintiff did not demonstrate that the temporary stop was for a necessary purpose as a matter of law. We agree.

The evidence clearly indicates that plaintiff's truck was not disabled. The plaintiff testified that the stop was for the purpose of clearing loose rock off his tailgate and securing his tailgate upon completion of dumping rock in the driveway. No testimony was offered as to the quantity and consistency of the rock on the tailgate indicating that had the plaintiff traveled any distance, it would have blown onto the highway and endangered other motorists.

The majority of the Court of Appeals held that the defendant had offered "no evidence" that the stop was "not for a necessary purpose on the ground that N.C.G.S. 20-116(g) forbids any vehicle loaded with rock to be driven on the highway unless measures are taken to prevent the load from blowing off the truck." 68 N.C. App. at 259, 314 S.E. 2d at 591.

Even conceding that the plaintiff had a statutory duty to clear the excess rock from the rear of his truck so as to prevent harm to other motorists caused by flying rock, it does not necessarily follow that under the factual circumstances of the instant case, plaintiff's stop was for a "necessary purpose" under N.C.G.S. 20-161(a) as a matter of law.

In *Melton v. Crotts*, 257 N.C. 121, 125 S.E. 2d 396, we held that "[W]hether a puncture or blowout is such a disablement of a motor vehicle as to justify the driver in stopping partially on the paved portion of the highway is ordinarily a question for the jury unless the facts are admitted." *Id.* at 130, 125 S.E. 2d at 402. Similarly, in *Thomas v. Deloatch and Long v. Deloatch*, 45 N.C.

App. 322, 263 S.E. 2d 615, the issue of contributory negligence was submitted to the jury where the defendant's evidence tended to show that the plaintiff had stopped his vehicle partially on the highway due to transmission disability. There, the plaintiff's evidence and contentions in the light most favorable to him were to the effect that the car was coasting and could not have turned into a driveway and was in fact completely off the road when stopped. The court held that the situation presented a factual question for the jury to determine as to whether the stop due to the transmission disability was unavoidable.

In this case, although the plaintiff testified that "I could not secure the tailgate of my truck in the private drive because I had dumped rock all the way out to the road," he also stated that "There was nothing to prevent me from taking the truck I was driving over to the other side of the road to put the tailgate up." Plaintiff admitted that he simply chose to pull onto the side of the road with the narrower shoulder; he did not indicate that he was under any constraint to do so. Indeed, he had parked another truck on that opposite and wider shoulder.

The weight to be given to plaintiff's explanation for his decision to pull onto the narrower shoulder rather than clear the rock in the private drive or on the opposite shoulder is properly a matter for the jury to determine. Certainly a stop for this purpose can be considered no *more* necessary than a stop caused by either transmission disability or a punctured tire. Therefore, as in *Melton* and *Thomas*, the situation in the instant case presented a jury question as to whether it was necessary for the plaintiff to stop his truck where he did in order to clear loose, excess rock from the tailgate and secure the tailgate.

The Court of Appeals also found "that the defendant failed to offer any evidence that the plaintiff parked his truck on the road 'outside municipal corporate limits' which is an essential element in establishing a violation of G.S. 20-161(a)." 68 N.C. App. at 259, 314 S.E. 2d at 591. We note that there is no indication in the record or briefs that proof of this element of the statute was ever contested or at issue in the court below. Moreover, a careful reading of the evidence in the record indicates that this accident occurred on a rural road and outside a municipality.

The parties stipulated that the maximum, posted speed limit was 55 miles per hour. On direct examination, the plaintiff testified that "On February 4, 1981, I was landscaping a house on Rural Paved Road 1003 which house is approximately a mile and one-half west of Highway 145." Plaintiff's witness at the scene, Jack Painter, testified that he "was working at a house on 1003 in the southern part of the county." The investigating officer testified, "I traveled down 52 to Morven and 145 over and then turned off 145 to 1003." The officer then identified defendant's exhibits Nos. 2, 3, 4, 5 and 6 as representing the area where the accident occurred and these exhibits were introduced into evidence. The photographs contained in the record clearly depict a rural scene. No evidence was introduced which indicated that the accident site was within municipal corporate limits. It is readily apparent from the foregoing summary that sufficient evidence was introduced to support the reasonable inference that the accident occurred outside a municipality and that plaintiff's conduct was therefore governed by N.C.G.S. 20-161(a).

We therefore hold that the record clearly contains sufficient evidence from which a jury could find the initial requisite of plaintiff's liability, his negligence on the basis of the violation of a safety statute, or negligence per se.

B.

In *Hughes v. Vestal*, 264 N.C. at 508, 142 S.E. 2d at 367, we stated: "[i]t is true that the violation of the statute regulating 'Stopping on Highway,' [N.C.] G.S. 20-161 is negligence per se. But whether such violation is the proximate cause of the injury in a particular case is ordinarily a question for the jury." Therefore, assuming the jury were to find plaintiff negligent, the remaining question is whether the jury could reasonably infer that plaintiff's negligence in parking his dump truck was a proximate cause of the collision. For reasons which follow, we answer the question in the affirmative.

[2] Proximate cause has been defined as "a cause which in natural and continuous sequence, unbroken by any new and independent cause, produced the plaintiff's injuries, and without which the injuries would not have occurred, and one from which a person of ordinary prudence could have reasonably foreseen that such a result, or consequences of a generally injurious nature, was proba-

ble under all the facts as they existed." *Hairston v. Alexander Tank & Equipment Co.*, 310 N.C. at 233, 311 S.E. 2d at 565. *See also Kanoy v. Hinshaw*, 273 N.C. 418, 160 S.E. 2d 296 (1968); *Green v. Tile Co.*, 263 N.C. 503, 139 S.E. 2d 538 (1965). Foreseeability of injury is thus an essential element of proximate cause, and this is true even though the act complained of is a violation of a safety statute. *McNair v. Richardson*, 244 N.C. 65, 92 S.E. 2d 459 (1956); *Aldridge v. Hasty*, 240 N.C. 353, 82 S.E. 2d 331 (1954).

The test of foreseeability as an element of proximate cause does not require that the actor should have been able to foresee the injury in the precise manner in which it actually occurred. Reasonable pre-vision is all that is legally required; the actor is not required to foresee events which are merely possible, but only those which are reasonably foreseeable. *Hairston v. Alexander Tank & Equipment Co.*, 310 N.C. 227, 311 S.E. 2d 559; *Bennett v. R.R.*, 245 N.C. 261, 96 S.E. 2d 31 (1957).

Proximate cause is an inference of fact to be drawn from other facts and circumstances. Only when the facts are all admitted and only one inference may be drawn from them will the court declare whether an act was the proximate cause of an injury or not. *Conley v. Pearce-Young-Angel Co.; Rutherford v. Pearce-Young-Angel Co.*, 224 N.C. 211, 29 S.E. 2d 740 (1944). However, because that is rarely the case, what is the proximate cause of an injury is ordinarily a question for the jury. *Id.*

The evidence, in the light most favorable to the defendant, shows that the accident occurred on a paved two-lane rural road, running in a generally east-west direction. From the driveway near where plaintiff stopped his truck, there was a clear, unobstructed view of approximately 1,200 feet in each direction. The plaintiff testified that the sun did not bother him as he pulled out into the road and parked his truck. The defendant was traveling in a westerly direction. He testified that he saw the truck as he topped the hill and approached the area, but "could not tell whether it was on the pavement or not." The sun, which was bothering him as he got to the top of the hill, was virtually blinding him as he got midway down the hill. Nonetheless, he proceeded by following the center line down the hill, traveling, according to plaintiff's witness, at sixty to sixty-five miles per hour. Defendant left no skid marks and did not swerve into the opposite lane

of travel to avoid plaintiff's truck. As plaintiff correctly notes in his brief, when the principles of proximate causation are applied to the instant case, the issue becomes whether a person of ordinary prudence in the plaintiff's position would have foreseen that an accident, or some generally injurious consequence would occur under the facts as they existed.

It is well settled that there may be more than one proximate cause of an injury. *Batts v. Faggart*, 260 N.C. 641, 133 S.E. 2d 504 (1963). *See generally* 9 Strong's N.C. Index 3d, Negligence, § 9. Where the second actor does not become apprised of the existence of a potential danger created by the negligence of an original tort-feasor until his own negligence, added to that of the existing perilous condition, has made the accident inevitable, the negligent acts of the two tort-feasors are contributing causes and proximate factors in the happening of the accident. *Caulder v. Gresham*, 224 N.C. 402, 30 S.E. 2d 312 (1944); *Powers v. Sternberg*, 213 N.C. 41, 195 S.E. 88 (1938). *See also King v. Allred*, 309 N.C. 113, 305 S.E. 2d 554.

In order to insulate the negligence of one party, the intervening negligence of another must be such as to break the sequence or causal connection between the negligence of the first party and the injury, so as to exclude the negligence of the first party as one of the proximate causes of the injury. *Batts v. Faggart*, 260 N.C. 641, 133 S.E. 2d 504; *Riddle v. Artis*, 243 N.C. 668, 91 S.E. 2d 894 (1956). An efficient intervening cause is a new proximate cause. It must be an independent force which entirely supersedes the original action and renders its effect in the chain of causation remote. *Hairston v. Alexander Tank & Equipment Co.*, 310 N.C. 227, 311 S.E. 2d 559; *Harton v. Telephone Co.*, 141 N.C. 455, 54 S.E. 299 (1906). The test by which the negligent conduct of one is to be insulated as a matter of law by the independent negligent act of another, is reasonable unforeseeability on the part of the original actor of the subsequent intervening act and resultant injury. *King v. Allred*, 309 N.C. 113, 305 S.E. 2d 554; *Riddle v. Artis*, 243 N.C. 668, 91 S.E. 2d 894; *Butner v. Spease*, 217 N.C. 82, 6 S.E. 2d 808 (1940). Put another way, in order for the conduct of the intervening agent to break the sequence of events and stay the operative force of the negligence of the original wrongdoer, the intervening conduct must be of such nature and kind that the original wrongdoer had no reasonable ground to anticipate it. *Rid-*

dle v. Artis, 243 N.C. 668, 91 S.E. 2d 894; *Balcum v. Johnson*, 177 N.C. 213, 98 S.E. 532 (1919).

We observed in *Hairston v. Alexander Tank & Equipment Co.*, 310 N.C. 227, 311 S.E. 2d 559, that the law of proximate cause does not always support the generalization that the misconduct of others is unforeseeable.

> The intervention of wrongful conduct of others may be the very risk that defendant's conduct creates. In the absence of anything which should alert him to the danger, the law does not require a defendant to anticipate specific acts of negligence of another. It does, however, fix him with notice of the exigencies of traffic, and he must take into account the prevalence of that "occasional negligence which is one of the incidents in human life." (Citations omitted.)

Id. at 234, 311 S.E. 2d at 565.

Under the facts of this case, it cannot be said as a matter of law that defendant's conduct in continuing to drive in a westerly direction down the two-lane paved road while blinded by the bright setting sun was reasonably unforeseeable to one in plaintiff's position. The risk of the intervention of this or other similar wrongful conduct is the very risk created by violation of the regulations governing stopping on the highway. Similarly, we are unable to say as a matter of law, as plaintiff would have us do, that the intervening conduct of the defendant was such as to break the sequence of events and stay the operative force of the plaintiff's original negligence, so as to render that negligence a remote, and not proximate, cause of the injury. A jury could reasonably infer from the facts in this case that plaintiff negligently stopped his truck partially on the main traveled portion of the highway; that without this original negligence, the collision would not have occurred; and the subsequent injury was clearly foreseeable, given the defendant's failure to keep a proper lookout and decrease his speed to avoid colliding with a vehicle on the highway. Accordingly, the trial court erred in failing to submit the issues of plaintiff's negligence per se and proximate causation to the jury.

C.

[3] Additionally, we find that the evidence was sufficient to take the case to the jury under ordinary common law principles of negligence, wholly apart from considerations of whether plaintiff's conduct violated N.C.G.S. 20-161. Defendant's responsive pleading was not limited to allegations of negligence per se in violation of the statute. The defendant also alleged and the evidence tended to show, plaintiff's negligence in parking his vehicle so that a portion of it protruded onto the westbound paved lane, at a time of day in which plaintiff knew, or should have known, that the setting sun was shining directly into the eyes of westbound motorists and in failing to park the vehicle entirely off the paved surface of the highway although there was ample opportunity and space to do so.

In a factually similar case, we found evidence of negligence sufficient to take the issue to the jury on common law principles. In *Pardon v. Williams*, 265 N.C. 539, 144 S.E. 2d 607 (1965), the evidence tended to show that the defendant had parked his car in the evening on a residential street within the corporate limits of Winston-Salem, at a point across from his residence. From where the vehicle was parked, two of the wheels extended three feet onto the paved surface of the road. Defendant chose to park at that spot, despite the existence of a nearby shoulder which was sufficiently wide to have parked the vehicle entirely clear of the paved surface of the road.

The driver of the car in which the plaintiff was riding was blinded by the lights of an oncoming car as he was going upgrade and before his vision cleared, the collision with the right front of the defendant's car occurred. We stated:

> [I]t is our opinion that there is sufficient evidence of negligence on the part of appellant to take the case to the jury on common law principles. Appellant's car was not disabled. He was in position to freely choose a parking place. About 15 feet south of the place where the car was parked, and about the same distance north thereof, the shoulder was 10 to 12 feet wide and the vehicle could have been parked so as to leave several feet clearance between it and the paved portion of the street. The jury could find that in the exercise of reasonable prudence and foresight appellant could have

> foreseen that parking, without lights, at the narrowest place on the shoulder, partly on the pavement which was only 20 feet wide, would result in a collision with some vehicle blinded by meeting traffic, and that he was negligent in not choosing a more favorable place. "As a general rule, a motorist who desires to stop his vehicle or to leave it unattended on a street or highway is under a duty to select a suitable place, where his vehicle will not constitute an obstruction of the highway or a source of danger to other users of the highway; and this duty has been held to exist independently of any statutory requirement." 60 C.J.S., Motor Vehicles, § 330, p. 770.

265 N.C. at 541-42, 144 S.E. 2d at 609.

Similarly, in this case the jury could find that in the exercise of reasonable care and foresight plaintiff could have foreseen that parking on the narrower shoulder, partly on the pavement of the westbound lane of a two-lane paved highway, at sunset, would result in a collision with a vehicle whose driver was blinded by the bright setting sun, and that he was negligent in not choosing a more favorable place to park and attend to his tailgate. The fact that plaintiff's vehicle was not left unattended does not alter the risk posed by its location under the facts of this case.

In sum, the evidence was sufficient to warrant submission of the issue of contributory negligence to the jury. The factual questions raised as to whether plaintiff's vehicle was partially on or completely off the pavement, whether he was in violation of N.C.G.S. 20-161, whether his conduct was negligent under common law principles and whether the plaintiff's negligence was a proximate cause of the collision are properly for the jury, and not the trial court, to resolve. Therefore, the trial court erred in failing to instruct the jury on the issue of contributory negligence and in failing to set aside the verdict of the jury for that reason. We therefore reverse the ruling of the Court of Appeals and remand this case to that court for further remand to the Superior Court, Anson County for a new trial on the issue of liability only.

Reversed and remanded.

STATE OF NORTH CAROLINA v. SHARON RANDOLPH AND REGINALD PHIL SANDERS

No. 146A84

(Filed 6 November 1984)

1. **Robbery § 4.3— continuing threat of use of firearm—evidence sufficient**

Defendants' conduct rose to the level of a continuing threat of the use of a firearm sufficient to support a conviction for armed robbery where there was a display of a firearm which induced the victim to acquiesce to the defendants' demands, and where on several occasions the defendants indicated that they would use the weapon if the victim resisted. G.S. 14-87.

2. **Rape and Allied Offenses § 5; Criminal Law § 9.1— first degree rape—aiding and abetting—evidence sufficient**

The evidence was sufficient to convict the defendant of first degree rape and first degree sexual offense as an aider and abettor where the evidence tended to show that defendant had previously threatened the victim with a gun, that defendant was driving when a codefendant got into the back seat with the victim, that defendant drove down an isolated dirt road and stopped, that defendant remarked that she "had to see this" when the victim began to perform fellatio on the codefendant, that defendant moved the victim's legs around when the codefendant was raping the victim, and that the victim was forced to suck defendant's breast while the codefendants had intercourse.

3. **Rape and Allied Offenses § 5— first degree sexual offense—evidence sufficient**

There was sufficient evidence to convict a defendant of first degree sexual offense under G.S. 14-27.4 where the evidence clearly supported a finding that a codefendant aided and abetted defendant, and where the evidence showed a concert of action between the codefendants, so that there can be no doubt that defendant was aware of the fact that the codefendant had used a gun to abduct the victim and continued to threaten her with the gun.

4. **Criminal Law § 102.8— failure to testify—prosecutor's comment—permissible**

The prosecutor did not comment impermissibly on defendants' failure to testify where any reference to the failure to testify was so brief as to make improbable any contention that the jury inferred guilt from the failure of defendants to testify, and where the defendants failed to promptly object and decided against a curative instruction when this was suggested by the trial court. G.S. 8-54.

5. **Indictment and Warrant § 3; Criminal Law § 13— grand jury—no jurisdiction over crimes in another county**

Where all of the evidence tended to show that a kidnapping and larceny occurred in Cumberland County, a Wake County Grand Jury had no jurisdiction to indict defendants for those crimes. Furthermore, statements in an indictment naming the county where the crime allegedly occurred establish *prima facie jurisdiction* and may be challenged at any time as stated in G.S.

15A-952(2), not just in a timely motion to dismiss for improper venue under G.S. 15A-135.

6. Rape and Allied Offenses § 6.1— instruction on second degree sexual offense not required

Defendant was not entitled to a jury instruction on second degree sexual offense where there was no evidence which would support a finding of guilt of second degree sexual offense.

7. Indictment and Warrant § 13.1— bill of particulars—denial—no abuse of discretion

Defendant did not show prejudicial error in the denial of his motion for a bill of particulars where the warrants and indictments adequately informed defendant that the crimes allegedly occurred on July 13 and 14 in Wake County, and where defendant failed to present any evidence to rebut the charges and made no showing as to how his preparation and conduct of the case was impaired by the denial of the motion. G.S. 15A-925(c).

APPEAL by the defendants from the judgment of *Judge John C. Martin*, entered October 28, 1983 in Superior Court, WAKE County.

The defendants were tried on indictments charging each with first degree rape, first degree sexual offense, first degree kidnapping, armed robbery and felonious larceny. The defendants pleaded not guilty to all charges. A jury found them guilty of all charges. The trial court sentenced the defendants to life imprisonment for the rape convictions and life imprisonment for the sexual offense convictions. The trial court consolidated the kidnapping, armed robbery and felonious larceny convictions and sentenced each defendant to twenty-five years. The defendants appealed the rape and sexual offense convictions as a matter of right under N.C.G.S. 7A-27(a). On April 19, 1984, the Supreme Court allowed the defendants' motions to bypass the Court of Appeals on the defendants' appeal in the kidnapping, armed robbery and felonious larceny cases. Heard in the Supreme Court October 10, 1984.

Rufus L. Edmisten, Attorney General, by Dennis P. Myers, Assistant Attorney General, for the State.

Irving Joyner for defendant appellant Randolph.

Adam Stein, Appellate Defender, by Lorinzo Joyner, Assistant Appellate Defender, for defendant appellant Sanders.

MITCHELL, Justice.

On appeal the defendants bring forward several assignments of error. We conclude that no reversible error was committed at trial, but because the Wake County Grand Jury was without jurisdiction to indict the defendants for the kidnapping and felonious larceny, judgment must be arrested in those cases. In addition since the trial court consolidated the armed robbery convictions with the kidnapping and larceny convictions for sentencing, we vacate the sentences in the armed robbery cases and remand them for resentencing.

The State's evidence tended to show that on July 13, 1983, the victim was living in Fayetteville, North Carolina. On that date she drove her father's automobile to the post office in order to post some mail and buy stamps. As she was leaving the post office, the victim was approached by a black female who was identified at the trial as the defendant Sharon Randolph. Randolph asked the victim where she was going and stated that she needed a ride to her place of employment. The victim thought she recognized the location Randolph described and offered her a ride.

During the course of the drive, Randolph indicated that she had changed her mind and asked the victim to take her to the boardinghouse where she was staying. After driving a bit further, the victim stopped to allow Randolph to get out of the car. Randolph got out of the car, but then turned around and displayed a gun. She told the victim "not to try anything funny" and proceeded to reenter the car. Randolph instructed the victim to drive and gave her specific directions leading back to an area near the post office, where Randolph told the victim to pull into a driveway. A black man, identified at trial as the defendant Reginald Sanders, was nearby. Randolph motioned for him to come over to the car. Sanders entered on the driver's side and began to drive. At that time, the victim was in the front seat between the two defendants.

As they were driving, the victim was instructed to close her eyes and was told by Randolph that if she opened them "it will be the last time." After driving for about thirty minutes, they stopped for gas. As Sanders pumped gas, Randolph told the victim that she still had the gun and warned her not to "try anything." Sanders returned to the car, and they continued to drive.

Sometime later they stopped, and the victim was ordered to get into the back seat.

After driving another hour or so, the victim saw the Wake Advancement Center and realized that they were in Wake County. Sometime later they entered the Lion's Park and stopped. The defendants proceeded to drink some whiskey from paper cups. They then left the park with Randolph driving.

Eventually Sanders instructed Randolph to stop the car on a dirt road near Eagle Crest Golf Course. Sanders then got into the back seat with the victim and ordered her to disrobe. He told her that she had five minutes to stimulate him any way she could. The victim proceeded to manually massage his penis. She was then forced to perform fellatio on Sanders. Sanders then proceeded to rape the victim. While the rape was occurring, Randolph moved the victim's legs around in an effort to aid penetration. The victim stated that she did not resist the attack by struggling because she had been told that she would not be harmed as long as she complied with the defendants' demands and because of Randolph's gun.

After Sanders had sexual intercourse with the victim, Randolph got into the back seat. She and Sanders then had intercourse. During this time, the victim sat in the floorboard behind the front seat. While Sanders and Randolph were having intercourse, Randolph told the victim to suck her breast. The victim complied. Afterwards, the victim was allowed to dress and told to lie back and go to sleep.

The defendants then left the area of the golf course. Earlier Randolph had discovered the victim's Wachovia Teller II card. After locating a bank, Randolph asked the victim what her code number was. The victim told her the number. Randolph went up to the teller machine while Sanders stayed in the car with the victim. At that time Sanders made a statement to the effect that he hoped the victim had given them the correct code number because he would hate to get hurt over a little bit of money. Randolph returned to the car after receiving $90.00 from the machine.

The defendants then drove north stopping occasionally for food and gas. Eventually, they stopped at a motel in Virginia and rented a room. As they were entering the room, Randolph pulled

out a gun which was different from the one she had displayed when the victim was abducted. The victim was bound and gagged in the room.

While Sanders and Randolph were asleep, the victim managed to free herself and leave the room. She went to the manager's office and called the Arlington County Police. She gave them a statement and a description of the car. The police then entered the room where the defendants were staying. Sanders and Randolph tried to flee, but Sanders was immediately apprehended. Randolph, however, escaped down a stairwell and managed to get to the car. As she was trying to drive away, a policeman drew his gun and forced Randolph to stop. Both defendants were placed under arrest. The officers seized two guns, one from the person of Sanders and one from a purse lying on the front seat of the car. Other pieces of evidence were taken from the motel.

On returning to Wake County, the victim gave a statement to the local police. She also accompanied police around Wake County in an attempt to locate the scene of the sexual attack. They were able to find the location of the attack and found paper cups and a whiskey bottle there. Latent prints, which matched Randolph's and Sanders' fingerprints, were found on the bottle.

The defendants presented no evidence and moved to dismiss the charges against them. The motions were denied, and the cases were submitted to the jury. The defendants were found guilty as charged.

[1] The defendants initially contend that the State failed to present sufficient evidence to support the verdicts finding them guilty of the armed robbery of $90.00. Specifically, they argue that there was no evidence of the use of a dangerous weapon to threaten the victim at the time the bank card was taken or when the money was acquired by use of the bank card. We disagree.

Armed robbery is the taking or attempted taking of personal property by the use or threatened use of a firearm or dangerous weapon, whereby the life of a person is endangered or threatened. N.C.G.S. 14-87. The element of danger or threat to the life of the victim is the essence of the offense. *State v. Gibbons*, 303 N.C. 484, 279 S.E. 2d 574 (1981).

While there is no evidence that the defendants displayed a firearm or other dangerous weapon at the exact times they took the bank card or used the bank card to acquire the money, the conduct of the defendants created the same "continuing threat" as was present in *State v. Joyner*, 295 N.C. 55, 243 S.E. 2d 367 (1978). In that case a woman was sodomized at gunpoint. As the assailants prepared to leave the scene, one of them took her diamond ring. We noted that, although there was no evidence that a gun was displayed at the time of the taking, it had been made clear previously that the gun would be used if she resisted. We held that this continuing threat constituted a threatened use of a firearm which endangered or threatened her life within the meaning of the statute.

In this case, the victim testified that Randolph displayed a revolver at the time she was abducted and told her "not to try anything funny" while they drove to pick up Sanders. Later she was instructed to keep her eyes shut while they were driving and warned that if she opened them, "it would be for the last time." On one occasion while stopping for gas, Randolph told her "not to try anything" and that she "had her finger on the trigger." Also, while Randolph went up to the teller machine, Sanders stated that he hoped the victim had given them the correct code number because he "would hate to get hurt over a little bit of money." As in *Joyner*, there was a display of a firearm which induced the victim to acquiesce to the defendants' demands. Furthermore, on several occasions the defendants indicated that they would use the weapon if the victim resisted. We hold that the conduct of Sanders and Randolph rose to the level of a continuing threat of the use of a firearm sufficient to support conviction of the defendants under N.C.G.S. 14-87.

The defendants next make separate, but closely intertwined, arguments concerning their convictions for first degree rape and sexual offense. The defendant Randolph claims that the State failed to produce sufficient evidence to support her conviction for first degree rape and sexual offense on the theory that she was an aider and abettor. Sanders makes no argument with regard to the rape conviction but contends that the conviction for first degree sexual offense should be reversed as there was no evidence that he displayed or used a deadly weapon or that he was aided and abetted by Randolph. We find these arguments to be

without merit and find no error in the convictions of each defendant for both offenses.

[2] Randolph was convicted of first degree rape and first degree sexual offense based on a finding that she aided and abetted Sanders in committing the acts. More than mere presence at the crime scene is required in order to support a finding that a defendant is an aider and abettor. Additionally, it ordinarily must be shown that the person aided, encouraged, or advised another to commit the crime. *State v. Walden*, 306 N.C. 466, 293 S.E. 2d 780 (1982); *State v. Locklear*, 304 N.C. 534, 284 S.E. 2d 500 (1981). Aiding and abetting requires a "community of unlawful purpose" between two or more defendants. *State v. McKinnon*, 306 N.C. 288, 293 S.E. 2d 118 (1982).

Randolph argues the evidence merely shows that she was present when the act occurred, and that there was no showing that she committed any affirmative act which would constitute aiding and abetting. We disagree. The evidence tended to show that Randolph had previously threatened the victim with a gun. Randolph was driving when Sanders got into the back seat with the victim. Randolph proceeded to drive the car down an isolated dirt road and stop. When the victim began to perform fellatio on Sanders, Randolph remarked that she "had to see this." Later when Sanders was raping the victim, Randolph moved the victim's legs around in an effort to aid Sanders in penetrating her vagina. The victim was also forced to suck Randolph's breast while Sanders and Randolph had intercourse. The evidence clearly supported a finding that Randolph was not only present at the crime scene but that she actively encouraged and participated in the criminal acts.

[3] Sanders was convicted of first degree sexual offense, a violation of N.C.G.S. 14-27.4. There are four courses of conduct which will support a conviction for first degree sexual offense. They include cases in which the perpetrator employs or displays a deadly weapon and cases in which he is aided and abetted by one or more persons. These two theories were relied upon by the State at trial.

Sanders argues that there was no evidence that he displayed or employed a deadly weapon at the time of the attack and that there was insufficient evidence to support a finding that Ran-

dolph aided and abetted him. Both arguments are without merit. The evidence clearly supported a finding that Randolph aided and abetted Sanders in the rape and sexual offense. Additionally, the evidence was sufficient to permit the inference that Sanders procured the victim's submission through the use of a deadly weapon. The evidence tended to show that Sanders and Randolph conspired to kidnap someone and to use their victim's automobile to leave Fayetteville. Randolph employed the use of a gun to facilitate the abduction. Several times prior to the attack, the victim was reminded in Sanders' presence by Randolph that she had a gun, and both defendants warned the victim to do as they said. Based upon the evidence showing a concert of action by Sanders and Randolph, there can be no doubt that Sanders was aware of the fact that Randolph had used a gun to abduct the victim and continued to threaten her with the gun. This permitted a reasonable inference that Sanders used the continuing threat of Randolph's gun to effectuate the attack. *See State v. Barnette*, 304 N.C. 447, 284 S.E. 2d 298 (1981); *State v. Thompson*, 290 N.C. 431, 226 S.E. 2d 487 (1976).

[4] The defendants' next contention is that they were denied their right to remain silent due to comments by the prosecutor referring to their failure to testify. During his closing argument, the prosecutor stated:

> The Judge is going to instruct you in the meaning of flight and what it signifies about a person's state of mind. It suggests, ladies and gentlemen, a guilty state of mind. This is why people run and hide, because they're guilty.
>
> Sanders and Randolph have not said much more about these affairs, but that was enough. They have spoken elegantly through their flight, or luckily through their attempted flight from the scene.

The defendants claim that this constituted an impermissible reference to their failure to testify entitling them to a new trial. We do not agree.

A criminal defendant cannot be compelled to testify, and any reference by the State regarding his failure to do so violates an accused's constitutional right to remain silent. *Griffin v. California*, 380 U.S. 609, *reh. denied*, 381 U.S. 957 (1965). Well before

Griffin, N.C.G.S. 8-54 provided that the failure of a defendant to testify creates no presumption against him. We have interpreted this statute as prohibiting the prosecution, the defense, or the trial judge from commenting upon the defendant's failure to testify. *See, e.g., State v. Bovender*, 233 N.C. 683, 65 S.E. 2d 323 (1951); *State v. Humphrey*, 186 N.C. 533, 120 S.E. 85 (1923). A nontestifying defendant, however, has the right upon request to have the trial court instruct the jury that his failure to testify may not be held against him. *Carter v. Kentucky*, 450 U.S. 288 (1981); *State v. Leffingwell*, 34 N.C. App. 205, 237 S.E. 2d 550 (1977).

In *State v. Bovender*, 233 N.C. 683, 65 S.E. 2d 323 (1951), we stated that the purpose behind the rule prohibiting comment on the failure to testify is that extended reference by the court or counsel concerning this would nullify the policy that the failure to testify should not create a presumption against the defendant. If the statement here was a reference to the defendants' failure to testify, it was not an "extended reference." The thrust of that portion of the prosecutor's final argument concerned the defendants' attempt to flee the motel room and the state of mind that such conduct infers. Any reference to the failure to testify was so brief and indirect as to make improbable any contention that the jury inferred guilt from the failure of the defendants to testify. The statement here clearly was not comparable to those arguments which we have held to be improper comments on a defendant's failure to testify. *See, e.g., State v. McCall*, 286 N.C. 472, 212 S.E. 2d 132 (1975); *State v. Monk*, 286 N.C. 509, 212 S.E. 2d 125 (1975).

We also note that the defendants did not object to the prosecutor's argument at the time it was made. Instead, their attorneys called it to the trial court's attention at the close of the State's argument. At that time, the trial court offered to give a cautionary instruction. Defense counsel stated that the instruction might tend to highlight the prosecutor's statement and, therefore, declined the cautionary instruction.

We have held that an improper reference to a defendant's failure to testify is cured by the trial court's sustaining a prompt objection and by giving a curative instruction. *See State v. Clayton*, 272 N.C. 377, 158 S.E. 2d 557 (1968); *State v. Monk*, 286

N.C. 509, 212 S.E. 2d 125 (1975). Here the defendants failed to promptly object and decided against requesting a curative instruction when this was suggested by the trial court. These decisions fell within the ambit of discretionary trial tactics, and the defendants are not now entitled to a new trial for the failure of the trial court to grant relief, since the statement was not so grossly improper as to require the trial court to act *ex mero motu*. *See State v. Hopper*, 292 N.C. 580, 234 S.E. 2d 580 (1977).

[5] The defendants' next contention is that the trial court erred when it refused to dismiss the indictments for kidnapping and larceny. All of the evidence tended to show that the kidnapping of the victim and the larceny of her automobile occurred in Fayetteville which is located in Cumberland County. The defendants were indicted for these crimes by the Wake County Grand Jury. The defendants argue that a grand jury has no power to return an indictment for a crime committed in another county and that the indictments for kidnapping and larceny should have been dismissed. We agree.

At common law a grand jury had the power to indict only for crimes allegedly committed within the county in which it sat, and an indictment which alleged an offense occurred outside the county was void for lack of jurisdiction by the grand jury. *State v. Mitchell*, 202 N.C. 439, 163 S.E. 581 (1932). Supplementing this rule was the act of 1854-55—Rev. Code ch. 35, § 25—which stated that the offense was deemed to have been committed in the county alleged in the indictment unless the defendant denied this by a plea in abatement. This provision of the act of 1854-55 was later carried forward as N.C.G.S. 15-134. Since the grand jury had jurisdiction to indict only for crimes alleged to have occurred in its own county, this provision in effect established jurisdiction absent an attack by a defendant by a plea in abatement. As we noted in *State v. Mitchell*, 83 N.C. 674 (1880), the statute was designed to remedy the problems encountered when an offense was committed near county boundaries which were undetermined or unknown.

N.C.G.S. 15-134 was repealed effective July 1, 1975, and the General Assembly enacted N.C.G.S. 15A-135 to provide that allegations of venue in any criminal pleading become conclusive in the absence of a timely motion to dismiss for improper venue.

N.C.G.S. 15A-952 requires that a motion for improper venue must be made at or before arraignment. The Official Commentary to N.C.G.S. 15A-135 states that this section carries forward the provisions of N.C.G.S. 15-134 in modified form. The plea in abatement was replaced by the motion to dismiss for improper venue, and the requirement that the defendant allege the county where venue would properly lie was omitted.

In *State v. Morrow*, 31 N.C. App. 654, 230 S.E. 2d 568 (1976), *rev. denied*, 297 N.C. 178, 254 S.E. 2d 37 (1979), the Court of Appeals interpreted N.C.G.S. 15A-135 to mean that a defendant who wishes to challenge an indictment on the basis that the offense occurred in a county other than the county in which the indictment was returned must do so by a timely motion to dismiss for improper venue. The Court of Appeals took the same position in *State v. Currie*, 47 N.C. App. 446, 267 S.E. 2d 390, *new trial awarded for other reasons, cert. denied*, 301 N.C. 237, 283 S.E. 2d 134 (1980). This interpretation is incorrect, however, and we overrule *Morrow* and *Currie* on this issue.

The construction which the Court of Appeals has placed on N.C.G.S. 15A-135 seems to have been based upon its view that the allegation in a criminal pleading of the county where the charged offense occurred is essentially one of venue. *Id.* Under the common law, however, a grand jury could only indict for crimes which allegedly occurred in its own county. The statement of the county where the offense took place established *prima facie* jurisdiction of the grand jury to return the indictment. Former N.C.G.S. 15-134 did not change this. It merely limited a defendant's means of attacking the indictment on the ground that the offense occurred in a county other than that named in the indictment. Current N.C.G.S. 15A-135, however, only limits a defendant's means of attacking *venue*. Since the statement in an indictment of the county where the crime allegedly occurred establishes *prima facie jurisdiction*, a challenge to this statement can be asserted at any time as stated in N.C.G.S. 15A-952(d).

Here, the indictment itself alleged that the kidnapping and larceny of the vehicle took place in Cumberland County. Nevertheless, the State argues that N.C.G.S. 15A-926(a) provides that two or more offenses may be joined in one pleading or for trial when the offenses are based on the same act or constitute parts

of a single plan, and that N.C.G.S. 15A-132(b) grants concurrent venue to all counties in which an act joined under N.C.G.S. 15A-926(a) occurred. The State contends that this provides a sufficient basis for venue in Wake County. This argument is correct but fails to address the fundamental *jurisdictional* defect in the kidnapping and larceny indictments. The Wake County Grand Jury simply had no *jurisdiction* to indict the defendants for these crimes. We, therefore, arrest judgment in the first degree kidnapping and felonious larceny cases against the defendants. Since the armed robbery cases were consolidated for sentencing with the kidnapping and larceny cases, we vacate the sentences in the armed robbery cases and remand those cases to the Superior Court, Wake County, for resentencing. The legal effect of arresting judgment in the first degree kidnapping and felonious larceny cases is to vacate the verdicts and sentences of imprisonment in those cases. *State v. Benton*, 275 N.C. 378, 167 S.E. 2d 775 (1969). If the State chooses, it may proceed against the defendants for those offenses upon proper bills of indictment returned by the grand jury of Cumberland County. *Id.*

The defendant Sanders raises two additional assignments of error. He first contends that he was entitled to a jury instruction on second degree sexual offense. We disagree.

[6] To support a conviction for first degree sexual offense the State must show either that the defendant used a deadly weapon or was aided and abetted in carrying out the crime. N.C.G.S. 14-27.4. All the evidence at trial tended to show that the victim submitted due to the display and threatened use of a firearm by Randolph, and that the two defendants were at all times acting in concert. The evidence is also clear that Randolph aided and abetted Sanders in the commission of the offense. There simply was no evidence which would support a finding of guilt of second degree sexual offense.

[7] Sanders also contends that the trial court abused its discretion when it denied his motion for a bill of particulars. Prior to trial, Sanders filed a motion for a bill of particulars with respect to the rape, sexual offense and armed robbery charges. The motion requested a concise statement of the facts and circumstances underlying the charges including the time and place where the

acts occurred and a statement of the overt acts committed by Sanders. The motion was denied.

We have held that the short form indictments set out in N.C.G.S. 15-144.1 and 15-144.2 for first degree rape and first degree sexual offense provide adequate notice of the charges. *State v. Edwards*, 305 N.C. 378, 289 S.E. 2d 360 (1982); *State v. Lowe*, 295 N.C. 596, 247 S.E. 2d 878 (1978). In *Lowe* we noted that a defendant may request a bill of particulars to obtain information to supplement the facts contained in the indictment. The granting of a motion for a bill of particulars lies within the discretion of the trial court and is not subject to review by the appellate courts except for gross abuse of discretion. *State v. Taylor*, 304 N.C. 249, 283 S.E. 2d 761 (1981), *cert. denied*, --- U.S. ---, 103 S.Ct. 3552, *reh. denied*, --- U.S. ---, 104 S.Ct. 37 (1983).

N.C.G.S. 15A-925(c) provides that the trial court must order the State to respond to a motion for a bill of particulars when the defendant shows that the requested information is necessary to enable him to adequately prepare his defense. We have held that the denial of a defendant's motion for a bill of particulars will be held error only upon a clear showing that the lack of timely access to the information significantly impaired the defendant's preparation and conduct of his case. *State v. Easterling*, 300 N.C. 594, 268 S.E. 2d 800 (1980). There is no evidence of such prejudice here. The warrants and indictments for the rape, sexual offense and armed robbery adequately informed Sanders that the crimes allegedly occurred on July 13 and 14, and that they occurred in Wake County. The defendant failed to present any evidence to rebut the charges and made no showing as to how his preparation and conduct of the case was impaired in any way by the denial of the motion for a bill of particulars. Therefore, he has failed to show prejudicial error in the denial of his motion.

For the foregoing reasons, we reach the following results in the cases against the defendants:

No. 83CRS62165 and No. 83CRS62166—First Degree Kidnapping (both defendants)—Judgment arrested.

No. 83CRS62167 and No. 83CRS62168—Felonious Larceny (both defendants)—Judgment arrested.

No. 83CRS59560 and No. 83CRS59563—Armed Robbery (both defendants)—Sentence vacated and remanded for resentencing.

No. 83CRS47857 and No. 83CRS47859—First Degree Sexual Offense (both defendants)—No error.

No. 83CRS47858 and No. 83CRS47860—First Degree Rape (both defendants)—No error.

IN THE MATTER OF THE ASSESSMENT OF ADDITIONAL NORTH CAROLINA AND ORANGE COUNTY USE TAXES AGAINST VILLAGE PUBLISHING CORPORATION FOR THE PERIOD FROM APRIL 1, 1972 THROUGH MARCH 31, 1978

No. 127PA84

(Filed 6 November 1984)

1. **Constitutional Law § 18; Taxation § 31— use tax—application to newspaper—no violation of free speech and free press**

Assuming arguendo that *The Village Advocate* is a newspaper, application of the use tax to *The Village Advocate* does not violate the Free Speech and Free Press clauses of the First Amendment to the U. S. Constitution since the tax is an economic regulation applied uniformly to all businesses, not just to the press.

2. **Constitutional Law § 20— equal protection—test applied**

When a classification created by a statute impermissibly interferes with the exercise of a fundamental right or operates to the peculiar disadvantage of a suspect class, the "strict scrutiny" standard applies in determining whether the statute violates the Equal Protection Clause of the Federal Constitution and requires the government to demonstrate that the classification is necessary to promote a compelling government interest. When a statutory classification does not burden the exercise of a fundamental right or operate to the peculiar disadvantage of a suspect class, the government need only show that the classification in the challenged statute bears some rational relationship to a conceivable legitimate interest of government.

3. **Constitutional Law § 20; Taxation § 31— sales and use tax exemption—equal protection—rational basis standard**

The rational basis standard applied in determining whether a sales and use tax exemption statute violated the Equal Protection Clause of the U. S. Constitution.

4. Taxation § 31.3— sales and use tax—exemption of certain newspaper sales—no violation of equal protection

The sales and use tax exemption set forth in G.S. 105-164.13(28) for the sale of newspapers door-to-door by newsboys or by resident street vendors while all other newspapers distributed by other means are subject to either the sales or use tax bears a rational relationship to a legitimate governmental interest and does not violate the Equal Protection Clause of the U. S. Constitution. Nor does the classification created by the statute violate Art. V, § 2 of the N. C. Constitution which provides that "the power of taxation shall be exercised in a just and equitable manner."

ON discretionary review, pursuant to N.C.G.S. 7A-31(1), of the decision of the Court of Appeals, 66 N.C. App. 423, 311 S.E. 2d 366 (1984), affirming judgment for appellee, North Carolina Department of Revenue, by *Farmer, J.*, on 20 July 1982 in WAKE County Superior Court which judgment affirmed decisions of the North Carolina Secretary of Revenue and Tax Review Board also in favor of appellee.

Thigpen & Hines, P.A., by James C. Smith, for petitioner appellant.

Rufus L. Edmisten, Attorney General, by George W. Boylan, Assistant Attorney General, for respondent appellee.

EXUM, Justice.

The issue presented by this case is whether the imposition of a use tax under the North Carolina Sales and Use Tax Act, N.C.G.S. 105-164, *et seq.* (the Act), upon copies of a publication printed by Womack Press in Virginia from layouts submitted by appellant, Village Publishing Corporation, a North Carolina corporation, and sold by Womack to appellant for free distribution in North Carolina violates any of appellant's federal or state constitutional rights. We conclude that it does not for reasons which in part differ from those used by the Court of Appeals. Therefore, we modify and affirm.

I.

Appellant Village Publishing Corporation is engaged in the publishing and distribution of *The Village Advocate* (the *Advocate*), a weekly publication consisting primarily of commercial and classified advertisements. The *Advocate* also contains a limited number of other items, including school lunch menus,

sporting events schedules, community events calendars and announcements of local public interest. The publication's current circulation rate is approximately 24,000 copies, all of which are distributed free in the Chapel Hill-Carrboro area. Roughly 97 percent of these copies are delivered door-to-door by agents of the corporation with the remainder being distributed from racks scattered throughout the two cities.

During the period from 1 April 1972 through 31 March 1978, the *Advocate* was not printed by appellant. Rather, appellant provided layouts for the publication to Womack Press in Danville, Virginia, which printed the papers and then sold the finished product to appellant. During this period, appellant did not pay any sales or use tax on the purchase of this product from Womack Press, either in Virginia or in North Carolina.

On 12 June 1978, an auditor from the North Carolina Department of Revenue completed an examination of appellant's tax records for this period and concluded that appellant owed an additional tax, including penalty and interest, of $42,309.89 based on its transactions with Womack Press. Appellant objected to this proposed assessment to the Secretary of the Department of Revenue (the Secretary). Appellant contended: (1) the *Advocate* was a newspaper; (2) purchases of newsprint, ink and printing services by paid circulation newspapers were exempt from sales and use taxation by N.C.G.S. 105-164.13(28); and (3) that denial of a similar exemption to the *Advocate*, a free circulation publication, violated constitutional guarantees of freedom of speech and press, equal protection of the laws under the United States Constitution and the principle of equitable taxation under Article V, section 2 of the North Carolina Constitution.

Following an 11 November 1980 hearing, the Secretary issued a decision upholding the additional tax assessment. The Secretary concluded: (1) The *Advocate* is not a newspaper within the meaning of the statute but is an "advertising circular." (2) No statutory authority exists for exempting advertising circulars from taxation. (3) Even if the *Advocate* were a newspaper, it would not escape taxation since the statute exempts only paid circulation and not free circulation publications. (4) The Secretary has no authority to decide appellant's constitutional objections.

Appellant then sought administrative review of this ruling from the North Carolina Tax Review Board (the Board) pursuant to N.C.G.S. 105-241.2. The Board on 2 June 1981 adopted the conclusions of the Secretary and affirmed his decision. Appellant paid the tax on 21 August 1981 and petitioned for judicial review in Wake County Superior Court pursuant to N.C.G.S. 150A-43, again asserting its constitutional objections to the tax. Following a hearing on 20 July 1982, Judge Farmer entered judgment affirming the decision of the Board.

On appeal the North Carolina Court of Appeals concluded: (1) the *Advocate* is not a newspaper and (2) appellant's First Amendment rights are not violated by a tax which is applicable to all persons who use, consume, distribute or store for use or consumption tangible personal property in this state.

II.

We begin with an examination of the Act before addressing the parties' contentions about it.

Generally the Act, with certain exceptions and in pertinent part, imposes upon persons engaged in the business of selling tangible personal property at retail in this state a state sales tax at a rate of three percent of the sales price of each item sold. N.C.G.S. 105-164.4. The Act also imposes a complementary state use tax "upon the storage, use or consumption in this state of tangible personal property purchased within and without this state for storage, use or consumption within this state" at a rate of three percent of the cost of such property "when the same is not sold but used, consumed, distributed or stored for use or consumption in this State. . . ." N.C.G.S. 105-164.6.[1]

The purpose of North Carolina's sales and use tax is twofold. The primary purpose is, of course, to generate revenue for the state. N.C.G.S. 105-164.2. The sales tax is, in effect, a tax imposed upon the retail merchant as a privilege tax for the right to engage in that business. *Piedmont Canteen Service, Inc. v. Johnson*, 256 N.C. 155, 123 S.E. 2d 582 (1962). The tax is, however, designed

1. Parallel sales and use tax provisions appear in the Local Government Sales and Use Tax Act, N.C.G.S. 105-463, *et seq.* Since the same principles apply to both acts, we shall limit our discussion to the North Carolina Sales and Use Tax Act.

to be passed on to the consumer. N.C.G.S. 105-164.7; *Manufacturing Co. v. Johnson*, 264 N.C. 12, 140 S.E. 2d 744 (1965).

The second purpose of the sales and use tax scheme is to equalize the tax burden on all state residents. This is achieved through imposition of the use tax in certain situations where the sales tax is not applicable. The sales tax cannot constitutionally be imposed upon interstate sales since it would then be a tax upon the privilege of doing interstate business, and would constitute a burden upon interstate commerce in violation of the Commerce Clause of the United States Constitution. *Atwater-Waynick Hosiery Mills, Inc. v. Clayton*, 268 N.C. 673, 151 S.E. 2d 574 (1966). Imposing a tax upon the retail sale of goods within the state without imposing a complementing tax on the in-state use of goods purchased outside the state might encourage North Carolina residents to shop in other states to avoid paying North Carolina sales tax. Therefore, the Act imposes a use tax on items purchased outside the state and thus not subject to sales tax, which are brought into the state for "storage, use or consumption" here. "Its chief function is to prevent the evasion of a sales tax by persons purchasing tangible personal property outside of North Carolina for storage, use or consumption within the state." *Johnston v. Gill*, 224 N.C. 638, 643-44, 32 S.E. 2d 30, 33 (1944).

The use tax also removes, "insofar as possible, the discrimination against local merchants resulting from the imposition of a sales tax" and equalizes "the burden of the tax on property sold locally and that purchased without the state." *Watson Industries v. Shaw*, 235 N.C. 203, 211, 69 S.E. 2d 505, 511 (1952). Unlike a sales tax imposed on interstate sales, the use tax does not impermissibly burden interstate commerce since it is a tax imposed on the enjoyment of goods after the sale has already spent its interstate character. *Atwater-Waynick Hosiery Mills, Inc. v. Clayton*, 268 N.C. 673, 151 S.E. 2d 574 (1966). It is designed to complement the sales tax and to reach transactions which cannot constitutionally be subject to a sales tax. *Id.* The sales tax and the use tax may often bring about the same result but "they are different in conception. They are assessments upon different transactions and are bottomed on distinguishable taxable events." *Id.* at 675, 268 S.E. 2d at 576.

Finally, the Act provides for a number of exemptions from sales and use taxes. N.C.G.S. 105-164.13. One of these exemptions is:

> Sales of newspapers by resident newspaper street vendors and by newsboys making house-to-house deliveries and sales of magazines by resident magazine vendors making house-to-house sales.

N.C.G.S. 105-164.13(28).

III.

Appellant's first assignment of error concerns whether the *Advocate* is a "newspaper" within the meaning of the exemption created by N.C.G.S. 105-164.13(28). In the courts below, both parties argued the merits of labeling this publication a newspaper for purposes of applying the Act. Appellant contends the Court of Appeals erred in affirming decisions of the Secretary, the Board and Wake County Superior Court that the *Advocate* does not qualify as a newspaper within the meaning of the exemption. Courts in other jurisdictions which have considered whether publications consisting predominantly of advertisements are "newspapers" have reached conflicting results. *See, Shoppers Guide Publishing Co., Inc. v. Woods*, 547 S.W. 2d 561 (Tenn. 1977) (advertising circular which is given away is not a newspaper within the commonly understood meaning of the word); *Green v. Home News Publishing Co.*, 90 So. 2d 295 (Fla. 1956) (give-away advertising circular with a modicum of local news does not amount to a newspaper). *Cf. Hadwen v. Department of Taxes*, 139 Vt. 37, 422 A. 2d 255 (1980) (advertising circular with only 2-3 percent of its space committed to current events and opinion does constitute a newspaper).

We find it unnecessary to address this issue. We assume, arguendo, that the *Advocate* is a newspaper within the meaning of the exemption as argued by appellant. *See, Hadwen v. Department of Taxes, supra* (declining to adopt a definition of newspaper based on content). We turn now to appellant's other assignments of error.

IV.

[1] Appellant contends that application of the use tax to the *Advocate* violates the Free Speech and Free Press clauses of the

First Amendment to the United States Constitution. In support of this contention appellant refers us to the constitutional principles that a state may not unduly burden freedom of speech or of the press through taxation or other regulatory measures. Appellant reminds us that the power to tax the press is the power to control or suppress it, *Murdock v. Pennsylvania*, 319 U.S. 105, 112 (1943), and that taxes which unduly curtail freedom of speech or of the press have been held unconstitutional by the United States Supreme Court. *Grosjean v. American Press Co.*, 297 U.S. 233 (1936).

However, these maxims of constitutional law do not alone resolve the issue before us. The United States Supreme Court has made clear in a long line of cases that not all economic regulatory schemes which involve the press implicate First Amendment guarantees. *See, Citizen Publishing Co. v. United States*, 394 U.S. 131, 139 (1969); *Lorain Journal Co. v. United States*, 342 U.S. 143, 155-156 (1951); *Branzberg v. Hayes*, 408 U.S. 665 (1972).

In *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575, 103 S.Ct. 1365 (1983), the United States Supreme Court held a Minnesota use tax which applied to "publications" to be a constitutionally impermissible burden on the press. Although appellant relies heavily on this holding, it does not control the case at bar for three reasons. First, the taxing scheme challenged there was not the same as ours. Second, the Court did not promulgate a *per se* rule against all taxes which affect the press. Finally, the Court did undertake a general analysis of economic regulations applicable to the press which resolves appellant's complaint regarding the use tax against appellant's position.

The statute at issue in *Minneapolis Star* imposed a general sales tax on the sale of goods above a certain minimum price and a use tax on the "privilege of using, storing or consuming in Minnesota tangible personal property" which was not specifically exempt by statute and on which no sales tax was paid. *Id.* at 577. As the Court noted, this was a classic use tax designed to complement and protect the sales tax by eliminating a resident's incentive to travel to states with lower sales tax and purchase goods there rather than in Minnesota. *Id.* Such taxes, in essence, require a resident who shops out of state to pay a "use tax" equal to the

sales tax savings. *Id.* at 582. The Minnesota statute provided an exemption from the sales tax for periodic publications, which appellant, the Minneapolis Star & Tribune Company, had enjoyed from 1967 to 1971.

In 1971 the Minnesota legislature amended the statute to impose a special use tax on the costs of ink and paper used in producing periodic publications, while leaving intact the publications' exemption from sales tax. The amendment created the only situation in the entire tax scheme where components of goods that were later to be sold at retail were taxed. In all other situations, tax was assessed only when the finished product was purchased by the ultimate user. The only components taxed were ink and paper used in periodic publications. The tax, therefore, fell exclusively upon the press. In addition, the statute was again amended, this time to exempt from the use tax the first $100,000 worth of ink and paper used in any calendar year by a publication so that, in effect, only a few publishers in the state were subject to use taxation.

These unique features of the Minnesota use tax scheme, not the mere fact that the press was being taxed, led the United States Supreme Court to declare this statute unconstitutional. Nonetheless, the Court stressed that "it is beyond dispute that the states and the federal government can subject newspapers to generally applicable economic regulations without creating constitutional problems." *Minneapolis Star* at 581. The Court noted that "any tax that the press must pay, of course, imposes some burden. But, as we have observed [citations omitted] this Court has long upheld economic regulation of the press. The cases approving such economic regulation, however, emphasize the general applicability of the challenged regulation to all businesses." *Id.* at 583.

The Minnesota statute failed because it singled out the press for differential tax treatment. The only supporting rationale was the need for revenue—a need which the Court noted was better served by taxing all businesses equally. The Minnesota statute did not serve to complement the state's sales tax, as do most use tax statutes, since it imposed a use tax on publications which were specifically exempt by statute from the state's sales tax. The Court noted that had the tax been a generally applicable

sales tax it would probably have been constitutionally permissible. *Id.* at 586-87 n. 9.

Turning now to the Act at bar, we believe it clear that under the constitutional directives in *Minneapolis Star*, the North Carolina use tax can be constitutionally assessed against the *Advocate* even if we assume, as we do, that it is a newspaper which enjoys First Amendment protection. The Act imposes a tax on the "storage, use or consumption in this state of tangible personal property purchased within and without this State for storage, use or consumption in this State." N.C.G.S. 105-164.6. This language clearly demonstrates that the use tax is "an economic regulation generally applicable to all businesses," and not just the press. Unlike the Minnesota statute, the North Carolina statute does not single out the press for disparate tax treatment. Moreover, unlike the Minnesota tax, the North Carolina use tax applies only to items which, were they sold, would be subject to the sales tax, thus serving to complement the sales tax.

The earlier cases cited in *Minneapolis Star*, as interpreted in that case, establish that a state has the power to enact statutes which impose taxes on all businesses, including the press, in order to generate revenue so long as those statutes operate evenhandedly upon all similarly situated. The Act at bar imposes a uniform tax on all. Absent the kind of discriminatory tax burden evident in *Minneapolis Star*, appellant cannot be heard to complain that it, like all other businesses in the state, must bear its portion of the state's revenue needs.

V.

Appellant's final contention is that the Act violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, and the principle of equitable taxation found in Article V, section 2 of the North Carolina Constitution. The basis for appellant's equal protection claim is the Act's exemption for certain sales of newspapers provided in section 105-164.13(28).[2] Appellant argues that the Act discriminatorily classifies free circulation newspapers, like the *Advocate*, differently than paid circulation newspapers, by imposing a use tax upon the purchase of

2. The exemption is quoted in full, *supra*, in text.

printing services and supplies by free circulation newspapers while specifically exempting from the tax similar purchases by paid circulation newspapers. Appellant contends that no rational basis exists for this differential treatment and that the Act is therefore unconstitutional.

Appellant misconceives the Act's classification and the effect of the exemption. First, the tax at issue here is not a tax upon the "purchase of printing services and supplies" as appellant contends. The decisions of both the Secretary and the Board demonstrate that appellant's tax assessment was based on the cost (which would include the printer's profit) of the finished printed product appellant purchased from Womack Press, as the statute required. N.C.G.S. 105-164.6 imposes a use tax at the rate of "three percent (3%) of the *cost price* . . . of tangible personal property when the same is not sold but used, consumed, distributed or stored for use or consumption in this State." (Emphasis added.)

Second, the Act through the exemption does not, as appellant contends, classify newspapers according to whether they are paid circulation or free circulation, imposing a tax on one while exempting the other. In fact, a newspaper does not qualify for this exemption, nor fail to qualify for it, solely by virtue of whether it is sold or given away. Instead, to qualify for the exemption, a newspaper must be sold "by resident newspaper street vendors" or "by newsboys making house-to-house deliveries." The Act classifies not solely on the basis of paid-versus-free circulation, as appellant contends, but also on the basis of the method of distribution. Even paid circulation newspapers are subject to the sales tax on all sales other than those by newsboys selling door-to-door or sales by resident street vendors. The distinction in the Act is between the sale of newspapers door-to-door by newsboys or by resident street vendors on the one hand and the distribution of newspapers by any other method on the other, whether the newspapers are sold or given away.

The question is whether this classification is constitutional. The answer depends on whether the legislature's decision to exempt from sales and use taxation the sale of newspapers door-to-door by newsboys or by street vendors, while subjecting all other newspapers distributed by other means to either the sales or use

tax, bears a rational relationship to some legitimate governmental interest. We conclude that it does.

[2] In determining whether a challenged statute violates the Equal Protection Clause of the federal constitution by treating similarly situated persons differently, courts generally employ a two-tiered analysis. *Texfi Industries v. City of Fayetteville*, 301 N.C. 1, 269 S.E. 2d 142 (1980). Under this analysis, a statute is subjected to the highest level of review, or "strict scrutiny," "only when the classification impermissibly interferes with the exercise of a fundamental right or operates to the peculiar disadvantage of a suspect class." *White v. Pate*, 308 N.C. 759, 766, 304 S.E. 2d 199, 204 (1983), citing *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 312 (1976); *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 16 (1973). For a statute to survive this level of constitutional review, the government must demonstrate that the classification created by the statute is "necessary to promote a compelling government interest." *Id.*; *Texfi Industries v. City of Fayetteville*, 301 N.C. 1, 11, 269 S.E. 2d 142, 149 (1980).

Where as statutory classification does not burden the exercise of a fundamental right or operate to the peculiar disadvantage of a suspect class, the government need only show the classification in the challenged statute has some rational basis. *White v. Pate*, 308 N.C. at 766-67, 304 S.E. 2d at 204, *citing, Vance v. Bradley*, 440 U.S. 93 (1979). A statutory classification survives this analysis if it bears "some rational relationship to a conceivable legitimate interest of government." *Id.* Statutes subjected to this level of scrutiny come before the Court with a presumption of validity. *Id.*

[3] We conclude that the proper level of review in this case is the lower level, or rational basis standard. The Act is clearly a taxing statute which operates evenly against all persons who purchase tangible personal property within North Carolina or purchase it without North Carolina for "storage, use or consumption in this State." As such, the statute does not operate to the peculiar disadvantage of a suspect class. And, as we concluded earlier in dealing with appellant's First Amendment claims, neither does it impermissibly burden the exercise of a fundamental right.

The Act is designed to produce revenue for the state while, at the same time, equalizing the tax burden by insuring that out-of-state purchases are taxed at the same rate as local sales. *Watson Industries v. Shaw*, 235 N.C. 203, 69 S.E. 2d 505 (1952). The Act is an economic regulation. In determining whether a purely economic regulation violates the Equal Protection Clause, the test generally applied is the rational basis standard. *See, Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976). Indeed, appellant seems to recognize that this is the proper level of review in its argument that the classification created by G.S. 105-164.13(28) rests upon "no rational basis." Appellant's Brief p. 16.

[4] Having concluded that the rational basis standard is the proper level of review in this case, we turn now to the question of whether the Act's classification "bears a rational relationship to a conceivable legitimate purpose." *White v. Pate*, 308 N.C. at 766-67, 304 S.E. 2d at 204.

The Equal Protection Clause is not violated merely because a statute classifies persons differently, so long as there is a reasonable basis for the distinction. *Lamb v. Wedgewood*, 308 N.C. 419, 435, 302 S.E. 2d 868, 877 (1983). "A court may not substitute its judgment of what is reasonable for that of the legislative body, particularly where the reasonableness of a particular classification is fairly debatable." *Id., citing ASP Associates v. The City of Raleigh*, 298 N.C. 207, 226, 258 S.E. 2d 444, 456 (1979).

In creating the sales and use tax exemption for newspaper sales door-to-door by newsboys or by street vendors, the legislature could have concluded that these sales would likely be made, for the most part, by minors acting as independent merchants. *See, Hadwen v. Department of Taxes*, 139 Vt. 37, 422 A. 2d 255 (1980). As such, requiring the sales tax to be paid on these transactions would place a great burden both on the vendors, whose age and lack of business experience would render it difficult to comply with the monthly reporting procedures required by the Act, and the Department of Revenue, which would be charged with policing these sales and enforcing payment of the tax. The legislature, therefore, could have reasonably concluded that the state's interest in generating revenue was better served by a

system which exempted these particular sales than one which included them.

The *Advocate* also distributes its newspapers through door-to-door vendors, just as do paid circulation newspapers. The *Advocate's* vendors, however, are not independent contractors making retail sales as are vendors of paid circulation newspapers. Rather, they are agents of the *Advocate*, distributing a free product. As such, there is no retail sale involved and the concern that the youth and lack of business experience of minors acting as independent contractors will render the monthly reporting requirements of the Act too burdensome for both the state and the vendors is not present. Where no sale is involved, no reports for tax purposes are required. The rationale which justifies exempting *retail sales* by resident street vendors and newsboys selling door-to-door does not apply to the *Advocate*. Appellant is not taxed, as it contends, simply because it is free. It is taxed because its distribution method does not involve retail sales by the narrowly defined group of vendors described by the Act. In that sense, the *Advocate* is treated no differently than a paid circulation newspaper which distributes its product in any manner other than resident street vendors or newsboys selling door-to-door. The legislature has chosen to exempt from the tax two particular types of retail newspaper sales. The *Advocate* fails to qualify for the exemption for the reason that it has no retail sales. A paid circulation newspaper would similarly fail to qualify for the sales and use tax exemption to the extent that the newspaper is sold at retail by means other than resident street vendors or door-to-door newsboys. A sales tax would be levied on these other kinds of retail sales.

We hold, therefore, that the classification created by the Act rests upon a rational basis and is therefore not in violation of the Equal Protection Clause.

Appellant also contends that the classification violates Article V, section 2 of the North Carolina Constitution which provides in pertinent part that "the power of taxation shall be exercised in a just and equitable manner. . . ." However, we have held that a classification does not violate this provision if it is founded upon a reasonable distinction and bears a substantial relation to the object of the legislation. *In re Appeal of Martin*, 286 N.C. 66, 209

S.E. 2d 766 (1974). It is only those classifications which are arbitrary or capricious which violate Article V, section 2. *Id.*

We have already concluded that the classification here is not arbitrary or capricious, but is based upon a reasonable distinction substantially related to the subject of the legislation. The classification, therefore, does not violate Article V, section 2 of the North Carolina Constitution.

The decision of the Court of Appeals is

Modified and affirmed.

CYCLONE ROOFING COMPANY, INC., PLAINTIFF v. DAVID M. LaFAVE COMPANY, INC., DEFENDANT, AND JOSEPH C. FRYE AND EMMA GRAY FRYE, DEFENDANTS AND THIRD-PARTY PLAINTIFFS v. DAVID M. LaFAVE, THIRD-PARTY DEFENDANT

No. 181A84

(Filed 6 November 1984)

1. **Arbitration and Award § 2— waiver of agreement to arbitrate—filing pleadings and informally negotiating—not sufficient**

Where a construction contract contained an arbitration agreement, a party to the contract did not waive its right to arbitrate by filing pleadings concerning a dispute arising from the contract and by negotiating informally for two years in an effort to come to agreement. A court must order arbitration on motion of a party to a contract as long as the requirements of the Uniform Arbitration Act, G.S. 1-567.1 to .20, have been met and an order compelling arbitration would not prejudice a party to the contract who opposes the motion.

2. **Arbitration and Award § 2— agreement to arbitrate—enforcement after pleadings filed—no prejudice to opposing party**

There was nothing indicating that the party opposing arbitration would be prejudiced by having to arbitrate where, during the time between the filing of a crossclaim by the favoring party and the date it moved for arbitration, no motions were filed, apparently no discovery was conducted, no evidence concerning the matters at issue was lost, and there was no evidence that the opposing party had incurred substantial expenses in preparation for litigation.

3. **Arbitration and Award § 7— confirmation of award by superior court—proper**

The superior court properly confirmed the award of the arbitrator where there were no evident mathematical errors, errors relating to form, or errors evidencing that the arbitrator exceeded his powers. G.S. 1-567.12 through .14.

APPEAL of right by defendant David M. LaFave Company, Inc., pursuant to N.C.G.S. 7A-30(2), from the decision of a divided panel of the Court of Appeals, 67 N.C. App. 278, 312 S.E. 2d 709 (1984), which vacated and remanded an order entered by *Grist, J.*, at the 21 June 1982 session of Superior Court, MECKLENBURG County. Heard in the Supreme Court 10 October 1984.

Horack, Talley, Pharr & Lowndes, P.A., by Robert C. Stephens and Susan Christman, for David M. LaFave Company, Inc., appellant.

Mraz and Boner, by John A. Mraz and Richard D. Boner, for Joseph C. Frye and Emma Gray Frye, appellees.

MARTIN, Justice.

By contract dated 2 May 1978 Joseph C. Frye, Jr. and Emma Gray Frye (Fryes) engaged the services of David M. LaFave Company (LaFave Company) to build a house. David M. LaFave (LaFave) is president of LaFave Company. The contract price of $191,000 included a contractor's fee of $20,000, and the contract specified that construction of the house was to be completed by 15 May 1979.

During construction of the house disagreements arose among the parties concerning progress of the work, quality of worksite supervision, installation of fixtures and flooring, and other aspects of construction. Negotiations between counsel for each of the parties failed to resolve the dispute satisfactorily, and on 24 September 1979 LaFave Company notified the Fryes that it was ceasing work under the contract. On 18 October 1979 LaFave Company filed a claim of lien against the property. Thereafter the Fryes spent more than $60,000 to complete the house and correct defective work. While this further construction was being carried out, counsel for the Fryes and LaFave Company continued to correspond, trying to resolve outstanding differences in the parties' contentions. Although the contract between the Fryes and LaFave Company provided for arbitration of problems arising out of the contract, neither side demanded arbitration while these negotiations were going on.

On 5 March 1980 Cyclone Roofing Company, Inc. (Cyclone), a subcontractor of LaFave Company, filed this action against

LaFave Company and the Fryes in Mecklenburg County District Court. On 7 July 1980 LaFave Company answered the complaint and crossclaimed against the Fryes for breach of the construction contract. The crossclaim alleged that LaFave Company had performed its duties under the contract and that the Fryes owed the company a balance of $47,449.27. The crossclaim included a demand for jury trial. On 9 July 1980 the Fryes filed an answer to the Cyclone complaint and a crossclaim against LaFave Company. The Fryes' crossclaim alleged that LaFave Company breached the contract, causing damages of $50,000. The Fryes' answer also included a third-party claim against LaFave individually, alleging negligence resulting in damages of $50,000. The Fryes demanded a jury trial. On 14 July 1980 the Fryes answered the LaFave Company crossclaim, denying that the company had performed under the contract and denying that any balance was due. On 11 August 1980 LaFave Company and LaFave filed an answer to the Fryes' crossclaim and third-party complaint, alleging for the first time that the dispute between the parties was subject to mandatory arbitration pursuant to the contract. On the same date LaFave Company and LaFave individually also filed a motion to stay litigation pending arbitration. The Fryes filed affidavits and a memorandum in opposition to this motion, denying that arbitration was mandatory and that it was the exclusive remedy for resolving disputes under the contract. The Fryes also contended that LaFave Company had waived any right to demand arbitration.

On 18 November 1980 District Court Judge L. Stanley Brown entered an order staying litigation between LaFave Company and the Fryes while they arbitrated their differences in accordance with the terms of the contract. In its discretion the court also stayed litigation between the Fryes and LaFave individually pending the outcome of arbitration between the Fryes and LaFave Company. The Fryes appealed the district court's order that they proceed to arbitration; this appeal was dismissed by the Court of Appeals. On 24 November 1980 the case was properly transferred to the Mecklenburg County Superior Court.[1]

1. By this time Cyclone had been dismissed from the case, and it is no longer involved in this suit.

In accordance with the contract, LaFave Company and the Fryes first submitted their dispute to the architect of the project. The architect determined that the Fryes had not breached the construction contract and ordered that because of LaFave Company's breach, LaFave Company was to pay the Fryes $32,500.01.[2] Pursuant to the contract, LaFave Company appealed this award to an arbitrator, and arbitration was conducted under the Construction Industry Arbitration Rules of the American Arbitration Association. The arbitrator ordered the Fryes to pay LaFave Company $37,094.27, without any offset for the amount awarded to the Fryes by the architect.

Pursuant to N.C.G.S. 1-567.12, LaFave Company properly applied for confirmation of this award by the superior court. Upon motion of the Fryes the superior court ordered the arbitrator to clarify his award. After reviewing the arbitrator's clarification of his findings, calculations, and conclusions, the superior court confirmed the award. From this order and judgment the Fryes appealed to the Court of Appeals. N.C. Gen. Stat. § 1-567.18(a)(3) (1983). They also renewed their appeal from the order of the district court directing the parties to pursue arbitration under the contract. A divided panel of the Court of Appeals vacated the award of the arbitrator, holding that the district court erred in ordering arbitration. LaFave Company appealed the decision of the Court of Appeals to this Court pursuant to N.C.G.S. 7A-30(2). LaFave Company's petition for discretionary review of the question whether the superior court erred by confirming the arbitration award was allowed 6 July 1984.

[1] We now turn to an analysis of the questions arising upon the foregoing facts. The first issue for consideration is whether the Court of Appeals erred in holding that as a matter of law both parties waived the arbitration agreement contained in the construction contract. We hold that the court did so err, and we reverse.

N.C.G.S. 1-567.2(a) provides:

2. We note that the contract provides: "The Architect will be the Owner's representative during construction and until final payment. . . . The Architect will advise and consult with the Owner, and all of the Owner's instructions to the Contractor shall be issued through the Architect."

> Two or more parties may agree in writing to submit to arbitration any controversy existing between them at the time of the agreement, or they may include in a written contract a provision for the settlement by arbitration of any controversy thereafter arising between them relating to such contract or the failure or refusal to perform the whole or any part thereof. Such agreement or provision shall be valid, enforceable, and irrevocable except with the consent of all the parties, without regard to the justiciable character of the controversy.

The contract between the Fryes and LaFave Company contained a provision stating that if any dispute arose between the parties it would first be submitted for decision to the architect for the project. After the architect rendered a decision, the claim or dispute involved "shall be subject to arbitration upon the written demand of either party." Under N.C.G.S. 1-567.2(a) this provision was enforceable and irrevocable except with the consent of both the Fryes and LaFave Company.

N.C.G.S. 1-567.3(a) provides in pertinent part that "[o]n application of a party showing an agreement described in G.S. 1-567.2; and the opposing party's refusal to arbitrate, the court shall order the parties to proceed with arbitration. . . ." N.C.G.S. 1-567.3(c) provides in part that "[i]f an issue referable to arbitration under the alleged agreement is involved in an action or proceeding pending in a court having jurisdiction to hear applications under subsection (a) of this section, the application shall be made therein." Under these statutes LaFave Company properly applied to the District Court of Mecklenburg County for an order directing arbitration. In opposition to LaFave Company's motions the Fryes alleged that LaFave Company had waived its right to arbitrate by having filed pleadings concerning the dispute and by having negotiated informally for two years in an effort to come to agreement. We agree with the district court that by these actions LaFave Company did not waive its right to have the controversy arbitrated. *See, e.g., ATSA of California, Inc. v. Continental Ins. Co.*, 702 F. 2d 172 (9th Cir. 1983). *See generally* Annot., 98 A.L.R. 3d 767, 781-93 (1980 & Supp. 1984). The court properly ordered the parties to arbitrate under the terms of the contract.

Waiver of a contractual right to arbitration is a question of fact. *E.g., Davis v. Blue Cross of Northern California*, 25 Cal. 3d 418, 158 Cal. Rptr. 828, 600 P. 2d 1060 (1979); *Doers v. Golden Gate Bridge Etc. Dist.*, 23 Cal. 3d 180, 151 Cal. Rptr. 837, 588 P. 2d 1261 (1979). Because of the strong public policy in North Carolina favoring arbitration, *see* N.C. Gen. Stat. § 1-567.3 (1983); *Thomas v. Howard*, 51 N.C. App. 350, 355-56, 276 S.E. 2d 743, 747 (1981), courts must closely scrutinize any allegation of waiver of such a favored right. *See Keating v. Superior Court*, 31 Cal. 3d 584, 183 Cal. Rptr. 360, 645 P. 2d 1192 (1982), *dismissed in part and rev'd in part on other issues sub nom. Southland Corp. v. Keating*, --- U.S. ---, 79 L.Ed. 2d 1 (1984); *Doers v. Golden Gate Bridge Etc. Dist.*, 23 Cal. 3d 180, 151 Cal. Rptr. 837, 588 P. 2d 1261. *See also Moses H. Cone Hospital v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25, 74 L.Ed. 2d 765, 785 (1983) ("[A]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability."). Because of the reluctance to find waiver, we hold that a party has impliedly waived[3] its contractual right to arbitration if by its delay or by actions it takes which are inconsistent with arbitration, another party to the contract is prejudiced by the order compelling arbitration. *See, e.g., Carolina Throwing Co. v. S & E Novelty Corp.*, 442 F. 2d 329, 331 (4th Cir. 1971) (" 'waiver . . . may not rest mechanically on some act such as the filing of a complaint or answer but must find a basis in prejudice to the objecting party' ") (quoting *Batson Y. & F. M. Gr., Inc. v. Saurer-Allma GmbH-Allgauer M.*, 311 F. Supp. 68, 73 (D.S.C. 1970)).

A party may be prejudiced if, for example, it is forced to bear the expenses of a lengthy trial, *E.C. Ernst, Inc. v. Manhattan Const. Co. of Tex.*, 551 F. 2d 1026 (5th Cir.), *modified and aff'd per curiam on reh'g*, 559 F. 2d 268, 269 (1977), *cert. denied sub nom. Providence Hospital v. Manhattan Constr. Co.*, 434 U.S. 1067 (1978); evidence helpful to a party is lost because of delay in the seeking of arbitration, *In re Mercury Const. Corp.*, 656 F. 2d 933, 940 (4th Cir. 1981) (en banc), *aff'd sub nom. Moses H. Cone Hospital v. Mercury Constr. Corp.*, 460 U.S. 1, 74 L.Ed. 2d 765

3. A party may, of course, expressly waive contractual arbitration.

(1983); *N&D Fashions, Inc. v. DHJ Industries, Inc.*, 548 F. 2d 722, 728 (8th Cir. 1976); a party's opponent takes advantage of judicial discovery procedures not available in arbitration, *Carcich v. Rederi A/B Nordie*, 389 F. 2d 692, 696 n. 7 (2d Cir. 1968); or, by reason of delay, a party has taken steps in litigation to its detriment or expended significant amounts of money thereupon, *Michelin Tire Corp. v. Todd*, 568 F. Supp. 622, 625-26 (D. Md. 1983); *Commercial Metals Co. v. International Union Marine Corp.*, 294 F. Supp. 570, 574 (S.D.N.Y. 1968); *Christensen v. Dewor Developments*, 33 Cal. 3d 778, 191 Cal. Rptr. 8, 661 P. 2d 1088 (1983). *See generally* Note, *Contractual Agreements to Arbitrate Disputes: Waiver of the Right to Compel Arbitration*, 52 S. Cal. L. Rev. 1513, 1531-33 (1979).

In the instant case, on 11 August 1980 LaFave Company moved for an order compelling arbitration. LaFave Company's crossclaim against the Fryes was dated 7 July 1980, and the Fryes' crossclaim against LaFave Company and their third-party claim against David M. LaFave were dated 9 July 1980.[4] The mere filing of these pleadings did not manifest waiver by either LaFave Company or the Fryes of their right to arbitrate under the contract. To hold otherwise, that is, to hold that the mere filing of pleadings or other motions in a pending lawsuit constitutes waiver of a contractual arbitration provision would make parts of N.C.G.S. 1-567.3 nonsensical. For example, 1-567.3(c) provides that if an issue subject to a contractual provision to arbitrate is involved in a pending lawsuit, any party to the contract can apply to the court for an order directing arbitration. This indicates that the General Assembly contemplated the possibility that a party would apply for arbitration after a lawsuit had begun. By expressly providing that a party may apply for an order compelling arbitration after suit has begun and by providing that in such a case the court must order arbitration in accordance with N.C.G.S. 1-567.3(a), it is clear that the legislature could not have intended that the mere filing of pleadings causes a waiver of a contractual arbitration provision.

The Fryes point out that in *Crutchley v. Crutchley*, 306 N.C. 518, 525, 293 S.E. 2d 793, 798 (1982), this Court stated that "[o]nce

4. We note that neither the Fryes nor LaFave Company initiated suit; Cyclone was the initial complainant.

a civil action has been filed and is pending, the court has no authority to order, even with the parties' consent, binding arbitration." This statement was limited to the facts involved in *Crutchley*: There plaintiff sued for divorce from bed and board, alimony pendente lite, permanent alimony, custody of the three children, and child support. In response, defendant denied plaintiff's alleged grounds for divorce from bed and board and prayed for custody of the children and dismissal of plaintiff's action. Pursuant to a consent order the district court ordered the parties to submit all issues to an arbitrator appointed by the court. The arbitrator made an award which was approved by the district court on 1 December 1977. On 30 November 1978 plaintiff filed motions in the cause seeking modification of the arbitrator's award. The trial court ruled that the arbitrator's award was binding and therefore plaintiff was precluded from making any motions in the cause. On appeal the Court of Appeals determined that the only issue before it was that part of the arbitrator's award concerning spousal support. It held that such an issue was arbitrable and that the arbitrator's award was binding and was not modifiable without consent of both parties.

On discretionary review, this Court reversed, holding that the trial court has no authority to order *binding* arbitration in a civil action for alimony, custody, and child support. In *Crutchley* we held that an issue of spousal support may be settled by a binding arbitration award. However, an arbitrator's award concerning child custody and child support is always modifiable by the courts and thus any arbitration award concerning these issues is not binding:

> [W]hile there . . . exists no prohibition to the parties settling the issues of custody and child support by arbitration, the provisions of an award for custody or child support will always be reviewable and modifiable by the courts. It is a well-established rule in this jurisdiction that parents cannot by agreement deprive the court of its inherent and statutory authority to protect the interests of their children. . . . Further, a court order pertaining to custody or support of a minor child does not finally determine the rights of the parties as to these matters. Instead, such an order "may be modified or vacated at any time, upon motion in the cause

and a showing of changed circumstances by either party or anyone interested." G.S. § 50-13.7(a) (1981 Cum. Supp.).

306 N.C. at 524, 293 S.E. 2d at 797 (citations omitted). Thus *Crutchley* did not hold that parties to a suit that has been filed and is pending cannot come to an agreement to arbitrate or that the court cannot order the parties to arbitrate in accord with such an agreement.[5] Rather, we ruled that because all awards or orders concerning child support or custody are reviewable and modifiable, any arbitration concerning these issues is not *binding*.

In the present case the Court of Appeals erroneously read *Crutchley* as holding that once pleadings have been filed the court could not order arbitration even with consent of the parties. As long as the statutory requirements of the Uniform Arbitration Act, N.C.G.S. 1-567.1 to .20, have been met and an order compelling arbitration would not prejudice a party to the contract who opposes the motion according to the standard set forth in this opinion, a court must order arbitration on motion of a party to the contract.[6]

[2] Having thus determined that the mere filing of pleadings by both parties to a contract containing an arbitration agreement does not constitute waiver of the arbitration provision as a matter of law, we now turn to consider whether the stage at which

5. Such a holding would have violated N.C.G.S. 1-567.2(a) and .3(a) which together provide that two or more parties may agree in writing to submit to arbitration any controversy existing between them at the time of the agreement and that if one of the parties to such an agreement refuses to arbitrate, the court shall order arbitration in accord with the agreement upon motion of another party.

6. The case of *Hargett v. Delisle*, 229 N.C. 384, 49 S.E. 2d 739 (1948), also cited by the Court of Appeals in the present case, merely stands for the proposition that all parties to a contract containing an arbitration provision may waive arbitration and seek relief in the courts. In *Hargett* neither party moved for an order compelling arbitration. Since both parties had thus waived that provision of the contract at issue, this Court held that it was error on the part of the trial court to have ordered the parties to arbitrate on its own motion.

We do not hereby overrule *Development Co. v. Arbitration Assoc.*, 48 N.C. App. 548, 269 S.E. 2d 685 (1980), *disc. rev. denied*, 301 N.C. 719 (1981), which held that a trial court has authority to determine whether the subject matter of a demand for arbitration has been previously litigated between the parties and reduced to a judgment binding upon them.

LaFave Company moved to compel arbitration was such that the order compelling arbitration prejudiced the Fryes.

During the thirty-five days between the date LaFave Company filed its crossclaim and the date it moved for arbitration, no motions were filed, apparently no discovery was conducted by the parties, and no evidence concerning the matters at issue was lost. Although the Fryes filed pleadings during this period, there is no evidence that the Fryes had incurred substantial expenses in preparation for litigation by the time the LaFave Company moved for arbitration. There is nothing in the record indicating that on 11 August 1980, the date LaFave Company's motion was filed, the Fryes would be prejudiced by having to arbitrate in accord with the terms of their contract with LaFave Company instead of proceeding with litigation of the dispute. The trial court properly ordered the parties to arbitrate.

[3] The next question presented for review is whether the superior court erred in confirming the award rendered by the arbitrator. N.C.G.S. 1-567.12 provides that "[u]pon application of a party, the court shall confirm an award, unless within the time limits hereinafter imposed grounds are urged for vacating or modifying or correcting the award. . . ." N.C.G.S. 1-567.13(a) provides:

> (a) Upon application of a party, the court shall vacate an award where:
>
> (1) The award was procured by corruption, fraud or other undue means;
>
> (2) There was evident partiality by an arbitrator appointed as a neutral or corruption in any of the arbitrators or misconduct prejudicing the rights of any party;
>
> (3) The arbitrators exceeded their powers;
>
> (4) The arbitrators refused to postpone the hearing upon sufficient cause being shown therefor or refused to hear evidence material to the controversy or otherwise so conducted the hearing, contrary to the provisions of G.S. 1-567.6, as to prejudice substantially the rights of a party; or

(5) There was no arbitration agreement and the issue was not adversely determined in proceedings under G.S. 1-567.3 and the party did not participate in the arbitration hearing without raising the objection; but the fact that the relief was such that it could not or would not be granted by a court of law or equity is not ground for vacating or refusing to confirm the award.

N.C.G.S. 1-567.14 provides:

(a) Upon application made within 90 days after delivery of a copy of the award to the applicant, the court shall modify or correct the award where:

(1) There was an evident miscalculation of figures or an evident mistake in the description of any person, thing or property referred to in the award;

(2) The arbitrators have awarded upon a matter not submitted to them and the award may be corrected without affecting the merits of the decision upon the issues submitted; or

(3) The award is imperfect in a matter of form, not affecting the merits of the controversy.

(b) If the application is granted, the court shall modify and correct the award so as to effect its intent and shall confirm the award as so modified and corrected. Otherwise, the court shall confirm the award as made.

(c) An application to modify or correct an award may be joined in the alternative with an application to vacate the award.

We note that a strong policy supports upholding arbitration awards. *See Carolina-Virginia Fashion Exhibitors, Inc. v. Gunter*, 291 N.C. 208, 230 S.E. 2d 380 (1976). Further, "judicial review of an arbitration award is confined to determination of whether there exists one of the specific grounds for vacation of an award under the [Uniform] Arbitration [Act]." *Carolina-Virginia Fashion Exhibitors, Inc. v. Gunter*, 41 N.C. App. 407, 411, 255 S.E. 2d 414, 418 (1979).

The Fryes argue first that the arbitrator exceeded his powers and therefore his award should have been vacated. N.C. Gen. Stat. § 1-567.13(a)(3) (1983). Second, they argue that the arbitrator made several evident miscalculations and therefore the award should have been modified or corrected. N.C. Gen. Stat. 1-567.14 (a)(1) (1983).

The powers of an arbitrator are set forth in part in N.C.G.S. 1-567.5 to .11. In addition, the contract between the Fryes and LaFave Company provides in part that "[a]ll claims, disputes and other matters in question arising out of, or relating to, this Contract or the breach thereof . . . shall be decided by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association then obtaining unless the parties mutually agree otherwise."

The record reveals no evidence that the arbitrator in the present case exceeded his powers under the statute or under the contract between the parties. Indeed, the Fryes do not argue directly that the arbitrator exceeded his powers. Rather, they contend that because of the way he calculated the award to LaFave Company, the arbitrator exceeded his powers. This assignment of error is without merit. Also, there is no evidence that the arbitrator improperly favored one party over the other. Therefore, the trial court properly denied the Fryes' motion to vacate the arbitrator's award.

The Fryes also allege that the arbitrator made an "evident miscalculation of figures," and thus the trial court ought to have modified or corrected the award pursuant to N.C.G.S. 1-567.14. The record shows that after the arbitrator made his award the Fryes applied to the superior court for an order to have the arbitrator clarify his award on several points. The superior court so ordered, and in response the arbitrator released a letter he had written dated 24 December 1981 to the American Arbitration Association in which the arbitrator explained in detail the basis for his award. Upon reviewing this letter and its attachments, the superior court ruled that no grounds existed for modification, correction, or vacation of the arbitrator's award.

The Fryes contend that the arbitrator's explanation of his award shows that it was "arbitrary and capricious, contrary to the evidence and contrary to law." The Fryes specifically list

several decisions the arbitrator made in calculating his award which the Fryes claim were inappropriate. The Fryes contend that because of these the superior court should have modified the award.

We concur with the statement of the Court of Appeals in *Carolina-Virginia Fashion Exhibitors, Inc. v. Gunter*, 41 N.C. App. 407, 414-15, 255 S.E. 2d 414, 419-20 (1979), that the legislative intent of N.C.G.S. 1-567.14(b) is that

> only awards reflecting mathematical errors, errors relating to form, and errors resulting from arbitrators['] exceeding their authority shall be modified or corrected by the reviewing courts. . . . If an arbitrator makes a mistake, either as to law or fact [unless it is an evident mistake in the description of any person, thing or property referred to in the award, *see* N.C.G.S. 1-567.14(a)(1)], it is the misfortune of the party. . . . There is no right of appeal and the Court has no power to revise the decisions of "judges who are of the parties' own choosing." An award is intended to settle the matter in controversy, and thus save the expense of litigation. If a mistake be a sufficient ground for setting aside an award, it opens the door for coming into court in almost every case; for in nine cases out of ten some mistake either of law or fact may be suggested by the dissatisfied party. Thus . . . arbitration instead of ending would tend to increase litigation.

Finding no evident mathematical errors, errors relating to form, and no errors evidencing that the arbitrator exceeded his powers, we hold that the superior court properly confirmed the award of the arbitrator pursuant to N.C.G.S. 1-567.14(b).

The decision of the Court of Appeals is

Reversed.

STATE OF NORTH CAROLINA v. LESTER LEE BROWN

No. 39A84

(Filed 6 November 1984)

1. **Rape and Allied Offenses § 4.3— another rape accusation by victim—in-camera hearing—admission of evidence**

Cross-examination of the prosecutrix in a rape trial concerning her prior accusation of rape against another man was properly prohibited until the trial judge had conducted an in-camera hearing to determine the relevancy of the evidence. In this case, the trial court did not in fact prohibit defense counsel from asking questions with respect to the complainant's prior accusation of rape where the court permitted defense counsel to ask questions which apprised the jury that the complainant had earlier accused another man of raping her and that a police investigation revealed no basis for the institution of criminal proceedings against the alleged offender.

2. **Criminal Law § 42.4— admissibility of knife—connection to crimes**

A pocketknife found on the floor of a car in which a kidnapping and rape allegedly occurred was sufficiently connected to the crime for its admission into evidence where an officer testified that on the morning after the sexual assault, he arrested defendant standing next to the car and found the open pocketknife lying on the floor in the back; another witness identified the knife as being one defendant had shown him in the car prior to the crimes; and the victim testified that she resisted defendant's sexual advances until he held a knife to her throat and threatened to kill her.

3. **Criminal Law § 71— sense perceptions from telephone conversation—shorthand statements of fact**

Testimony by a witness that, based on a telephone conversation with the victim on the night of an alleged rape, she thought the victim was scared and that the victim pretended to be calm and tried to signal the witness that something was wrong was admissible as shorthand statements of fact based upon the sense impressions or perceptions of the witness. Even if the statements were improperly admitted, defendant was not prejudiced because such evidence was merely corroborative of the victim's own admissible testimony concerning how she felt when speaking on the telephone with the witness.

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

The trial court did not err in refusing to include an instruction that the jury "must be satisfied to a moral certainty" of defendant's guilt in its charge on reasonable doubt where the court's definition of reasonable doubt properly informed the jury of the State's burden of proof and was, in fact, in substantial conformity with the instruction requested by defendant.

5. **Rape and Allied Offenses § 6.1— failure to submit lesser offenses of attempted rape**

The trial court in a prosecution for first-degree rape did not err in failing to submit to the jury the lesser included offenses of attempted first-degree rape and attempted second degree rape on the ground that the evidence of penetration was equivocal, although the victim testified that defendant "tried to put a flaccid penis inside of me," where an examination of the victim's entire testimony plainly shows that defendant was successful in achieving penetration despite his failure to obtain an erection.

6. **Kidnapping § 1.3— conviction upon theories not alleged in indictment—instructions as plain error**

Where defendant was tried under an indictment alleging as the theory of kidnapping that defendant confined the victim for the purpose of facilitating commission of the felony of rape and alleging as the basis for first-degree kidnapping that defendant did not release the victim in a safe place, the trial court committed "plain error" in instructing the jury that in order to convict defendant of kidnapping it must find that defendant confined and restrained the victim "for the purpose of terrorizing her," and that in order to convict defendant of first-degree kidnapping it must find that defendant "sexually assaulted" the victim.

7. **Criminal Law § 138— serious mental injury to victim—aggravating factor—insufficient evidence**

The evidence was insufficient to support the trial court's finding as an aggravating factor that defendant caused serious mental injury to a kidnapping and rape victim "in that she has been confined to the hospital a portion of this week, even though she is now at home, according to the statement of her husband," where the only evidence offered by the State in support of this factor was a statement by the district attorney that he had been told by the victim's husband that the victim entered the hospital after testifying at trial, had been heavily sedated, and was now resting at home.

8. **Criminal Law § 138— aggravating factors based on same evidence**

The trial court erred in finding both the statutory aggravating factor that defendant had a prior conviction for a criminal offense punishable by more than 60 days' confinement and the nonstatutory aggravating factor that he had previously been convicted of rape where each aggravating factor was premised upon defendant's prior rape conviction. G.S. 15A-1340.4(a)(1)(o).

Justice EXUM dissenting in part.

APPEAL by defendant from *Walker, J.*, at the 31 October 1983 Criminal Session of Superior Court, FORSYTH County.

Defendant was charged in indictments, proper in form, with first-degree rape, first-degree sexual offense, first-degree kidnapping and second-degree kidnapping. He entered a plea of not guilty to each offense.

A detailed recitation of the facts surrounding the commission of the crimes charged is unnecessary for discussion of the issues raised on appeal. Briefly, the State's evidence tended to show that on the evening of 10 July 1983 defendant and Ricky Odell Duncan drove from Siler City to Winston-Salem, North Carolina. Upon arriving in Winston-Salem, the two men passed Elizabeth Anne Noles, who was walking her dog on the side of a road that led to defendant's brother-in-law's house. Duncan and defendant drove to defendant's brother-in-law's and, upon discovering that no one was at home, returned to where Ms. Noles was walking her dog. Defendant got out of the car and approached Noles, asking her if anything was wrong. As defendant grabbed her by the arm, she passed out and fell onto the road. Defendant picked her up and placed her in the back seat of the car.

After driving for approximately five miles, Duncan stopped the car on a dirt road and, pursuant to defendant's request, went for a walk leaving defendant and Ms. Noles alone. Ms. Noles testified that defendant then got into the back seat and forced her to lift her dress and remove her panties. She stated that defendant repeatedly attempted sexual intercourse and did, in fact, penetrate her, although he was unable to obtain an erection. She remembered that defendant then performed oral sex upon her and that she passed out again. When she regained consciousness, defendant had returned to the front passenger seat and Duncan was in the driver's seat of the car.

Duncan then drove back to Siler City where Noles was permitted to call a friend, Regina Reel, from a pay phone. Both Noles and Ricky Duncan spoke with Ms. Reel in an effort to arrange a place where Reel could meet them. The two of them returned to the car and Duncan began to drive again. Shortly thereafter, defendant grabbed Duncan's shorts and began twisting them tightly. Duncan slammed on the brakes and he and Ms. Noles ran from the car.

Officers of the Chatham County Sheriff's Department located defendant the next morning standing next to Duncan's abandoned car. After conducting a search of the vehicle, Officer Shamburger discovered an open pocketknife on the floor behind the driver's seat. Ms. Noles testified at trial that defendant used this knife to force her to submit to the rape and sexual offense.

Defendant offered no evidence.

The jury found defendant guilty of the first-degree rape, first-degree sexual offense and first-degree kidnapping of Elizabeth Anne Noles. Defendant was, however, found not guilty of the kidnapping of Ricky Duncan.

Defendant was sentenced to consecutive terms of life imprisonment for first-degree rape and first-degree sex offense. In sentencing defendant on the kidnapping conviction, the trial judge found the existence of three aggravating factors: (1) that defendant had a prior conviction or convictions for criminal offenses punishable by more than 60 days' confinement; (2) that defendant caused serious injury to the prosecuting witness "in that she has been confined to the hospital a portion of this week . . . according to the statement of her husband, Mr. Noles"; and (3) that defendant had previously been convicted of a sex offense. The judge found no mitigating factors. Finding therefore that the aggravating factors outweighed the factors in mitigation, Judge Walker entered judgment imposing the maximum sentence of 40 years' imprisonment for the crime of first-degree kidnapping.

Defendant appealed the life sentences directly to this Court as a matter of right pursuant to N.C.G.S. 7A-27(a). We allowed his motion to bypass the Court of Appeals on the kidnapping conviction on 11 May 1984.

Rufus L. Edmisten, Attorney General, by Thomas J. Ziko, Assistant Attorney General, for the State.

Carl F. Parrish for defendant-appellant.

BRANCH, Chief Justice.

[1] By his first assignment of error, defendant contends the trial court erred in restricting defense counsel's cross-examination of the prosecuting witness. Specifically, defendant complains that he was not permitted to cross-examine Elizabeth Noles extensively regarding a prior accusation of rape she made against another man approximately sixteen months before the trial of this case.

Prior to trial, defense counsel filed a motion in which he requested leave "to admit evidence of complainant's prior statements accusing others of improper sexual advances, specifically

the statements surrounding the alleged incident occurring in May, 1982, as recorded in police report 28053." The court did not rule on this motion prior to trial.

During defense counsel's cross-examination of the prosecuting witness, the following transpired:

> Q. Miss Noles, back in May of 1982, you filed a report at that time that you had been raped by a black man, did you not?
>
> A. Yes, sir.
>
> Q. And in that report, did you make the statement—
>
> MR. LYLE: OBJECTION.
>
> THE COURT: SUSTAINED.
>
> Q. Were you taken to a dark dirt road on that occasion?
>
> MR. LYLE: OBJECTION.

At that point, the jury was excused and Judge Walker conducted an in-camera hearing to consider arguments with respect to the propriety of further questions on this subject. During the conference, defense counsel requested and received the court's approval of several questions relating to the complainant's prior accusation of rape. From the record, it appears defense counsel was satisfied with the trial court's rulings for he interposed no objection to the judge's failure to allow any specific questions, nor did he object to the wording of the questions he would be permitted to ask.

When court reconvened, defense counsel continued with his cross-examination of Ms. Noles. He then asked and received answers to each of the questions previously approved at the in-camera hearing. From this line of questioning, the jury was apprised of the fact that the complainant had earlier accused another man of raping her and that a police investigation revealed no basis for the institution of criminal proceedings against the alleged offender.

Our review of the trial proceedings leads us to conclude that the trial court properly sustained the prosecutor's objection to defense counsel's initial inquiry into the witness's prior accusation

of rape. Cross-examination relating to evidence of this sort during a rape trial is properly prohibited until the trial judge has conducted an in-camera hearing to determine the relevancy of the evidence. N.C. Gen. Stat. § 8-58.6(c) (1981).

Furthermore, we note that during defense counsel's subsequent cross-examination on this subject, the State objected to only one question and defense counsel abandoned it before the trial judge ruled on the objection.

We hold that defendant is not entitled to relief under this assignment of error since there is no evidence of record that the trial judge in fact prohibited defense counsel from asking any questions with respect to the complainant's prior accusations of rape. We therefore do not address defendant's contention that evidence of the prosecuting witness's prior accusations of sexual misconduct is not barred by N.C.G.S. § 8-58.6 (the North Carolina Rape Shield statute).

[2] Defendant next argues that the trial court erred in admitting into evidence a pocketknife which Officer Shamburger found on the floor in the back of Duncan's abandoned car on the morning of 11 July 1983. Defendant takes the position that it was error to admit the knife because the State failed to present sufficient proof that it was in some way connected to the crimes charged. We do not agree.

Ricky Duncan testified that on the evening of 10 July 1983 before he and defendant encountered Ms. Noles, defendant took a knife from his pocket and showed it to Duncan. Ricky identified that knife as State's Exhibit 1. The victim testified that she resisted defendant's sexual advances until he held "a cold knife" to her throat and threatened to kill her. Finally, Officer Shamburger stated that on the morning following the sexual assault, he arrested defendant standing next to Duncan's automobile. Shamburger stated that at that time he saw "an open pocketknife lying back on the floor behind the driver's seat." This was the same knife that Duncan identified as belonging to defendant and the same knife that was subsequently introduced into evidence as State's Exhibit 1. We therefore hold that the trial judge correctly admitted the pocketknife into evidence.

[3] Defendant also objects to certain portions of Regina Reel's testimony wherein she described the telephone conversations she had with the victim and Ricky Duncan on the night of the rape. Ms. Reel testified that based on those conversations she thought Duncan and Noles were scared. She further stated that Ms. Noles pretended to be calm and tried to signal Ms. Reel that something was wrong. It is defendant's contention that Regina Reel was not competent to testify as to these facts which were "beyond her personal knowledge."

This contention is without merit. The testimony to which defendant objects was properly admitted as shorthand statements of fact based upon the sense impressions or perceptions of the witness. *See* 1 Brandis on North Carolina Evidence § 129 (2d rev. ed. 1982) and cases cited therein. "The emotion displayed by a person on a given occasion is a proper subject for opinion testimony by a non-expert witness." *State v. Looney*, 294 N.C. 1, 14, 240 S.E. 2d 612, 619 (1978).

Furthermore, assuming *arguendo* that the statements were improperly admitted, defendant was not prejudiced because this evidence was merely corroborative of the victim's own clearly admissible testimony concerning how she felt when speaking on the telephone with Ms. Reel.

[4] We next address defendant's contention that the trial court erred in refusing to give his requested instruction on the definition of "reasonable doubt."

During the instructions conference, defendant requested the judge to define reasonable doubt in accordance with the definition approved by this Court in *State v. Hammonds*, 241 N.C. 226, 85 S.E. 2d 133 (1954). In *Hammonds*, we held that the jury may be instructed that they "must be satisfied to a moral certainty" of the truth of the charge. In this case, the trial court refused to include such language in its definition of reasonable doubt and instead instructed as follows:

> What is a reasonable doubt? It's a doubt which is based on reason and common sense arising out of some or all of the evidence, as the case may be, or lack or insufficiency of the evidence, as the case may be. It means that you must be *fully satisfied or entirely convinced* of the guilt of the defendant

as to the matter you're considering. The term beyond a reasonable doubt does not mean beyond all doubt or beyond all possible doubt. It means beyond a reasonable doubt.

(Emphasis added.)

We agree with defendant that when a special instruction is requested the court is required to give it, at least in substance, if it is a correct statement of the law supported by the evidence. *State v. Corn*, 307 N.C. 79, 296 S.E. 2d 261 (1982). The court is not required, however, to recite the defendant's requested instruction verbatim. It is sufficient if the jury is instructed "in substantial conformity to the prayer." *State v. Davis*, 291 N.C. 1, 14, 229 S.E. 2d 285, 294 (1976), *quoting State v. Bailey*, 254 N.C. 380, 386, 119 S.E. 2d 165, 170 (1961).

We have held that a proper definition of reasonable doubt need not include language that the jury must be satisfied of the defendant's guilt "to a moral certainty." *State v. Watson*, 294 N.C. 159, 167, 240 S.E. 2d 440, 446 (1978). Furthermore, our review of the charge convinces us that the trial court's definition of reasonable doubt properly informed the jury of the State's burden of proof and was, in fact, in "substantial conformity" with the instruction requested by defendant. This assignment of error is overruled.

[5] Defendant next contends the trial court erred in failing to submit to the jury the charges of attempted first-degree rape and attempted second-degree rape.

In support of his argument that the trial court erred in refusing to instruct on the lesser included offenses, defendant cites the victim's testimony that after defendant placed a knife to her throat and removed her panties, "he *tried* to put a flaccid penis inside of me." (Emphasis added.) From this, defendant argues the evidence of penetration was equivocal and therefore instructions on attempted rape were warranted.

"Instructions on the lesser included offenses of first-degree rape are warranted only when there is some doubt or conflict concerning the crucial element of penetration." *State v. Wright*, 304 N.C. 349, 353, 283 S.E. 2d 502, 505 (1981). In a prosecution for rape, evidence of the *slightest* penetration of the female sex

organ by the male sex organ is sufficient for vaginal intercourse and the emission of semen need not be shown to prove the offense. *State v. Sneeden*, 274 N.C. 498, 164 S.E. 2d 190 (1968); *State v. Monds*, 130 N.C. 697, 41 S.E. 789 (1902).

Our examination of the victim's *entire* testimony plainly shows that defendant was successful in achieving penetration despite his failure to obtain an erection. The prosecutrix testified on direct examination as follows:

> Then he tried to put a flaccid penis inside of me over and over and over and over and over and over.
>
> Q. Was he successful?
>
> . . .
>
> Q. (By Mr. Lyle, Continuing) Mrs. Noles, I don't want to go back any. Do you remember where you were in your testimony? You stated that he had repeatedly tried—
>
> A. Yes, sir.
>
> Q. —to put his penis in you, and I asked you was he successful at any point. Was he?
>
> A. At one time he made me touch him and push it in. I couldn't but as far—and then when he started to move, it came out again.
>
> Q. Was he able to push it in some—
>
> A. Somewhat.
>
> Q. Somewhat into your self?
>
> A. As much as you can do with one of those. But when he moved again, it came out and he got very, very angry.

The record fails to support defendant's contention that the evidence of penetration was conflicting and the trial judge therefore correctly refused defendant's requested instructions on the lesser included offenses of first-degree rape and second-degree rape.

[6] By his final assignment of error pertaining to the guilt phase of the trial, defendant contends the trial court erred in its instructions on the first-degree kidnapping charge because they permitted the jury to convict on theories of the crime which were not charged in the bill of indictment nor supported by the evidence at trial.

Defendant was tried under N.C.G.S. § 14-39 which provides, in pertinent part, as follows:

> (a) Any person who shall unlawfully confine, restrain, or remove from one place to another, any other person 16 years of age or over without the consent of such person, or any other person under the age of 16 years without the consent of a parent or legal custodian of such person, shall be guilty of kidnapping if such confinement, restraint or removal is for the purpose of:
>
> (1) Holding such other person for ransom or as a hostage or using such other person as a shield; or
>
> (2) Facilitating the commission of any felony or facilitating flight of any person following the commission of a felony; or
>
> (3) Doing serious bodily harm to or terrorizing the person so confined, restrained or removed or any other person.
>
> (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.

N.C. Gen. Stat. § 14-39 (1981 & Cum. Supp. 1983).

The indictment returned against defendant by the Forsyth County grand jury on 19 September 1983 charged as follows:

> The jurors for the State upon their oath present that on or about the date of offense shown and in the county named above the defendant named above unlawfully, willfully and feloniously did kidnap Elizabeth Anne Noles, a person who had attained the age of 16 years, without her consent, by unlawfully removing her from one place to another and confining and restraining her for the purpose of facilitating the commission of a felony, to wit: attempted rape. The said Elizabeth Anne Noles was not released by the defendant in a safe place.

Thus, the theory of the kidnapping charge was that defendant confined the victim for the purpose of facilitating commission of a felony under N.C.G.S. 14-39(a)(2), and the basis for first-degree kidnapping under subsection (b) was that defendant did not release the victim in a safe place.

In its charge to the jury, however, the trial court instructed that to convict defendant of kidnapping, the jury must find that he "removed, restrained and confined" the victim "for the purpose of terrorizing" her, a theory under N.C.G.S. § 14-39(a)(3) totally distinct from the theory alleged in the indictment under (a)(2) (for the purpose of facilitating commission of a felony). Furthermore, the judge instructed the jury that to convict of first-degree kidnapping they must find that defendant "sexually assaulted" the victim, rather than that he failed to release her in a safe place. In sum, then, the judge instructed on different theories for both the crime of kidnapping and the basis for first-degree kidnapping than were alleged in the indictment.

We note that the trial judge instructed erroneously more than once. When the jury returned to the courtroom prior to their release for the noon recess, the foreman requested a written copy of the elements of the charges against defendant. The court reporter transcribed the trial judge's original erroneous instructions which the judge then read to the jury before they resumed deliberations. The court thus stated for a second time that in order to convict defendant of first-degree kidnapping, the jury was required to find that defendant confined and restrained the

victim "for the purpose of terrorizing her" and that he "sexually assaulted" her.

The State concedes the instructions were erroneous but advances the argument that defense counsel failed to interpose a timely objection, thereby waiving appellate review on this issue.

It is true defendant posed no objection to that portion of the trial judge's instruction wherein he charged that to convict defendant of the crime of first-degree kidnapping, the jury must find that defendant "sexually assaulted" the victim. As to the instruction relating to terrorization of the victim as the basis for the kidnapping charge, defense counsel objected after the trial judge so instructed the jury for the second time following their return from the noon recess. The State is correct, however, in its assertion that this objection was untimely, for 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,. . . ." (Emphasis added.) Thus, we are faced with the question of whether the instructions constitute "plain error" under the standards adopted by this Court in *State v. Odom*, 307 N.C. 655, 300 S.E. 2d 375 (1983) and are therefore reviewable despite defendant's failure to comply with Rule 10(b)(2).

Because our review of the entire record convinces us that "the instructional mistake had a probable impact on the jury's finding that the defendant was guilty," *Odom* at 660, 300 S.E. 2d at 378, *quoting United States v. McCaskill*, 676 F. 2d 995, 1002 (4th Cir. 1982), we conclude that the errors in the instructions are "plain" and that defendant should receive a new trial on the first-degree kidnapping charge.

This Court has consistently held that it is error, generally prejudicial, for the trial judge to permit a jury to convict upon a theory not supported by the bill of indictment. *State v. Taylor*, 301 N.C. 164, 170, 270 S.E. 2d 409, 413 (1980); *State v. Dammons*, 293 N.C. 263, 272, 237 S.E. 2d 834, 840-41 (1977). Unlike the short-form indictments authorized for homicide (N.C. Gen. Stat. § 15-144 (1983)) and rape (N.C. Gen. Stat. § 15-144.1 (1983)), an indictment charging first-degree kidnapping *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." *State v. Moore*, 311 N.C. 442, 463, 319 S.E. 2d 150, 158 (1984) (Meyer, J., concurring). *See also State v. Jerrett*, 309 N.C. 239, 307 S.E. 2d 339 (1983) (indictment for kidnapping will not support conviction unless all elements of crime accurately and clearly alleged in indictment).

In this case, the jury was obviously having some difficulty understanding the elements of the crimes charged, for they asked the trial judge for further clarification on two occasions. Each time the trial judge instructed, he erroneously informed the jury that they could convict defendant of first-degree kidnapping on theories totally distinct from those alleged in the bill of indictment. We are especially concerned by the "terrorism" instruction, for the State presented absolutely no evidence directed to proof of the theory that defendant kidnapped Ms. Noles for the purpose of terrorizing her.

In conclusion, the judge's instructions permitted the jury in this case to predicate guilt on theories of the crime which were not charged in the bill of indictment and which were, in one instance, not supported by the evidence at trial. We therefore hold that under the factual circumstances of this case, there was "plain error" in the jury instructions as that concept was defined in *Odom* and defendant must therefore receive a new trial on the first-degree kidnapping charge.

Although unnecessary to decision in this case in light of our holding that defendant is entitled to a new trial on the kidnapping charge, in the interest of judicial economy we address defendant's arguments relating to certain aggravating factors the trial court found in sentencing defendant for this offense. It is, of course, possible these issues may arise again upon retrial.

[7] First, defendant contends the trial court erred in finding as an aggravating factor that defendant caused serious mental injury to the victim "in that she has been confined to the hospital a portion of this week, even though she is now at home, according to the statement of her husband, Mr. Noles." Defendant argues the State presented insufficient evidence to support this nonstatutory aggravating factor. We agree.

The only evidence offered by the State in support of this factor was a statement by the district attorney that he had been told by the victim's husband that Ms. Noles entered the hospital after testifying at trial, had been heavily sedated, and was now resting at home. Mr. Noles, however, did not testify and the State failed to offer any medical testimony or reports in support of their contention that Ms. Noles was suffering from a "serious mental injury" or that, if so, her present condition was occasioned by any action of defendant. Since there was no evidence to support a finding that defendant caused Ms. Noles' hospitalization during the trial other than the prosecutor's reiteration of Mr. Noles' statement that she was confined to bed and heavily sedated, we hold that the trial judge erred in finding this aggravating factor.

[8] Defendant also argues that the trial judge erred in finding both the statutory aggravating factor that he had a prior conviction for a criminal offense punishable by more than 60 days' confinement (N.C.G.S. § 15A-1340.4(a)(1)(o) and the nonstatutory aggravating factor that he had been previously convicted of rape. It is defendant's position that since his only prior conviction was for rape, the trial judge "used the same item of evidence [the prior rape conviction] to prove more than one factor in aggravation" in violation of N.C.G.S. § 15A-1340.4(a)(1). We agree, and hold that the trial judge erred in finding both aggravating factors when each of them was premised upon defendant's prior rape conviction.

No. 83CRS31804—First-Degree Rape—No error.

No. 83CRS31805—First-Degree Sexual Offense—No error.

No. 83CRS31733—First-Degree Kidnapping—New trial.

Justice EXUM dissenting in part.

I dissent from so much of the majority decision which holds that defendant was not entitled to an instruction on the lesser included offense of attempted rape. The majority correctly states the law and the evidence bearing on this issue. The majority errs, however, in concluding that the victim's testimony is not equivocal on the question of penetration. To me, her testimony on this

issue is the epitome of equivocation. It is enough to carry the issue to the jury; but it leaves the issue in enough doubt that the jury should have been permitted to consider as an alternative verdict defendant's guilt of attempted rape on the theory that there was, in fact, no penetration.

I, therefore, vote for a new trial in the rape case for failure of the trial court to submit the lesser included offense of attempted rape.

STATE OF NORTH CAROLINA v. BERNARDINO ZUNIGA

No. 2A84

(Filed 6 November 1984)

1. **Searches and Seizures § 7— search incident to lawful arrest**

A search without a search warrant may be made incident to a lawful arrest. In the course of such a search, the officer may lawfully take from the person arrested any property which such person has about him and which is connected with the crime charged, including the contents of handbags or wallets.

2. **Arrest and Bail § 3.1— warrantless arrest—necessity for probable cause**

To be lawful, a warrantless arrest must be supported by probable cause.

3. **Arrest and Bail § 3— time of defendant's arrest**

Although an officer stated that defendant was not placed under arrest while he was in Tennessee and that defendant was just being formally detained, defendant was, in effect, placed under arrest when he was escorted from the Knoxville bus station to the Knoxville Police Department where the officer admitted that he "would not have let [the defendant] go."

4. **Arrest and Bail § 3.1— probable cause for arrest—bulletins from other officers**

One law enforcement officer may rely upon bulletins from other officers as the basis for an arrest, but only so long as the originating officer himself has probable cause.

5. **Arrest and Bail § 3.1— requisites of probable cause**

Probable cause is a flexible, common-sense standard. It does not demand any showing that such a belief be correct or more likely true than false; rather, a practical, nontechnical probability is all that is required.

6. Searches and Seizures § 8— search incident to arrest—probable cause for arrest in Tennessee—knowledge by North Carolina officers

North Carolina law enforcement officials had probable cause to believe that defendant had committed the felonies of rape and murder of a seven-year-old child, and the warrantless search of defendant while he was detained in Knoxville, Tennessee at the request of North Carolina authorities was proper as being incident to defendant's lawful arrest by Tennessee officers pursuant to information received from North Carolina authorities, where the crimes occurred on a farm in a small, rural community, and where North Carolina officers knew that the victim's grandfather had seen defendant, who had previously been employed on the farm, going toward the farm in a taxicab on the morning of the crimes, that the taxicab driver had identified defendant as the person he had taken to the farm that morning, and that defendant had fled on a bus destined for Arkansas a few hours after the crimes.

7. Arrest and Bail § 3.1; Searches and Seizures § 8— probable cause for arrest—consideration of flight to evade arrest

Flight to evade arrest is a strong idicia of *mens rea*, and when coupled with other relevant facts or the specific knowledge on the part of the arresting officer relating the suspect to the evidence of the crime, flight may properly be considered in assessing probable cause.

Justice EXUM dissents.

THE State appeals pursuant to N.C.G.S. § 15A-979(c) from an order suppressing evidence to be offered by the State entered by *Judge Smith* at the 15 August 1983 Criminal Session of Superior Court, DAVIDSON County. Heard in the Supreme Court 11 September 1984.

Rufus L. Edmisten, Attorney General, by Harry H. Harkins, Jr., Assistant Attorney General, for the State.

Adam Stein, Appellate Defender, and Robin E. Hudson, Assistant Appellate Defender, for defendant-appellee.

MEYER, Justice.

At approximately 2:00 p.m. on the afternoon of 13 July 1982, 7-year-old April Lee Sweet was reported missing. Her body was discovered later that afternoon on the Calvin Johnson farm near Taylorsville in rural Alexander County. The victim had been stabbed, her throat had been cut, and, as was later confirmed by autopsy, she had been raped.

As a result of investigation conducted during the afternoon and evening of 13 July, law enforcement authorities determined the following:

On the morning of 13 July the victim's grandfather, Calvin Johnson, saw the defendant, whom he had known as Richard Lopez, traveling by taxicab toward the Johnson home. Mr. Johnson had previously employed the defendant as a farm worker. The cab driver took his passenger to the Johnson home and let him out at the house. It was further learned that later that day a Mexican male took a taxicab from Taylorsville to Statesville where he caught a bus destined for Pine Bluff, Arkansas. The passenger was identified as the defendant, Bernardino Zuniga, by means of a check which he had cashed with the driver of the taxicab. Based on the information given by these witnesses, law enforcement authorities determined that the prime suspect in the murder of April Sweet was the defendant, Bernardino Zuniga, also known as Richard Lopez—a Mexican male, approximately five feet nine inches in height, weighing approximately 155 pounds; that he had a mustache; and that when last seen he was wearing blue jeans, a blue-grey shirt, and possibly a ball cap. Law enforcement authorities were also aware that the suspect had fled the area and that in a matter of hours, the bus in which he was riding which was destined for Arkansas would arrive for a scheduled stop in Knoxville, Tennessee. Thus, this information was relayed to law enforcement authorities in Knoxville, Tennessee first by telephone and then over the Police Information Network.

In response to the request of North Carolina law enforcement authorities that defendant be held "for investigative purposes and for interview," Knoxville police, after conferring by telephone with the North Carolina authorities, met the bus in which defendant was believed to be riding. Defendant, the only Mexican male aboard the bus, was detained. Although defendant was wearing tan colored pants when he arrived in Knoxville, he was carrying a pair of wet blue jeans in a rolled-up paper bag. Defendant was taken to the Knoxville Police Department where he was placed in custody awaiting the arrival of North Carolina law enforcement authorities. During this time, the Knoxville police seized certain items of an incriminating nature, including a photograph of the victim found in defendant's wallet and a pair of bloodstained undershorts. After waiving extradiction, defendant was returned to North Carolina on 14 July 1982 at which time an arrest warrant was issued for the murder of April Lee Sweet. On 19 July

1982, an arrest warrant was issued against the defendant for the first-degree rape of April Lee Sweet.

Prior to trial the defendant moved to suppress all evidence "seized or taken from the defendant upon his being taken into custody by law enforcement officers on or about July 13, 1982 in Knoxville, Tennessee," on the ground that at the time defendant was taken into custody, there was no probable cause to believe that defendant had committed the crime for which he was later charged. At the conclusion of the suppression hearing, the trial judge made the following pertinent findings of fact:

> (1) That on the morning of the 13th day of July, 1982, the defendant was observed by Calvin Johnson, the grandfather of April Lee Sweet, in the vicinity of the home of Calvin Johnson while proceeding towards the home of Calvin Johnson by way of a taxicab.
>
> (2) That later, April Lee Sweet was found to be missing and in the late afternoon her body was discovered, which said body appeared to the officers to have been stabbed and raped.
>
> (3) That Calvin Johnson knew the defendant by the name of Richard Lopez and had several years prior to 1982 employed the defendant.
>
> (4) That a taxicab took a man to the home of Calvin Johnson on the morning of the 13th day of July, 1982.
>
> (5) That the defendant or someone with the same general description, had on the 13th day of July, taken a bus from Statesville, North Carolina, to Pine Bluff, Arkansas, which was scheduled to arrive in Knoxville, Tennessee, at approximately 10:45 p.m. on said date.
>
> (6) That the foregoing information was known to State Bureau of Investigation Agent Lester and Detective Hayden Bentley of the Alexander County Sheriff's Department, and the same was communicated by telephone, and the Police Information Network to Detective Moyers of the Knoxville Police Department along with a request that assistance be rendered in detaining a Mexican male who was on the heretofore referred to bus for interview and investigation.

(7) That Detective Moyers and the other officers of the Knoxville Police Department met the said bus and the defendant was the only person on said bus who appeared to be of Mexican origin, and who met the physical description previously furnished to them. The clothing being worn by the defendant was not as had been described.

(8) That upon encountering the defendant, Detective Moyers, felt or looked through the bag or package that was in the defendant's possession and found a pair of jeans, wet or damp, which he had been informed might be part of the clothing of the person under investigation.

(9) That Detective Moyers did not formally arrest the defendant but he did take him into custody and would not have allowed the defendant to leave had the defendant desired or attempted to do so.

(10) That at the time that Detective Moyers took the defendant into custody, he believed that the North Carolina authorities had probable cause to obtain a warrant charging the defendant with rape and murder.

(11) That at the time that Detective Moyers took the defendant into custody, Detective Moyers believed that the defendant had probably committed the crimes in question.

(12) That the beliefs of Detective Moyers concerning probable cause were based on information furnished to him in good faith and which he relied upon in good faith.

(13) That the defendant was transported to the Knoxville Police Department where head hair samples, fingernail scrapings, and pubic hair samples were obtained. His wallet was also taken at this time.

(14) That an interpreter was called because the defendant appeared to have difficulty understanding the Knoxville police officers even though he had informed them at the bus station that he understood the English language.

(15) That the defendant had been apprised of his rights in accordance with, *Miranda v. Arizona*, at the bus station and furnished a copy of those rights in order that he might

read and sign them and he did appear to, in fact, read the said rights.

(16) That at the time of taking the pubic hair samples Detective Moyers observed that the defendant pulled his trousers and undershorts down together and also used the same method in pulling up his trousers.

(17) That the defendant was placed in jail because of other matters within the duties of the Knoxville police officers, and because of the time needed for the North Carolina officers to arrive in Knoxville, Tennessee.

(18) That Detective Moyers, upon reflection, became concerned about the manner in which the defendant had removed and replaced his trousers during the obtaining of the pubic hair samples and he went to the jail for further investigation. At this further investigation, it was discovered that the defendant's undershorts had a large spot or spots of blood thereon.

(19) That the North Carolina officers arrived at the Knoxville Police Department in the early morning hours of July 14, 1982.

(20) That the defendant's wallet containing a picture of April Lee Sweet and the condition of the defendant's undershorts were made known to the North Carolina officer by Detective Moyers.

(21) That through an interpreter that arrived the defendant was again advised of his rights in accordance with, *Miranda v. Arizona*, and he refused to sign a waiver thereof without an attorney present, but then immediately stated he would sign the waiver and return to North Carolina.

* * *

Based on the foregoing findings the trial judge made conclusions of law which included the following:

(1) That in the late afternoon of July 13, 1982, the law enforcement officers of the State of North Carolina and more particularly, the State Bureau of Investigation, Agent Lester and Detective Hayden Bentley of the Alexander County

Sheriff's Department, had probable cause to believe that a felony had been committed, the same being murder and rape.

(2) That at the time of the communications between the North Carolina law enforcement officers and Detective Moyers of the Knoxville Police Department, the North Carolina officers did not have probable cause to believe that the defendant was the perpetrator of those crimes heretofore mentioned.

(3) Though mistaken, Detective Moyers was of the opinion that the North Carolina officials had probable cause and believed that the defendant was the perpetrator of the murder and rape and he himself believed that the defendant probably committed those crimes.

(4) That the detention of the defendant in Knoxville, Tennessee, from the late evening hours of July 13, 1982, until the early morning hours of July 14, 1982, was without a warrant of arrest or probable cause.

(5) That, though the officer's actions were in good faith and reasonable as set forth in *The United States v. Williams*, 622 F. Supp. 830, "the good faith exception" is not presently the law of the United States or of North Carolina. It is a decision of application only to the Fifth Circuit of the United States.

* * *

(7) That, though the defendant's return to the State of North Carolina did not comply with the statutes of the State of Tennessee concerning extradition, the defendant freely, understandingly and voluntarily waived the provisions of those statutes by agreeing to return to the State of North Carolina voluntarily, without threat or reward or hope of reward other than the officer's statement, if he refused, legal process would be obtained.

(8) That the statements of the officers in that regard were merely a statement of the legal proceedings that would be instigated, i.e., extradition, and they had probable cause at that time to believe that the defendant was the perpetrator

of a rape and murder, probable cause having existed from the time Detective Moyer observed the defendant's undershorts.

The trial judge therefore ordered "[t]hat any evidence obtained as a result of the defendant's detention without probable cause in the State of Tennessee be and the same is hereby ordered suppressed."

In its brief to this Court, the State presents three arguments in support of its position that the evidence obtained as the result of action taken by the Knoxville police should not be suppressed. The State first contends that the North Carolina officials had probable cause to believe that the defendant murdered and raped April Lee Sweet, and that even if the North Carolina officials lacked probable cause, the Knoxville police had probable cause to detain and search the defendant. Therefore, argues the State, the items in question were seized incident to a lawful arrest. Second, the State contends that in the absence of a finding of probable cause, the detention and search of the defendant was not an unreasonable search or seizure and therefore did not constitute a violation of defendant's fourth amendment rights. Third, in the event that we reject its first two contentions, the State urges us to recognize a good faith exception to the exclusionary rule and find that the Knoxville police acted on a good faith belief that North Carolina authorities had probable cause to arrest the defendant.

[1] A search without a search warrant may be made incident to a lawful arrest. *State v. Hardy*, 299 N.C. 445, 263 S.E. 2d 711 (1980); *State v. Harris*, 279 N.C. 307, 182 S.E. 2d 364 (1971); *State v. Roberts*, 276 N.C. 98, 171 S.E. 2d 440 (1970). In the course of such a search, the officer may lawfully take from the person arrested any property which such person has about him and which is connected with the crime charged. *State v. Roberts*, 276 N.C. 98, 171 S.E. 2d 440. Property includes the contents of handbags or wallets, *Illinois v. Lafayette*, --- U.S. ---, 77 L.Ed. 2d 65 (1983); *State v. Dickens*, 278 N.C. 537, 180 S.E. 2d 844 (1971); *State v. Ross*, 269 N.C. 739, 153 S.E. 2d 469 (1967). Therefore, if the search conducted by the Knoxville police was made pursuant to a warrantless, but lawful arrest, it did not exceed the permissible scope of a valid search incident to such an arrest.

The first, and what we consider to be the determinative issue in this case, is whether the North Carolina law enforcement officials had probable cause on 13 July to believe that the defendant had committed a felony and thus, whether the seizure of incriminating evidence while defendant was detained in Knoxville was the result of a search conducted pursuant to a lawful, although warrantless, arrest.

[2] To be lawful, a warrantless arrest must be supported by probable cause. *Brinegar v. United States*, 338 U.S. 160, 93 L.Ed. 1879 (1949); *State v. Rinck*, 303 N.C. 551, 280 S.E. 2d 912 (1981); *State v. Joyner*, 301 N.C. 18, 269 S.E. 2d 125 (1980).

> A warrantless arrest is based upon probable cause if the facts and circumstances known to the arresting officer warrant a prudent man in believing that a felony has been committed and the person to be arrested is the felon. *McCray v. Illinois*, 386 U.S. 300, 18 L.Ed. 2d 62, 87 S.Ct. 1056 (1967). "Probable cause for an arrest has been defined to be a reasonable ground of suspicion supported by circumstances sufficiently strong in themselves to warrant a cautious man in believing the accused to be guilty. . . . To establish probable cause the evidence need not amount to proof of guilt, or even to prima facie evidence of guilt, but it must be such as would actuate a reasonable man acting in good faith." 5 Am. Jur. 2d, Arrest § 44 (1962); *State v. Harris*, 279 N.C. 307, 182 S.E. 2d 364 (1971).

State v. Shore, 285 N.C. 328, 335, 204 S.E. 2d 682, 686 (1974). *See also, State v. Joyner*, 301 N.C. at 21, 269 S.E. 2d at 128 and *State v. Rinck*, 303 N.C. 551, 280 S.E. 2d 912.

[3] The evidence was conflicting as to the precise moment of defendant's arrest. The North Carolina officers who went to Tennessee testified that they did not believe that they had the authority to arrest the defendant in Tennessee and that Officer Moyers of the Knoxville Police Department arrested defendant in their presence. However, Officer Moyers testified that he did not formally arrest the defendant. It appears that defendant was not "formally" arrested until his return to North Carolina on 14 July.

An officer's testimony that the defendant was or was not under arrest is not conclusive. *State v. Sanders*, 295 N.C. 361, 245

S.E. 2d 674 (1978), *cert. denied*, 454 U.S. 973, 70 L.Ed. 2d 392 (1981); *State v. Tippett*, 270 N.C. 588, 155 S.E. 2d 269 (1967). A "formal" declaration of arrest by an officer is not a prerequisite to the making of an arrest. *State v. Sanders*, 295 N.C. 361, 245 S.E. 2d 674; *State v. Tippett*, 270 N.C. 588, 155 S.E. 2d 269; *see* 5 Am. Jur. 2d, Arrest § 1.

We have held that "[w]hen a law enforcement officer, by word or actions, indicates that an individual must remain in the officer's presence or come to the police station against his will, the person is for all practical purposes under arrest if there is a substantial imposition of the officer's will over the person's liberty." *State v. Sanders*, 295 N.C. at 376, 245 S.E. 2d at 684.

In the present case, although Officer Moyers stated that the defendant was not placed under arrest while in Tennessee, that he was "just being formally detained" he readily admitted that he "would have not let [the defendant] go." We therefore hold that defendant was, for all practical purposes, under arrest no later than when he was escorted from the bus station to the Knoxville Police Department.

[4] It is well established that one law enforcement officer may rely upon bulletins from other officers as the basis for an arrest, but only so long as the originating officer himself had probable cause. *Whiteley v. Warden*, 401 U.S. 560, 28 L.Ed. 2d 306 (1971); *State v. Shore*, 285 N.C. 328, 204 S.E. 2d 682. Should we determine that probable cause existed for defendant's arrest by North Carolina authorities on 13 July when the defendant was detained at the bus station in Knoxville, the incriminating evidence seized while defendant was in Tennessee would be properly admissible as the result of a search conducted pursuant to a lawful, although warrantless arrest. *State v. Hardy*, 299 N.C. 445, 263 S.E. 2d 711; *State v. Harris*, 279 N.C. 307, 182 S.E. 2d 364; and *State v. Roberts*, 276 N.C. 98, 171 S.E. 2d 440. Therefore, we must determine whether the North Carolina authorities had probable cause to believe that the defendant had murdered and raped April Lee Sweet prior to his arrest by the Tennessee authorities in the late evening of 13 July.

As in every case involving a determination of probable cause, it is upon the particular facts and circumstances, and the particular offense, that we must focus for resolution of the issue.

And, in dealing with probable cause, "as the very name implies, we deal with probabilities." *Brinegar v. United States*, 338 U.S. at 175, 93 L.Ed. at 1890. While this Court has, on numerous occasions, repeated the legal standard against which we measure the facts of each probable cause determination, perhaps the most succinct and enlightened definition is provided in *Brinegar*.

> [P]robabilities . . . are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. The standard of proof is accordingly correlative to what must be proved.
>
> "The substance of all the definitions" of probable cause "is a reasonable ground for belief of guilt. . . ." [A]nd this "means less than evidence which would justify condemnation" or conviction, as Marshall, C.J., said for the Court more than a century ago in *Locke v. United States*, 7 Cranch 339, 348. Since Marshall's time, at any rate, it has come to mean more than bare suspicion: Probable cause exists where "the facts and circumstances within their [the officers'] knowledge and of which they had reasonable trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that" an offense has been or is being committed.
> . . .
>
> These long-prevailing standards seek to safeguard citizens from rash and unreasonable inferences with privacy and unfounded charges of crime. They also seek to give fair leeway for enforcing the law in the community's protection. Because many situations which confront officers in the course of executing their duties are more or less ambiguous, room must be allowed for some mistakes on their part. But the mistakes must be those of reasonable men, acting on facts leading sensibly to their conclusions of probability. The rule of probable cause is a practical, nontechnical conception affording the best compromise that has been found for accommodating these often opposing interests. Requiring more would unduly hamper law enforcement. To allow less would be to leave law-abiding citizens at the mercy of the officers' whim or caprice. (Citations omitted.)

Id. at 175-76, 93 L.Ed. at 1890.

[5] Probable cause is a flexible, common-sense standard. It does not demand any showing that such a belief be correct or more likely true than false. A practical, nontechnical probability is all that is required. *See Texas v. Brown*, 460 U.S. 730, 75 L.Ed. 2d 502 (1983).

> The process does not deal with hard certainties, but with probabilities. Long before the law of probabilities was articulated as such, practical people formulated certain common-sense conclusions about human behavior; jurors as factfinders are permitted to do the same—and so are law enforcement officers. Finally, the evidence thus collected must be seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement.

United States v. Cortez, 449 U.S. 411, 418, 66 L.Ed. 2d 621, 629 (1981).

Thus, while a reviewing court must, of necessity view the action of the law enforcement officer in retrospect, our role is not to import to the officer what in our judgment, as legal technicians, might have been a prudent course of action; but rather our role is to determine whether the officer has acted as a man of reasonable caution who, in good faith and based upon practical consideration of everyday life, believed the suspect committed the crime for which he was later charged. *See State v. Mathis*, 295 N.C. 623, 247 S.E. 2d 919 (1978); *State v. Streeter*, 283 N.C. 203, 195 S.E. 2d 502 (1973); *State v. Alexander*, 279 N.C. 527, 184 S.E. 2d 274 (1971); *State v. Harris*, 279 N.C. 307, 182 S.E. 2d 364; *State v. Tippett*, 270 N.C. 588, 155 S.E. 2d 269.

[6] We find that the North Carolina law enforcement authorities in the present case so acted. In reaching this conclusion we have attached particular significance to the fact that the murder occurred in a small, rural community;[1] that defendant's presence near the Johnson home was noted by the victim's grandfather and the taxi driver; that he was identified; that suspicion almost immediately narrowed to the defendant; and finally, that defendant fled within hours of the crime.

1. We note that out of an abundance of caution, the able trial judge granted defendant's motion for a change of venue based on this fact.

It is undisputed that the victim, a 7-year-old child, was brutally murdered and raped on the afternoon of 13 July 1982. It was a serious offense—one which demanded the most diligent and immediate police response. By early evening law enforcement authorities had targeted the defendant as a prime suspect. Indeed, a fair reading of the transcript indicates that the defendant, known to the family of the victim as Richard Lopez, a farm worker who had been employed by Calvin Johnson, was the only suspect. The ease with which the authorities were able to trace the defendant's movements on the day in question is a clear indication that in this tightly-knit, sparsely populated community, any unusual and unexplained presence was noticed and questioned. While presence in the vicinity of a crime which occurs in a populated area may, indeed, be of little significance, it is axiomatic that presence in the vicinity of a crime which occurs in a sparsely populated area, where access is limited and monitored, takes on added significance. Thus, in this rural section of Alexander County, the defendant's unexplained presence at the Johnson home on the morning of the murder, coupled with the discovery of the brutal slaying of a member of the Johnson family a short time later, would quite naturally arouse a high degree of suspicion in a reasonable person.

[7] When the authorities sought out the defendant for questioning, they discovered that he had fled. He was on a bus destined for Arkansas. Flight to evade arrest is a strong indicia of *mens rea*, and when coupled with other relevant facts or the specific knowledge on the part of the arresting officer relating the suspect to the evidence of the crime, flight may properly be considered in assessing probable cause. *State v. Williams*, 32 N.C. App. 204, 231 S.E. 2d 282, *appeal dismissed*, 292 N.C. 470, 233 S.E. 2d 924 (1977); *United States v. Garcia*, 516 F. 2d 318 (9th Cir.), *cert. denied sub nom., Martinez-Lopez v. United States*, 423 U.S. 934, 46 L.Ed. 2d 265 (1975). Not only did defendant's precipitous departure from the scene effectively deprive authorities of an opportunity to conduct an investigation prior to questioning the defendant,[2] but, more importantly, it was a circumstance which,

2. Following defendant's return to North Carolina on 14 July, investigation into the crime continued. A newspaper or advertising circular bearing defendant's post office box number was found near the scene of the crime. The postmaster recalled that defendant had picked up his mail shortly after 10:00 a.m. on the morning of the

considered with facts already known, would have led a reasonable person to believe that defendant was the perpetrator of the crime.

We therefore hold that when defendant was taken into custody by the Knoxville authorities, North Carolina authorities had probable cause to believe that the defendant had murdered April Lee Sweet. The subsequent search of the defendant was incident to his lawful arrest. The trial judge erred in ordering that the evidence obtained as the result of this search be suppressed. The order suppressing such evidence is vacated and the case is remanded to the Superior Court, Davidson County for further proceedings not inconsistent with this opinion.

Vacated and remanded.

Justice EXUM dissents.

STATE OF NORTH CAROLINA v. ANDREW McDONALD

No. 278A83

(Filed 6 November 1984)

1. **Criminal Law § 90— impeachment of State's witness by State—prior inconsistent statement**

The trial court did not abuse its discretion by declaring a State's witness to be hostile and permitting the State to impeach him through the use of prior inconsistent statements where there was evidence to support the trial judge's finding that the State had a "right to expect" that the witness would not repudiate his pretrial statements and was therefore "surprised" by his testimony at trial.

2. **Searches and Seizures § 23— search warrant—affidavit sufficient**

The trial court did not err by denying defendant's motion to suppress evidence obtained pursuant to a search warrant where the information con-

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murder. The mail contained numerous advertising circulars. A neighbor who lived approximately a mile from the Johnson home recognized the defendant as a Mexican who at one time had worked for Calvin Johnson. She recalled seeing the defendant walking along the road in front of her house at approximately 11:30 a.m. on the day of the murder. At approximately noon on the day of the murder, defendant was picked up by the local postman and driven into Taylorsville.

tained in the affidavit was obtained from numerous named sources as well as the independent investigation conducted by the affiant, and where the information supplied by the named individuals was remarkably consistent and was in turn corroborated by the results of the law enforcement officers' investigation.

3. Criminal Law § 42.6— chain of custody—evidence sufficient

The State showed a sufficient chain of custody to permit the introduction of a red emergency room bag, a pair of pants, and a coat where there was testimony that the coat and pants were worn by the victim the night he was attacked, that the coat was placed in the bag by an emergency room nurse at Cabarrus County Hospital, that an ambulance attendant transported the bag to Charlotte Memorial Hospital, that defendant was wearing the pants upon his arrival at the Charlotte Hospital, that a patient representative and secretary at the Charlotte Hospital retrieved the bag from the emergency room and found that it contained the coat and pants, that the bag and its contents were given to a detective who mailed them to the S.B.I. for analysis, and that the bag and clothing were returned from the S.B.I. to the police evidence locker.

4. Homicide § 21— first degree murder—motion to dismiss—evidence sufficient

Defendant's motion to dismiss the charge of first degree murder was properly denied where there was substantial evidence of each essential element of the offense charged and of the defendant being the perpetrator of the crime.

APPEAL by defendant from *Judge Long* at the 31 January 1983 Session of CABARRUS County Superior Court.

Defendant was charged in an indictment, proper in form, with the first-degree murder of Calvin E. Smith. He entered a plea of not guilty to the offense charged.

The State offered evidence tending to show that on the evening of 3 April 1982 the victim, Calvin Smith, was operating a pool hall in Concord, North Carolina. At around 11:00 p.m. Smith closed the establishment for the night and prepared to drive to his home a few blocks away. He had in his possession several bank bags which contained the night's receipts.

The victim's wife, Mattie Smith, testified that she heard her husband pull into the driveway sometime between 11:30 and 12:00 that night. When her husband did not come into the house after a few moments, Mrs. Smith went to the front door and turned on the porch light. Just as she reached the door, she heard several shots and saw her husband fall to the ground. She immediately ran to the telephone to call the police and her daughter.

The police arrived at the Smith residence around midnight. Lieutenant Sheppard testified that Smith was coherent and was able to respond to the officers' questions. Smith stated that he had been attacked from behind by someone he did not recognize. The assailant had taken his gun and the moneybags. The police conducted a search of the front yard and located several bank bags, a yellow plastic table leg broken in two pieces, some loose change and some keys.

Emergency personnel arrived at approximately 12:05 a.m. Smith was transported to Cabarrus Memorial Hospital and, shortly thereafter, was removed to Charlotte Memorial. He died in the emergency room of the Charlotte hospital early Sunday morning. An autopsy revealed that he died from a gunshot wound to the head.

The State presented the testimony of Robert Moose. He remembered seeing defendant outside the pool hall shortly before it closed on 3 April 1982. Moose overheard defendant remark to his companion, Daniel Benton, that he needed some money and that "My man is asleep. He's got a pouch on his lap." Moose noted that at the time defendant made this statement Calvin Smith was asleep in a chair in the pool hall with a bank bag on his lap. Moose's sister, Teresa, also testified that she saw defendant and Benton in the area of the pool hall at approximately 11:20 p.m. on 3 April.

On 4 April 1982, Detective Dennis Andrade obtained a search warrant to search defendant's home. As a result of the search, the police obtained a black coat and a straw hat which matched the description of the clothing worn by defendant on the night of 3 April.

John Bendura, an expert in fiber identification with the State Bureau of Investigation, examined the clothes worn by the victim on the night of the murder, scrapings removed from the victim's fingernails, the black coat obtained from the search of defendant's home and the yellow chair leg which had been found at the crime scene. His comparison of these objects revealed that numerous fibers on the victim's green jacket "could have come from the same source" as the material in the black coat recovered from defendant's home. According to Bendura, these fibers were unique in shape and color. Bendura further testified that fibers

removed from the victim's fingernails matched and could have come from the same source as the black coat, and that a white fiber found on the yellow chair leg was consistent with and could have come from the polyester lining inside the coat. Finally, a red fiber located on defendant's coat was consistent with the material in the lining of the victim's jacket.

Francis Doster was employed by The Trading Post, a store in Concord, North Carolina, during the month of February 1982. Doster testified that defendant came into the store in February wearing a black coat similar to the one identified as being worn by him on the night of 3 April. Doster observed a bulge in the coat and noticed what appeared to be the end of a club protruding from the bottom of it. The coat recovered from defendant's home on 4 April had an opening cut in the lining which would accommodate a club of the type found near Smith's body at the crime scene.

Daniel Benton was called as a witness for the State. Earlier on 4 April 1982, Benton had given a statement to Detective Andrade in which he admitted being with defendant on the night of the murder until around 10:00 p.m. He also told the detective that defendant had made several remarks about robbing the victim and that he observed a "bulge" in defendant's black suede coat. Benton testified at trial, however, that he and defendant passed the pool hall at around 11:00 p.m. on their way to a college dance, but that defendant said nothing about robbing Calvin Smith. He also denied that defendant was carrying anything noticeable under his coat. When Benton began delivering this "changed" testimony, the trial court granted the State's motion for a *voir dire* hearing. After hearing testimony from Daniel Benton and Detective Andrade out of the presence of the jury, the trial court found as a fact that the State was surprised by the change in Benton's testimony and allowed the prosecutor to impeach Benton by introducing into evidence the prior inconsistent statement.

Defendant offered the testimony of Dennis Stark, an employee at a local clothing store. Stark testified that the store carried jackets identical to that recovered from defendant's home by police on 4 April. He stated that at one time the store had about forty-five similar jackets in stock and that he had himself sold at least two of them.

Defendant also took the stand and testified that he did not see Robert or Teresa Moose on the night of 3 April. He stated that around 10:00 p.m. he went to a dance with Benton at Barber Scotia College where he remained until about 1:00 a.m. He specifically denied making statements to the effect that he planned to rob Calvin Smith and disclaimed any knowledge of the robbery and murder.

Finally, defendant presented the testimony of Evans Wilson, Jr., who stated that he saw defendant at the dance at Barber Scotia College between 11:30 p.m. and midnight on 3 April 1982.

Defendant was convicted of first-degree murder in perpetration of a felony.

The trial court conducted a sentencing hearing as required by N.C.G.S. 15A-2000 *et seq.* before the same jury. The jury was, however, unable to agree as to its sentencing recommendation and in accordance with N.C.G.S. 15A-2000(b), the trial judge imposed a sentence of life imprisonment.

Defendant appealed to this Court as a matter of right pursuant to N.C.G.S. 7A-27(a).

Rufus L. Edmisten, Attorney General, by Christopher P. Brewer, Assistant Attorney General, for the State.

William D. Arrowood and Edwin H. Ferguson, Jr., for defendant-appellant.

BRANCH, Chief Justice.

Defendant's first, second, third and seventh assignments of error will be considered together as each involves the same issue of law, that is, whether the trial court erred in permitting the State to impeach its witness Daniel Benton by his prior inconsistent statements. Specifically, defendant contends the trial judge's finding that the State was "surprised" by the change in Benton's testimony at trial is unsupported by the evidence.

[1] The general rule of law applicable to this case is that the State may not impeach its own witness through the use of prior

inconsistent statements.[1] *See State v. Cope*, 309 N.C. 47, 305 S.E. 2d 676 (1983); *State v. Anderson*, 283 N.C. 218, 195 S.E. 2d 561 (1973); *State v. Tilley*, 239 N.C. 245, 79 S.E. 2d 473 (1954). An exception to this rule, recognized in *State v. Pope*, 287 N.C. 505, 215 S.E. 2d 139 (1975), allows the State to impeach its own witness when the district attorney "has been misled and surprised by the witness, whose testimony as to a material fact is contrary to what the State had a *right* to expect." *Id.* at 513, 215 S.E. 2d at 145 (emphasis in original). "Surprise" means more than "mere disappointment"; in this context it is defined as "*taken unawares.*" *State v. Smith*, 289 N.C. 143, 158, 221 S.E. 2d 247, 256 (1976) (emphasis in original).

In *Pope*, the Court set forth a procedure which should be followed when the State seeks to invoke the "surprise" exception to the anti-impeachment rule. This procedure was summarized by Justice Exum in the recent case of *State v. Cope*, 309 N.C. 47, 305 S.E. 2d 676 (1983) as follows:

> (1) The state should move "to be allowed to impeach its own witness by proof of his prior inconsistent statements"; (2) the motion should be made as soon as the prosecutor is surprised; (3) the motion "is addressed to the sound discretion of the trial court"; (4) the preliminary questions of whether the prosecutor is surprised and misled as to the witness's expected testimony on a material fact is to be determined in a *voir dire* hearing in the absence of the jury; and (5) "[i]f the trial judge finds that the State should be allowed to offer prior inconsistent statements, his findings should also specify the extent to which such statements may be offered." 287 N.C. at 512-13, 215 S.E. 2d at 145. The Court in *Pope* further noted that prior inconsistent statements are not substantive evidence and are only admitted to show the prosecutor was

1. The new North Carolina Rules of Evidence, which became effective 1 July 1984 and which are fully applicable to all proceedings *commenced after that date*, effect a change in this long-standing anti-impeachment rule. Rule 607 provides that "[t]he credibility of a witness may be attacked by any party, including the party calling him." N.C. Gen. Stat. § 8C-1, Rule 607 (Cum. Supp. 1983). The trial in the instant case began in January 1983 and therefore we apply the rule that a party may not impeach his own witness by evidence of prior inconsistent or contradictory statements, unless the party is surprised and has been misled as to the witness's expected testimony. *State v. Pope*, 287 N.C. 505, 215 S.E. 2d 139 (1975).

surprised by the witness's testimony at trial and to explain why the witness was called by the state. *Id.* at 514, 215 S.E. 2d at 146. Finally, in keeping with the limited purpose for which the prior inconsistent statements may be offered, *Pope* said only statements "made . . . to the State's attorney or to some person whom he specifically instructed to communicate the statement to the attorney" or statements taken in writing by official investigators and furnished to the state's attorney may be used to impeach the witness. *Id.* at 513, 215 S.E. 2d at 145.

309 N.C. at 51, 305 S.E. 2d at 679.

The record reveals that these suggested procedures were scrupulously followed in this case.

The State moved to impeach its own witness, Daniel Benton, as soon as it became clear that the witness had definitely changed his testimony. Judge Long then conducted a *voir dire* hearing to determine whether the prosecutor was surprised or misled as to the witness's expected testimony. At the conclusion of the *voir dire* hearing and after arguments of counsel, the State's motion to impeach the witness Benton was allowed by the court. Judge Long set forth his findings of fact on the issue of "surprise" as follows:

> Let the record show that the Court finds as a fact that the State was surprised by the change in the statements of the witness, Daniel Benton, and that although the State had been told in open court by defense counsel that defendant had made an inconsistent statement [to them] prior to trial, the State was led to believe as recently as a week before trial *and even during trial* by statements of the defendant that he would testify as he had previously given information to the police officer, and that the State *reasonably believed* that the witness would repeat his earlier statements to the officer. And, therefore, the Court would allow impeachment of the witness by showing prior inconsistent statements. However, those statements may not be admitted as substantive evidence, but only as impeachment evidence that is to show or to demonstrate to the jury why the witness was called and the surprise of the State and to refresh his

> memory as to the events which may have occurred on the date or evening in question.

Record, Vol. II at 203-04 (emphasis added).

Our review of the transcript reveals evidence sufficient to support the trial judge's finding that the State had a "right to expect" that the witness Benton would not repudiate his pretrial statements and was therefore "surprised" by his testimony at trial.

Admittedly, at the pretrial hearing on a motion to sequester witnesses the State was informed by defense counsel that Benton had given a statement to defense attorneys which was inconsistent with previous statements he had given to Detective Andrade. For this reason, the trial judge granted defendant's motion to sequester Benton. We are convinced, however, that after learning of Benton's contradictory statement, the State made a diligent effort to determine if Benton intended to change his trial testimony and, as a result of those efforts, reasonably concluded that he would offer testimony consistent with the numerous statements previously given to police officials. Most significantly, during the trial at a lunch recess on the afternoon he was called to testify, Benton reviewed the specifics of his prior statements with the prosecutor and Detective Andrade. At that time, Benton indicated he could utilize a diagram the district attorney had prepared to point out specific locations and to clarify certain matters about which he would be testifying. Defendant himself admitted on *voir dire* that he was still reaffirming his prior statements to "Andrade just before court convened at 2:00" on the day he was called to testify. Record, Vol. II at 154-55.

We hold that the trial judge did not abuse his discretion in declaring Benton a hostile witness and permitting the State to impeach him through the use of prior inconsistent statements. These assignments of error are without merit and are overruled.

[2] We next consider defendant's contention that the trial court erred in denying his motion to suppress a black coat and straw hat which were obtained from a search of his home pursuant to a search warrant. He argues that the affidavit submitted in support of the application for the warrant was insufficient to support a finding of probable cause under the test established in *Illinois v.*

Gates, --- U.S. ---, 103 S.Ct. 2317, *reh'g denied*, --- U.S. ---, 104 S.Ct. 33 (1983), because the "reliability" and "veracity" of the individuals providing information to the officers was not established.

We first note that defendant's citation to *Illinois v. Gates* is inapposite. In *Gates*, the United States Supreme Court enunciated new legal standards to be applied in evaluating the sufficiency of *confidential informants'* tips to supply probable cause. *See State v. Arrington*, 311 N.C. 633, 319 S.E. 2d 254 (1984). In this case, the affidavit set forth the names and addresses of each individual from whom the police obtained information tending to implicate defendant in the crime charged. Therefore, none of the information contained in the affidavit depended upon the reliability of a *confidential informant* and *Gates* is simply inapplicable.

Furthermore, we have reviewed the affidavit submitted by Detective Andrade in this case and are convinced that the information contained therein was sufficient to support the magistrate's determination of probable cause to search defendant's home.

The information contained in the affidavit revealed that three named individuals who had known defendant for some years saw him in front of the pool hall where the victim worked shortly before closing on the night of 3 April 1982. Two of these individuals told Detective Andrade that defendant said he intended to rob Calvin Smith by surprising him and hitting him over the head. Andrade's own investigation tended to show Smith was robbed in the manner in which defendant had suggested to his companions. Finally, Daniel Benton identified the yellow club found next to the victim's body as belonging to defendant and stated he had seen the club in defendant's bedroom as recently as 2 April 1982.

It is clear, then, that the information contained in the affidavit was obtained from numerous named sources as well as the independent investigation conducted by the affiant. The information supplied by the named individuals was remarkably consistent and was in turn corroborated by the results of the law enforcement officers' investigation.

We therefore hold that the affidavit upon which the search warrant was issued "supplie[d] reasonable cause to believe that the proposed search for evidence of the commission of the designated criminal offense [would] reveal the presence upon the described premises of the objects sought and that they [would] aid in the apprehension or conviction of the offender." *State v. Vestal*, 278 N.C. 561, 576, 180 S.E. 2d 755, 765 (1971). *See also State v. Jones*, 299 N.C. 298, 261 S.E. 2d 860 (1980); *State v. Riddick*, 291 N.C. 399, 230 S.E. 2d 506 (1976).

[3] By his next assignment of error, defendant challenges the admission into evidence of the coat and pants worn by the victim on the night he was killed and the red emergency room bag containing them on the ground that the State failed to establish a proper chain of custody of these items.

At trial, the State presented the testimony of Mattie Smith, the deceased's wife. She identified the coat and pants as those her husband was wearing on the night of 3 April 1982.

Phyllis Millan, a registered nurse, stated that she was on duty in the emergency room of Cabarrus County Hospital on the night Calvin Smith was brought there by ambulance for treatment. She testified that she observed and supervised the removal of Smith's coat and shirt, placed them in a red emergency room bag and turned them over to the ambulance driver who transported the victim to Charlotte Memorial Hospital. She identified the coat at trial as the one she had removed from Smith in the emergency room.

Pearl Newell testified that she transported Smith by ambulance to Charlotte Memorial. She stated that she received a red emergency room bag at Cabarrus County Hospital and that she delivered it to emergency room personnel at Charlotte Memorial upon her arrival. Ms. Newell described this procedure as routine. She further recalled that the victim was still wearing his pants, shoes and belt upon his arrival at the Charlotte hospital.

The State also offered the testimony of Jenny Campbell, a patient representative at Charlotte Memorial. Ms. Campbell was responsible for the inventory and safekeeping of the personal belongings of patients entering the emergency room. She testified that in the early morning of 5 April 1982, she retrieved from a

cabinet in the emergency room the red bag containing Calvin Smith's clothing. Campbell stated that she took the bag to her office and inventoried its contents. She found that the bag contained a coat, pants, shirt, shoes and belt, although she stated that the contents were not removed from the bag. Ms. Campbell identified the pants and coat at trial as the same items she inventoried on Monday morning.

Vicky Harding, Ms. Campbell's secretary, stated that she assisted Campbell with the inventory. She recalled that the items were never removed from the bag and that she wrote out an inventory list as Ms. Campbell called out a description of each item. The bag was then reclosed and placed in a closet in Campbell's office. Ms. Harding stated that the bag was not removed from the closet until Detective Andrade arrived to take it into police custody.

Finally, Andrade testified that he took the bag and its contents to the Concord Police Department. The items were then mailed to the State Bureau of Investigation in Raleigh for analysis and were returned to the Concord Police Department on 29 April 1982. The bag containing Calvin Smith's clothing remained in the evidence locker at the police department until trial.

Of the above-described items, only the coat, pants and red emergency room bag were admitted into evidence at trial. It was from the victim's coat that the bulk of the fiber evidence implicating defendant in the commission of the crime was obtained.

We are of the opinion that the State showed a sufficient chain of custody to permit the admission into evidence of the red emergency room bag, the pants, the coat and the results of the fiber analyses performed on them. The victim's coat, which contained the damaging fiber evidence, was never removed from the emergency room bag after being placed there at Cabarrus County Hospital. The possibility that these items were materially changed or altered from their condition on the night the crime occurred "is too remote to have required [the trial court to rule] this evidence inadmissible." *State v. Detter*, 298 N.C. 604, 634, 260 S.E. 2d 567, 588 (1979). Any potentially weak links in the chain of custody relate only to the weight to be given this evidence by the jury. *State v. Montgomery*, 291 N.C. 91, 103, 229 S.E. 2d 572, 580 (1976).

[4] Finally, defendant argues the trial court erred in denying his motion to dismiss the charge of first-degree murder for the reason that the evidence was insufficient as a matter of law to identify him as the perpetrator of the offense. In particular, defendant contends the fiber evidence, while admissible, is "the sole evidence of any significant or creditable nature connecting [him] to the crime."

In addressing defendant's argument on this issue, we do not deem it necessary to repeat here the facts of this case. Suffice it to say that the evidence tending to implicate defendant was by no means limited to the testimony offered by the expert in fiber analysis, John Bendura. Applying the familiar test of the sufficiency of the evidence, and considering the evidence in the light most favorable to the State, 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 (1983). We therefore hold that the trial judge properly denied defendant's motion to dismiss.

Defendant received a fair trial free of prejudicial error.

No error.

NEWS AND OBSERVER PUBLISHING COMPANY v. STATE OF NORTH CAROLINA, *EX REL.* HAYWOOD STARLING, DIRECTOR OF THE STATE BUREAU OF INVESTIGATION

THE COUNTY OF WAKE v. STATE OF NORTH CAROLINA, *EX REL.* HAYWOOD STARLING, DIRECTOR OF THE STATE BUREAU OF INVESTIGATION, IN HIS OFFICIAL CAPACITY

DR. JOHN A. MURPHY v. STATE OF NORTH CAROLINA, *EX REL.* HAYWOOD STARLING, DIRECTOR OF THE STATE BUREAU OF INVESTIGATION, IN HIS OFFICIAL CAPACITY

No. 1PA84

(Filed 6 November 1984)

1. **Bills of Discovery § 5; Public Records § 1— public access to S.B.I. records— when permitted**

The statute providing that S.B.I. records and evidence are not public records but "may be made available to the public only upon an order of a court of competent jurisdiction," G.S. 114-15, permits a member of the public to obtain access to S.B.I. records only when such person is entitled to access under one of the procedures already provided by law for discovery in civil or criminal cases. The opinion in *State v. Goldberg*, 261 N.C. 181 (1964) is disapproved to the extent that it can be read as implying that trial courts are given unfettered discretion by G.S. 114-15 to make S.B.I. records and evidence public.

2. **Public Records § 1— S.B.I. report—no access by newspaper publisher**

A newspaper publishing company was not entitled to access to an S.B.I. report on a criminal investigation of a former school superintendent where the publishing company did not appear before the court as a defendant in a criminal case, and where the publishing company did not seek the S.B.I. report on the ground that it was reasonably calculated to lead to the discovery of admissible evidence to be used in the trial of any pending action but sought access only due to its desire to know and publish the contents of the report.

3. **Constitutional Law § 18; Public Records § 1— access to S.B.I. report—no constitutional right**

Members of the public do not have a First Amendment right of access to an S.B.I. report on the criminal investigation of a former school superintendent.

ON discretionary review of a decision by the Court of Appeals, 65 N.C. App. 576, 309 S.E. 2d 731 (1983), affirming an order entered September 24, 1983 by *Judge James H. Pou Bailey* in

Superior Court, WAKE County. Heard in the Supreme Court April 10, 1984.

Sanford, Adams, McCullough & Beard, by H. Hugh Stevens, Jr., and Nancy Bentson Essex, for the plaintiff appellee, The News and Observer Publishing Company.

Rufus L. Edmisten, Attorney General, by Andrew A. Vanore, Jr., Senior Deputy Attorney General, J. Michael Carpenter, Assistant Attorney General, and Daniel C. Higgins, Assistant Attorney General, for the State.

MITCHELL, Justice.

[1] The issues raised by this appeal concern the circumstances under which members of the public are to be given access to records of the State Bureau of Investigation [hereinafter "S.B.I."]. Our analysis of these issues rests upon our interpretation of N.C.G.S. 114-15 which provides that S.B.I. records and evidence are not public records but may be made available to the public "only upon an order of a court of competent jurisdiction." Because we believe that the legislature intended the statute to be a limitation upon access to S.B.I. records, we reverse the decision of the Court of Appeals which affirmed the order of the trial court making S.B.I. records in the present case public. We hold that access to S.B.I. records by members of the public may be obtained only under one of the procedures already provided by law for discovery in civil or criminal cases.

The facts of this case are not in serious dispute. On March 4, 1981, The Honorable Randolph Riley, District Attorney for the Tenth Prosecutorial District, requested that the S.B.I. conduct a criminal investigation into the conduct and activities of Dr. John A. Murphy, covering the entire period during which Murphy served as Superintendent of The Wake County Schools. After a fourteen month investigation, an S.B.I. report containing information gathered during the criminal investigation was prepared and transmitted to District Attorney Riley on June 17, 1982. On October 24, 1982, Riley announced that he had reviewed the report and found no grounds for prosecution.

The petitioner-appellee, The News and Observer Publishing Company [hereinafter "News and Observer"] publishes two daily

newspapers of general circulation. On August 26, 1982, the News and Observer petitioned the Superior Court, Wake County, under N.C.G.S. 114-15 for an order directing Haywood Starling, Director of the S.B.I., to release the S.B.I. records of the criminal investigation of Murphy. Similar petitions were filed on behalf of the County Commissioners of Wake County and on behalf of Murphy.

After a consolidated hearing on the petitions, the trial court entered an order directing that the S.B.I. records be made public. The order included findings stating that the public interest in having the information sought outweighed the interest of the S.B.I. in retaining its confidentiality. The State gave oral notice of appeal and requested a stay of the order pending appeal. The trial court granted the motion for stay.

The Court of Appeals affirmed the order of the trial court making the S.B.I. records public. The State petitioned this Court for a writ of supersedeas and for discretionary review. We allowed the petition for the writ of supersedeas on January 4, 1984 and the petition for discretionary review on February 2, 1984. Although the County Commissioners joined the News and Observer in appealing to the Court of Appeals, the County did not file a brief or otherwise participate in the appeal to this Court. Dr. Murphy has participated in neither appeal.

By several assignments of error, the State contends that the trial court erred in ordering that the S.B.I. records be made public. The State also argues that the opinion of the Court of Appeals sets a dangerous precedent which will severely hamper the ability of the State to investigate violations of criminal law. The News and Observer, on the other hand, contends that the Court of Appeals was correct in its holding that the decision to order disclosure of S.B.I. records was a matter within the trial court's discretion and could be reversed only upon a showing of abuse of discretion.

Under our statutory scheme, access to documents, papers and files in the possession of public agencies generally is controlled by the Public Records Act, N.C.G.S. 132-1 to 132-9, and by applicable rules of criminal and civil discovery. The Public Records Act defines "public records" as all documents, papers, letters, maps, books and other documentary material "made or

received pursuant to law or ordinance in connection with the transaction of public business by any agency of North Carolina government or its subdivisions." N.C.G.S. 132-1. Such public records must be open for public inspection at reasonable times. N.C.G.S. 132-6.

Records of the S.B.I., however, are expressly exempted from classification as public records by N.C.G.S. 114-15, which states in pertinent part the following:

> All records and evidence collected and compiled by the Director of the Bureau and his assistants shall not be considered public records within the meaning of G.S. 132-1, and following, of the General Statutes of North Carolina and may be made available to the public only upon an order of a court of competent jurisdiction.

We must decide in the present case what the legislature intended in allowing S.B.I. records to be "made available to the public only upon an order of a court of competent jurisdiction." In determining the legislative intent, we must first review common law and constitutional provisions for access to such records. This is so because common law and constitutional underpinnings of the right to access to such records are pertinent to the issue of legislative intent. *See State v. Emery*, 224 N.C. 581, 31 S.E. 2d 858 (1944).

At common law neither criminal nor civil litigants had any absolute rights to pretrial discovery. In a number of cases this Court has clearly stated that no right of discovery in criminal cases was recognized at common law. *E.g., State v. Hardy*, 293 N.C. 105, 235 S.E. 2d 828 (1977); *State v. Hoffman*, 281 N.C. 727, 190 S.E. 2d 842 (1972); *State v. Goldberg*, 261 N.C. 181, 134 S.E. 2d 334, *cert. denied*, 377 U.S. 978 (1964). The Supreme Court of the United States has recognized, however, that the Constitution of the United States provides *the defendant in a criminal case* with rights to obtain certain types of evidence from the prosecution before trial. *See generally, e.g., California v. Trombetta*, --- U.S. ---, 104 S.Ct. 2528 (1984); *United States v. Agurs*, 427 U.S. 97 (1976); *Brady v. Maryland*, 373 U.S. 83 (1963). Since no defendant in a criminal case is involved here, we need not examine further the rights of criminal defendants to access to documents in the hands of the State.

In civil actions the common law provided no means by which a party could be compelled to produce documents in his possession as a part of discovery. 27 C.J.S. *Discovery* § 1 (1959). Equity provided the remedy of discovery. *Id. See Vann v. Lawrence*, 111 N.C. 32, 15 S.E. 1031 (1892); *Coates Brothers v. Wilkes*, 92 N.C. 376, 386 (1885). Such discovery was allowed only when it was incidental to other relief. Courts of equity never, however, granted discovery merely to gratify curiosity. 27 C.J.S. Discovery § 2 (1959). At common law, information given to the government concerning alleged violations of criminal law was treated as a type of state secret to which the public was not entitled to have access. 27 C.J.S. *Discovery* § 5 (1959).

Statutes have now replaced the former equitable rights of discovery and bills of discovery in equity have been abolished. *Beck v. Wilkins Ricks Co.*, 186 N.C. 210, 119 S.E. 235 (1923). Civil discovery is now governed by statute. The Supreme Court of the United States has indicated that rules governing discovery in civil cases are a matter of legislative grace. *Seattle Times Co. v. Rhinehart*, --- U.S. ---, 104 S.Ct. 2199 (1984). Civil litigants then enjoy no absolute right to discovery of documents in the hands of others.

Another means which developed for gaining access to documents derived from the statutory and common law provisions for disclosure of public documents. At common law citizens had a right to inspect public documents, but the right was subject to numerous limitations. 76 C.J.S. *Records* § 35 (1952). The right was not absolute, and courts often held that it was limited to persons having a special interest. No right of inspection of public documents existed when inspection was sought merely to satisfy curiosity. *Id.*

In 1887 this Court recognized the public's right of access to public documents in a case involving inspection of records in the office of a register of deeds. We stated that all persons have the right to inspect public records without charge, but that a person who has no interest in the records "for the prosecution of his business" may not take copies without paying a fee. *Newton v. Fisher*, 98 N.C. 20, 23, 3 S.E. 822, 824 (1887).

Even in jurisdictions recognizing the right of members of the public to inspect public documents, however, an exception pre-

venting disclosure of police records generally has been recognized. *See, e.g., Whittle v. Munshower*, 221 Md. 258, 261, 155 A. 2d 670, 671-72 (1959), *cert. denied*, 362 U.S. 981 (1960); *Lee v. Beach Publishing Co.*, 127 Fla. 600, 604, 173 So. 440, 442 (1937); *People v. Wilkins*, 135 Cal. App. 2d 371, 377-78, 287 P. 2d 555, 559 (1955). Absent a statute requiring disclosure, police records generally are held confidential. *See* 66 Am. Jur. 2d, *Records and Recording Laws*, § 27 (1973). Reports based on criminal investigations have been held not to be subject to disclosure because they are often based on hearsay and for reasons of confidentiality. 66 Am. Jur. 2d, *Records and Recording Laws*, § 29 (1973); *see generally* Annot., 82 A.L.R. 3d 19 (1978).

As can be seen from the foregoing, neither parties to civil or criminal cases nor members of the public seeking access to public documents enjoyed any absolute common law right to the discovery of documents or to access to public records. Any such rights were limited and were always subject to exceptions for records concerning police investigations.

Discovery in criminal and civil cases and access to public records are now governed in this State by statute. *See, e.g.*, N.C.G.S. 15A-901 to 910 (criminal discovery); N.C.G.S. 1A-1, Rules 26 to 37 (civil discovery); N.C.G.S. 132-1 to 132-9 (access to public records). When the General Assembly as the policy making agency of our government legislates with respect to the subject matter of any common law rule, the statute supplants the common law and becomes the law of the State. *McMichael v. Proctor*, 243 N.C. 479, 91 S.E. 2d 231 (1956). Therefore, rights of access to S.B.I. records are no longer governed by common law principles but, instead, fall within the dictates of the applicable statutes.

The common law right of access to public records was made statutory in this State for the first time in 1935. 1935 N.C. Sess. Laws ch. 265, § 1. Although this Court has not had occasion to interpret the Public Records Act, N.C.G.S. 132-1 to 132-9, it is clear that the legislature intended to provide that, as a general rule, the public would have liberal access to public records. *Advance Publications v. City of Elizabeth City*, 53 N.C. App. 504, 281 S.E. 2d 69 (1981). Nevertheless, in N.C.G.S. 114-15 the General Assembly specifically provided that S.B.I. records and evidence "shall not be considered public records within the meaning of G.S.

132-1 and following." When as here the language of a statute is clear and unambiguous, there is no room for judicial construction, and courts must give the statute its plain meaning. *In re Banks*, 295 N.C. 236, 244 S.E. 2d 386 (1978). It is clear that S.B.I. records are not public records and that access to them is not available under N.C.G.S. 132-1 to 132-9, the Public Records Act. Instead, access to S.B.I. records is controlled entirely by N.C.G.S. 114-15.

We turn then to the proper interpretation to be given N.C. G.S. 114-15. In doing so we note that every statute is to be interpreted in light of the Constitution and laws as they were understood at the time of enactment. *State v. Emery*, 224 N.C. 581, 31 S.E. 2d 858 (1944). That part of N.C.G.S. 114-15 pertinent to the confidentiality of S.B.I. records was enacted in 1947. 1947 N.C. Sess. Laws ch. 280, § 1. Since the right of public access to public records had been granted by statute in 1935, we construe N.C.G.S. 114-15 as intended to limit the broad scope of the earlier enacted Public Records Act. In determining the extent to which the legislature intended N.C.G.S. 114-15 to limit access to S.B.I. records, we must review the generally recognized reasons for prohibiting public access to such records.

Courts have given almost universal recognition to certain reasons for excluding police and investigative records from the operation of statutory rights of public access. Reports based on criminal investigations are often exempt from disclosure because they are based on hearsay and consist largely of the opinions and conclusions of the investigators. *See Mathews v. Pyle*, 75 Ariz. 76, 251 P. 2d 893 (1952). The need for protection of confidentiality of government informants and the protection of investigative techniques used by law enforcement agencies also have been generally accepted as justifying prohibitions on disclosure of police and investigative records. *See Bougas v. Chief of Police*, 371 Mass. 59, 354 N.E. 2d 872 (1976). As stated in *Aspin v. Department of Defense*, 491 F. 2d 24 (D.C. Cir. 1973):

> It is clear that if investigatory files were made public subsequent to the termination of enforcement proceedings, the ability of any investigatory body to conduct future investigations would be seriously impaired. Few persons would respond candidly to investigators if they feared that their remarks would become public record after the proceedings.

> Further, the investigative techniques of the investigating body would be disclosed to the general public.

491 F. 2d at 30; *see also Frankel v. SEC*, 460 F. 2d 813 (2d Cir.), *cert. denied*, 409 U.S. 889 (1972). An equally important reason for prohibiting access to police and investigative reports arises from recognition of the rights of privacy of individuals mentioned or accused of wrongdoing in unverified or unverifiable hearsay statements of others included in such reports. *In re Investigation by Attorney General*, 30 N.C. App. 585, 227 S.E. 2d 645 (1976); *see also Houston Chronicle Publishing Co. v. Houston*, 531 S.W. 2d 177 (Tex. Civ. App. 1975).

We assume that the legislature considered the foregoing reasons for denying access to police records, as well as the common law and statutory history concerning such access, when it enacted the statute declaring S.B.I. records not to be public and, thereby, exempted them from disclosure under the Public Records Act. We find further support for our conclusion that, in passing N.C.G.S. 114-15, the legislature intended to limit access to S.B.I. records to those procedures already available at law from the fact that even District Attorneys were given only very limited access to such records. The District Attorneys who have the constitutional and statutory duty to prosecute criminal cases in this State have a right of access to S.B.I. records, but only if such records concern persons or investigations in their respective districts. N.C.G.S. 114-15. Therefore, we hold that N.C.G.S. 114-15 grants no new right whatsoever to access to S.B.I. records. The statute makes it clear that S.B.I. records are not public records, and access to them by parties, other than District Attorneys, may be permitted "only upon an order of a court of competent jurisdiction" when those parties are *otherwise entitled by statute to access*. We further hold that such access is available only under our statutory procedures for discovery in civil or criminal cases. *See, e.g., Blumkin v. New York*, 183 Misc. 31, 47 N.Y.S. 2d 492 (1944).

To the extent that our opinion in *State v. Goldberg*, 261 N.C. 181, 134 S.E. 2d 334, *cert. denied*, 377 U.S. 978 (1964) can be read as implying that our trial courts are given unfettered discretion by N.C.G.S. 114-15 to make S.B.I. records and evidence public, that opinion is expressly disapproved. The discretion possessed by our trial courts in this regard is limited to that necessary to

the performance of their duties in applying the statutory procedures for civil and criminal discovery.

[2] The News and Observer did not appear before the Superior Court as a defendant in a criminal case. Therefore, it was not entitled to discovery under the procedures applicable in criminal cases. *See generally* N.C.G.S. 15A-902 to 910. The rules permitting discovery in civil cases also were unavailable to the News and Observer. *See generally* N.C.G.S. 1A-1, Rules 26 to 37. Those rules are designed to allow discovery only when the information sought is "reasonably calculated to lead to the discovery of admissible evidence" to be used in the trial of the action in which discovery is sought. *See* N.C.G.S. 1A-1, Rule 26(b)(1). In the instant case, the News and Observer petitioned the Superior Court seeking as its sole relief the disclosure of the S.B.I. records of the investigation of Dr. Murphy. It is clear that the News and Observer did not seek the S.B.I. records on the ground that they were reasonably calculated to lead to the discovery of admissible evidence to be used in the trial of any pending action. Instead, it sought access to the S.B.I. records only due to its desire to know and publish the contents. Although Rule 26 is to be construed liberally, it does not allow one person "to roam at will in the closets of the other." *Willis v. Power Co.*, 291 N.C. 19, 34, 229 S.E. 2d 191, 200 (1976).

We have construed N.C.G.S. 114-15 as providing any member of the public a right of access to S.B.I. records, but only when such person is entitled to access under the statutory procedures for discovery in criminal or civil cases. The News and Observer had no right to discovery under any of those procedures. Therefore, we must reverse the holding of the Court of Appeals which affirmed the order of the trial court requiring the Director of the S.B.I. to disclose the S.B.I. records of the investigation of Dr. Murphy.

[3] The News and Observer further argues, however, that even if it is not entitled to access to the S.B.I. records under N.C.G.S. 114-15, it or any member of the public has a constitutional right of access to them. It argues that the First Amendment goes beyond the protection of the press and requires the government to allow public access to such records when they are of legitimate public interest. In support of this argument, the News and Observer

relies upon several decisions of the Supreme Court of the United States holding that the press and members of the public have a right of access to places or events traditionally open to the public. *See, e.g., Press Enterprise Co. v. Superior Court*, --- U.S. ---, 104 S.Ct. 819 (1984) (jury *voir dire*); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982) (child sex offense victim's testimony); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980) (criminal trials).

Although we recognize the general right of the public to have access to information about the actions of public agencies, the legislature still may properly limit the right of public access in appropriate cases. We take guidance from cautionary language in a concurring opinion by Justice Brennan in *Richmond Newspapers*. In discussing cases involving access to public records, Justice Brennan stated that:

> Read with care and in context, our decisions must therefore be understood as holding only that any privilege of access to governmental information is subject to a degree of restraint dictated by the nature of the information and the countervailing interest in security or confidentiality.

448 U.S. at 586 (Brennan, J., concurring). "The right to speak and publish does not carry with it the unrestrained right to gather information." *Zemel v. Rusk*, 381 U.S. 1, 17, *reh. denied*, 382 U.S. 873 (1965). *See generally Saxbe v. Washington Post Co.*, 417 U.S. 843 (1974) (restrictions on access to prisons); *Pell v. Procunier*, 417 U.S. 817 (1974) (same).

Courts in several States, when faced with constitutional challenges similar to those raised here by the News and Observer, have upheld restrictions on disclosure of police reports similar to the restrictions on disclosure of S.B.I. records we have found N.C.G.S. 114-15 to include. *See, e.g., New Bedford Standard Times Publishing Co. v. Clerk of Third District Court*, 377 Mass. 404, 387 N.E. 2d 110 (1979); *Houston Chronicle Publishing Co. v. Houston*, 531 S.W. 2d 177 (Tex. Civ. App. 1975); *Black Panther Party v. Kehoe*, 42 Cal. App. 3d 645, 117 Cal. Rptr. 106 (1974); Annot. 82 A.L.R. 3d 19 (1978). We share their view and hold that the restrictions we have found to be embodied in N.C.G.S. 114-15 limiting disclosure of S.B.I. records do not violate any rights

guaranteed by the First Amendment to the Constitution of the United States.

For the foregoing reasons, the decision of the Court of Appeals is reversed. The case is remanded to the Court of Appeals with instructions to vacate the order of the trial court requiring the disclosure of S.B.I. records.

Reversed and remanded.

STATE OF NORTH CAROLINA v. WILLIAM LEE HANNAH

No. 56A84

(Filed 6 November 1984)

1. **Criminal Law § 66.9— pretrial photographic identification—not impermissibly suggestive—no violation of due process**

The trial court properly concluded that a pretrial photographic identification procedure did not violate defendant's due process rights where there was plenary evidence to support the court's findings that the witness did not know of any suspect or that anyone was in custody when he made the identification, that the witness sat at a desk and observed eight photographs of eight white males with facial hair, that the witness was told that the suspect might or might not be in the lineup, that the officer left the presence of the witness, and that the witness selected a picture of defendant about five minutes after first observing the pictorial lineup.

2. **Criminal Law § 66.12— identification at probable cause hearing—defendant seated at defense table—not unduly suggestive**

Although a witness observed defendant at the defense table during a probable cause hearing, the trial court correctly ruled that the identification at the hearing was not unduly suggestive or violative of defendant's due process rights because the witness had already identified defendant from a pictorial lineup.

3. **Criminal Law § 66.1— opportunity for observation by witness—sufficient**

There was not a substantial likelihood of misidentification by the witness where the court found that: the witness's opportunity to observe defendant was somewhat impaired by darkness and rain, but he viewed defendant in the light of his headlights and was able to observe that defendant appeared drunk; the witness observed defendant for a period of time for the purpose of determining whether he needed help; the witness was able to see the right side of defendant's face and watched him long enough to see him walk from the front of his vehicle to the rear, open the trunk, get something out of the trunk, and close it; the witness described defendant's size and age; the witness observed

facial hair and a leather wallet with a chain; and the witness selected defendant's picture five minutes after being shown a photographic lineup of eight men eight days after observing defendant.

4. **Criminal Law § 66.1— opportunity for observation by witness—credibility and weight of testimony determined by jury**

Where there is a reasonable possibility of observation sufficient to permit subsequent identification, although the period of observation is brief, the credibility of the witness and the weight to be given his identification testimony is for the jury to decide.

5. **Criminal Law § 66.17— request for stipulation in presence of witness—defendant's fingerprints at scene—no prejudice**

There was no prejudice when the district attorney tendered, in the presence of the identification witness, a stipulation that defendant's fingerprints had been found in the victim's car because the witness had already identified defendant in a non-suggestive identification procedure and in a *voir dire*.

6. **Criminal Law § 68— hair sample comparison—relevant**

Testimony that a hair found in the sheet knotted around the victim's neck was consistent with a hair taken from defendant and inconsistent with the victim's hair was relevant because it tended to place defendant in the victim's presence at the time of the murder. The condition of the body when found was made no more inflammatory by the fact that a head hair consistent with defendant's was found on the body.

7. **Criminal Law § 169— technically incompetent evidence—no effect on result—no prejudice**

There was no prejudice from the admission of testimony about a pubic hair sample taken from defendant, although a comparison with a pubic hair found on the victim was excluded, because there was other compelling evidence of defendant's guilt. Where there is abundant evidence to support the main contentions of the State, the admission of technically incompetent evidence will not be held prejudicial where the defendant does not show prejudice or that the admission of the evidence could have affected the result.

8. **Criminal Law § 43.4— admission of photographs of crime scene—no error**

There was no error from the admission of photographs showing the victim's nude body with a sheet tied around her neck where the use of photographs was limited to illustrating testimony and the photographs were neither excessive in number nor unduly inflammatory.

APPEAL by Defendant from *Judge Gaines* at the 6 September 1983 Criminal Session of Superior Court, CATAWBA County.

Defendant was charged in indictments, proper in form, with first-degree burglary, felonious breaking and entering of a motor vehicle, felonious larceny of an automobile and first-degree murder. He entered a plea of not guilty to each charge.

Evidence for the State tended to show that on 15 April 1983 at approximately 5:30 p.m., Robert and Sherry Smith, family friends of the deceased, discovered the nude body of Iris Cleo Lehman on her bedroom floor. A twisted bedsheet was knotted around Mrs. Lehman's neck. The Smiths notified the authorities who came to the scene. Local police and SBI agents discovered that all of the windows in the victim's house were closed except for the window leading into a front bedroom. They found freshly disturbed dirt and mud outside that window and also found mud on a bedspread inside the house. Officers lifted fingerprints inside the house on the windowsill and on the telephone which were later identified as being defendant's fingerprints. There was no evidence of sexual activity.

David Leatherman, a neighbor of the deceased, last saw her alive at approximately 6:30 p.m. on 14 April 1983. At that time, Mrs. Lehman's car was in her carport. Sometime after 11:00 p.m. on the same night Mr. Leatherman heard a noise and upon looking toward the Lehman house, he observed that the lights were off. About 30 to 45 minutes later, he heard a noise that sounded like tires squealing. The following morning, at around 6:00 a.m., Mr. Leatherman noticed that the Lehman car was not in the carport.

Around 11:20 p.m. on the night of 14 April 1983, Donald Killian, who lived near Hickory on Section House Road, heard a vehicle hit a railroad tie in front of his house and heard a sound similar to that of a tire blowing out. Mr. Killian got in his car and drove down Section House Road to see if anyone was hurt. He observed a car and a man he later identified as the defendant changing a tire. The car was a yellowish Ford LTD with a vinyl top. The man who appeared to Mr. Killian to be drunk had long dark hair and facial hair. He was wearing a baseball cap, blue jeans and a jacket and was carrying a wallet with a chain attached. Mr. Killian thereafter selected defendant's picture from a photographic lineup as the man he saw on the night of 14 April 1983.

A yellowish Ford LTD registered in the name of Iris Cleo Lehman was found stuck in the yard of Colleen Blackburn on the morning of 15 April 1983. Mrs. Blackburn, who also lived on Section House Road, had heard a crash and the sound of wheels spin-

ning at about 12:30 to 1:00 a.m. on the morning of 15 April. The defendant's fingerprints were found on the steering wheel of the Ford automobile which was later identified as Mrs. Lehman's car. Officers obtained a white and red baseball cap and a wallet with a chain during a search of defendant's home on 19 April 1983. Defendant made a statement to the officers that he had not been in Mrs. Lehman's bedroom and that he had not been in her automobile.

At the close of the State's evidence the trial judge ruled that the charge of breaking and entering an automobile was merged with the charge of felonious larceny of an automobile.

Defendant offered nine witnesses, mostly family members, who gave evidence in the nature of an alibi. The witnesses testified that defendant was either asleep or on trips to nearby convenience stores from the afternoon of 14 April 1983 to the late morning of 15 April 1983. Two convenience store managers also testified that they had seen defendant, along with others, in their stores playing video games between 10:00 and 11:00 p.m. on 14 April 1983.

The jury returned verdicts of guilty of murder in the first degree, guilty of first-degree burglary and guilty of felonious larceny of an automobile. The trial judge entered judgment imposing sentences of life imprisonment upon the verdict of guilty of murder in the first degree, fourteen years imprisonment upon the verdict of guilty of first-degree burglary and three years imprisonment upon the verdict of guilty of larceny of an automobile, the sentences for burglary and larceny of an automobile to run consecutively.

The defendant appealed to this Court as a matter of right from his sentence of life imprisonment and we allowed his Motion to Bypass the Court of Appeals on the burglary and larceny convictions on 4 April 1984.

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

Keith Bridges for the defendant-appellant.

BRANCH, Chief Justice.

By his first assignment of error, defendant challenges the witness Donald Killian's in-court identification testimony. He contends that the circumstances under which the witness observed the person on Section House Road were conducive to misidentification. He further argues that a pretrial photographic identification procedure and a pretrial in-court confrontation were so impermissibly suggestive as to taint the witness's identification testimony at trial and to render inadmissible any evidence as to the photographic identification and the pretrial in-court confrontation.

This Court has consistently held that identification procedures which are so impermissibly suggestive as to give rise to a very substantial likelihood of misidentification violate a defendant's right to due process. *State v. Grimes*, 309 N.C. 606, 308 S.E. 2d 293 (1983); *State v. Harris*, 308 N.C. 159, 301 S.E. 2d 91 (1983). This Court employs a two-step process in evaluating such claims of denial of due process. First we must determine whether an impermissibly suggestive procedure was used in obtaining the out-of-court identification. If this question is answered in the negative, we need proceed no further. *State v. Leggett*, 305 N.C. 213, 287 S.E. 2d 832 (1982). If it is answered affirmatively, the second inquiry is whether, under all the circumstances, the suggestive procedures employed gave rise to a substantial likelihood of irreparable misidentification. *Id.*; *State v. Headen*, 295 N.C. 437, 245 S.E. 2d 706 (1978).

[1] We first address defendant's contention that the pretrial identifications were impermissibly suggestive. The test is whether the totality of the circumstances reveals a pretrial procedure so unnecessarily suggestive and conducive to irreparable mistaken identity as to offend fundamental standards of decency and justice. *State v. Grimes*, 309 N.C. 606, 308 S.E. 2d 293 (1983); *State v. Leggett*, 305 N.C. 213, 287 S.E. 2d 832 (1982).

The defendant contends that the pretrial photographic identification procedure was conducted in an impermissibly suggestive way. Defendant points to Mr. Killian's testimony that he was able to eliminate more than half of the photographs in the photographic lineup because of hair color or a lack of facial hair.

On *voir dire* the trial court concluded, after finding facts, that the photographic identification procedure did not violate defendant's due process rights. The trial court's findings of fact when supported by competent evidence are binding on this Court on appeal. *State v. Corbett*, 309 N.C. 382, 307 S.E. 2d 139 (1983). Those findings with regard to the photographic identification procedure were as follows:

> [T]hereafter he [Killian] went back on the 22nd of April, 1983 and that at that time the witness talked with Officer Setzer and that he was not aware at that time that anyone was in custody for the offense the defendant is charged for or with today; that Officer Setzer talked with the witness but in no way indicated to Mr. Killian the identity of any suspect which the Newton Police Department may have had in the matter; nine, that Officer Setzer asked the witness, Killian, to sit at his desk and placed before the witness a pictorial lineup consisting of eight photographs in color of eight white males all of whom had some facial hair and that Officer Setzer directed the witness not to pick up the photographs or touch them in any way; that the pictures were in a folder in which they were placed; that Officer Setzer requested the witness to observe the pictorial lineup, that the person suspected of taking the vehicle may be in the lineup or that the person may not be in the lineup; that Officer Setzer then left the presence of the witness, Killian and was gone for about ten to fifteen minutes and that approximately five minutes after the witness first observed the pictorial lineup, that he selected a photograph, number six, as being the photograph of the person that he observed on the unnamed street on . . . April 14, 1983.
>
> Ten, that the picture in the pictorial lineup, number six, is a picture of the defendant in this case, William Lee Hannah.

Our examination of the record evidence and the photographs used in the pretrial photographic procedure fails to disclose any substantial evidence of impermissible suggestiveness. To the contrary there is plenary evidence to support the trial judge's findings and conclusions that the photographic procedure did not violate defendant's due process rights.

[2] We next consider defendant's contention that the identification made by the witness in the preliminary hearing was impermissibly suggestive because defendant was seated at the defense table and was wearing prison clothes.

We have held that the viewing of a defendant in a courtroom during varying stages of a criminal proceeding by witnesses who are offered to testify as to the identity of the defendant is not in and of itself such a confrontation as will taint an in-court identification unless other circumstances are shown which are so "unnecessarily suggestive and conducive to irreparable mistaken identification" as would deprive defendant of his due process rights. *State v. Covington*, 290 N.C. 313, 324, 226 S.E. 2d 629, 638 (1976); *State v. Bass*, 280 N.C. 435, 186 S.E. 2d 384 (1972).

The trial court's findings of fact with regard to the in-court confrontation were that:

> thereafter the defendant appeared in the courtroom with trial proceedings now being held, at a probable cause hearing . . . on May 2, 1983, as indicated by the Court records . . . that a probable cause hearing was conducted and the defendant was present at the defense table and that the presence of the defendant at the defense table was for the purpose of the parties participating in a preliminary hearing and at that time the witness, Killian, observed the defendant at the hearing; that he had already made an identification of the defendant in the case from the pictorial lineup exhibited to him on April 22, 1983.

Defendant has shown no "other circumstances" which would convert the witness's view of defendant at the preliminary hearing into an unnecessarily suggestive confrontation. Further, there was ample evidence to support the trial judge's findings which in turn support his conclusion that the pretrial in-court identification was not unnecessarily suggestive or violative of defendant's due process rights. The trial court correctly ruled that the pretrial in-court confrontation was admissible.

Having determined that no impermissibly suggestive procedure was used in the courtroom confrontation, or in the photographic identification procedure, it follows that neither procedure could give rise to a "substantial likelihood of irreparable mis-

identification." *State v. Leggett*, 305 N.C. 213, 287 S.E. 2d 832 (1982).

[3] Even so, defendant argues that there was a substantial likelihood of misidentification because of the circumstances under which the witness observed a person on Section House Road on 14 April 1983. We find this contention to be without merit.

In this connection the trial court found that although Mr. Killian's opportunity to observe the man on Section House Road was somewhat impaired by darkness and rain, he viewed the man in the light of his headlights and was able to determine that the man appeared to be drunk. Mr. Killian observed the man for a period of time for the purpose of determining whether he needed help. He was able to see the right side of the man's face, and watched him long enough to see him walk from the front of the vehicle to the rear, open the trunk, get something out of the trunk, and close it. The court found that at one point Mr. Killian described the man he saw as weighing approximately 160 to 180 pounds; the witness later estimated the man's weight to be 110 to 120 pounds. The trial court found that the witness indicated that the man he observed was small and young, a little over five feet tall, with facial hair and carrying a leather wallet with a chain. At the photographic identification session, the witness selected defendant's picture five minutes after being shown a photographic lineup of eight men. Mr. Killian viewed the lineup only eight days after observing the man beside the car on Section House Road.

[4] We believe the facts as found by the trial court demonstrate that there was not a substantial likelihood of misidentification by the witness Killian. There was a reasonable possibility of observation sufficient to permit subsequent identification, although the period of observation was brief. Where such a possibility exists, the credibility of the witness and the weight to be given his identification testimony is for the jury to decide. *State v. Corbett*, 309 N.C. 382, 307 S.E. 2d 139 (1983); *State v. Miller*, 270 N.C. 726, 154 S.E. 2d 902 (1967).

[5] Defendant further contends that the district attorney's request for certain stipulations at the end of the *voir dire* on this issue had the effect of ensuring the unreliability of the witness's testimony. The district attorney, without advance warning and before the court and identification witness, tendered as a re-

quested stipulation the fact that the defendant's fingerprints were found in Mrs. Lehman's car. The defense counsel rejected the offer. Defendant argues that the district attorney's actions had the effect of bolstering the confidence of the identification witness, Killian. We find no merit in this argument. We note again that the witness had already identified defendant in a non-suggestive identification procedure and in the *voir dire*. We find no reasonable likelihood that the district attorney's offer of stipulation tainted the witness's in-court testimony.

Since we find the pretrial identification procedures free of the taint of impermissible suggestiveness, we hold that the trial court properly admitted the in-court identification of defendant by the witness Killian. We find no error in the trial court's allowing Killian to testify about the pretrial photographic identification procedure and no error in the admission of the photographs used in that procedure.

[6] The defendant next assigns as error the admission of testimony involving a head hair found in the sheet knotted around the victim's neck. SBI Agent Scott Worsham testified that a hair found within the folds of the bedsheet was "microscopically consistent" with a head hair taken from defendant. Worsham also testified that the hair found in the sheet was microscopically inconsistent with the victim's head hair. Defendant argues that the prejudicial effect of that testimony outweighed its probative value. He contends that since no evidence was presented concerning how frequently hair microscopically consistent with the defendant's would be found in the Caucasian population, the jury was free to speculate that that percentage was small. Defendant also argues that continued references to the knotted bedsheet were inflammatory and suggested sexual activity not supported by the evidence.

We reject defendant's arguments. This Court has consistently approved similar expert testimony regarding the comparison of hair samples. *See State v. Pratt*, 306 N.C. 673, 295 S.E. 2d 462 (1982); *State v. Barber*, 278 N.C. 268, 179 S.E. 2d 404 (1971). It is axiomatic that evidence is relevant if it has any logical tendency, however slight, to prove a fact in issue in the case. 1 Brandis on North Carolina Evidence § 77 (1982). Agent Worsham's testimony tended to place defendant in the victim's presence at the time of

the murder and the evidence is therefore relevant. The condition of the body when found is made no more inflammatory by the fact that a head hair consistent with the defendant's was found on the body. We overrule this assignment of error.

[7] By his next assignment of error, defendant contends the trial court erred in admitting into evidence a pubic hair sample taken from him. During *voir dire* Agent Worsham testified about comparisons he had made between a pubic hair found on the victim's chest and known pubic hair samples taken from defendant. The trial court refused to allow the jury to hear evidence concerning the comparison of the hairs. Worsham was allowed to testify before the jury, however, without objection from defendant, about receiving a known pubic hair sample from defendant. The trial court later admitted the known sample into evidence over defendant's objection. Defendant contends the evidence had little probative value and was unduly prejudicial because allusions to sexual activities were again raised despite the absence of evidence of sexual activities.

Although it is not clear from the record why the trial court allowed defendant's known pubic hair sample into evidence while disallowing the comparison evidence, we do not believe defendant has shown that he was prejudiced by its admission. We have often stated that where there is abundant evidence to support the main contentions of the State, the admission of evidence, though technically incompetent, will not be held prejudicial where the defendant does not make it appear that he was prejudiced or that the admission of the evidence could have affected the result. *See, e.g., State v. Braswell,* 283 N.C. 332, 196 S.E. 2d 185 (1973); *State v. Williams,* 275 N.C. 77, 165 S.E. 2d 481 (1969). Given the other compelling evidence of defendant's guilt, we are not persuaded that the admission of this evidence affected the verdict.

[8] The defendant finally assigns as error the admission into evidence of photographs showing the victim's nude body with a sheet tied around her neck. Defendant contends that continuing references to and pictures of the victim's body aroused inflammatory images of sexual activity in the minds of the jury even though no evidence of such activity was presented.

The State introduced three photographs showing the victim's body. The photographs were used to illustrate both the testimony

of law enforcement officers who testified about their observations of the crime scene and the testimony of the medical examiner. It is well settled that:

> Properly authenticated photographs of the body of a homicide victim may be introduced into evidence under instructions limiting their use to the purpose of illustrating the witness' testimony. Photographs are usually competent to be used by a witness to explain or illustrate anything that it is competent for him to describe in words. The fact that the photograph may be gory, gruesome, revolting or horrible does not prevent its use by a witness to illustrate his testimony.

State v. Watson, 310 N.C. 384, 397, 312 S.E. 2d 448, 457 (1984); *State v. Cutshall*, 278 N.C. 334, 347, 180 S.E. 2d 745, 753 (1971).

In this case, the trial court properly limited the use of the photographs to the purpose of illustrating the witness's testimony. The photographs were neither excessive in number nor unduly inflammatory. This assignment of error is overruled.

Having reviewed defendant's trial and convictions, we find no error.

No error.

STATE OF NORTH CAROLINA v. HAZEL MAE JOLLEY

No. 237A84

(Filed 6 November 1984)

Searches and Seizures § 10— evidence in plain view at crime scene—no warrant necessary

Where a law enforcement officer enters private premises in response to a call for help, thereby comes upon what reasonably appears to be the scene of a crime, and secures the crime scene from persons other than law enforcement officers by appropriate means, all property within the crime scene in plain view which the officer has probable cause to associate with criminal activity is thereby seized within the meaning of the Fourth Amendment. Officers arriving at the crime scene thereafter and while it is still secured can examine and remove property in plain view without a search warrant.

State v. Jolley

ON appeal of right by the State of North Carolina from the decision of the Court of Appeals, 68 N.C. App. 33, 314 S.E. 2d 134 (1984), reversing judgment entered by *Brown, J.*, at the 25 May 1983 Session of Superior Court, RUTHERFORD County. Heard in the Supreme Court 8 September 1984.

Evidence for the state tended to show that on 28 December 1982 defendant shot and killed her husband, John Preston Jolley, at the Jolley residence on Oak Grove Road in Ellenboro. Mr. Jolley was shot with a .22 semi-automatic rifle. Immediately after shooting her husband, defendant dialed a telephone operator and asked that help be sent to the Jolley residence.

Members of a volunteer rescue squad and deputies from the Rutherford County Sheriff's Department responded to defendant's call for help. The rescue personnel arrived first and began performing emergency cardiopulmonary resuscitation procedures on Mr. Jolley. Deputy Summers of the sheriff's department was the first law enforcement officer to arrive. He arrived about 3:00 p.m. and saw the rescue technicians working on the victim, who was lying on the floor in front of a couch in the den-kitchen area of the house.[1] Deputy Summers observed a .22 semi-automatic rifle leaning against a chair about six feet from the victim. He also observed defendant kneeling on the floor of the kitchen, sobbing. Officer Summers decided to escort defendant out of the house because he felt that it would help her emotionally to be away from her husband's body. He took her outside and placed her in the front seat of his patrol car. He then returned to the house as rescue personnel were carrying the victim out to an ambulance. Deputy Summers testified that after the victim and the emergency personnel left, "I secured a rope and crime scene poster out of the trunk of my patrol car and roped off the residence the best I could. Officer Bill Watts came at that time and about that time Major Philbeck arrived. I had been there ten or fifteen minutes when Major Philbeck arrived." Major Philbeck went into the house as Summers and Watts were advising defendant of her Miranda rights. Summers then went into the house and conferred briefly with Philbeck, after which Summers drove defendant to the Rutherford County Jail.

1. The den and kitchen comprised one large room partially separated by a bar.

Major Philbeck testified that when he entered the house he saw a .22-caliber rifle lying in a chair next to a wall. He also found some spent cartridges and shells in the house. Philbeck stayed at the Jolley residence for six hours, after which he took the .22-caliber rifle and the cartridges and shells to the Rutherford County Jail. These items were introduced into evidence during defendant's trial.

Defendant's evidence tended to show that on 28 December 1982 her husband was resting on the sofa in their den when defendant decided to go shopping. Defendant intended to buy some bullets and took a rifle out of its gun rack in the den to see what kind of bullets it required. Defendant testified:

> I got it down and came in front of the T.V. and started toward the kitchen where the light was on where I could see to take one of the bullets out of the thing. The next thing I remember is that he was lying on the floor hurt. I threw the gun behind me and went to him. I don't remember the gun going off.

After the gun went off defendant dialed the telephone operator for help.

Defendant also introduced evidence to the effect that multiple discharges are common in the kind of gun used to shoot the victim.

Defendant was convicted of murder in the second degree and was sentenced to ten years in prison. Defendant appealed the judgment to the Court of Appeals, which reversed and remanded for a new trial. Because there was a dissenting opinion in the Court of Appeals, the state was entitled to an appeal of right to this Court pursuant to N.C.G.S. 7A-30(2).

Rufus L. Edmisten, Attorney General, by Roy A. Giles, Jr., Assistant Attorney General, for the State.

Walter H. Dalton for defendant.

MARTIN, Justice.

The sole issue in this appeal is whether the Court of Appeals erred in holding that the rifle transported to the Rutherford County Jail by Major Philbeck was improperly admitted into

evidence at trial. We hold that the Court of Appeals did so err, and thus we reverse.

As the opinion of the Court of Appeals notes, on 20 April 1983 defendant filed a motion to suppress the .22-caliber rifle and any test results from the gun. The basis of this motion was stated as follows:

> Its exclusion is required by the Constitution of the United States or the Constitution of North Carolina in that it resulted from an unreasonable search and seizure and in addition, it was obtained as a result of a substantial violation of the provisions of Chapter 15A of the General Statutes in that the sworn testimony of the officers involved at the probable cause hearing clearly show that the defendant was arrested at her home on December 28, 1982 and was taken to the Rutherford County Jail; thereafter, other officers proceeded to her residence without the authority of a search warrant and under no recognized exception to the requirement of a search warrant and entered the defendant's premises without the consent of the defendant and without her being present and in violation of law and thereafter, seized the .22 rifle, J. C. Higgins model, which the defendant now seeks to suppress, together with any test results relating to said rifle; that said intrusion into the defendant's home without the authority of a search warrant was unlawful and a substantial violation of her rights and in violation of the Fourth Amendment of the United States Constitution and in violation of Chapter 15A of the North Carolina General Statutes.

After a hearing the trial court made the following findings of fact:

> That on December 28, 1982 at 3:00 p.m., Deputy Michael Summers of the Rutherford County Sheriff's Department went to the home of John Preston Jolley and Hazel Mae Jolley to investigate a possible shooting; that he found John Jolley in the den on the floor and EMT personnel were working on him.
>
> That he saw a .22 rifle in a chair in the den area.
>
> That the Defendant, Hazel Mae Jolley, was in the kitchen area in a squatting position.

> That Summers asked her to sit in the patrol car, that he thought getting her out of the house would help her emotional state, that he thereafter helped rope the area off to secure the scene, that he spoke with the defendant in his patrol [car] and advised her of her rights, on a form used by the Rutherford County Sheriff's Department.
>
> . . . .
>
> That Detective David Philbeck had arrived at the Jolley residence about five minutes after 3:00, and Summers turned control of the premises over to him.
>
> That Philbeck went inside the residence where he made photographs, seized the rifle, spent cartridges, a lead fragment, made a diagram, and visually observed the premises.

The trial court then denied defendant's motion to suppress the gun and test results.

The Court of Appeals held that Philbeck had conducted a warrantless search not justified under either the consent to search or exigent circumstances exceptions to the warrant requirement of the fourth amendment to the United States Constitution. *See, e.g., Mincey v. Arizona*, 437 U.S. 385, 57 L.Ed. 2d 290 (1978). Therefore the Court of Appeals concluded that his removal of the gun was an illegal seizure and the gun and test results from it should not have been permitted into evidence.[2]

While the Court of Appeals' discussion of the two exceptions to the warrant requirement is interesting, it is irrelevant to the present set of facts. The Court of Appeals erred in failing to focus upon the key issue in the case: At what point was the rifle in question *seized* within the meaning of the fourth amendment?

We hold that when a law enforcement officer enters private premises in response to a call for help and thereby comes upon what reasonably appears to be the scene of a crime, and secures the crime scene from persons other than law enforcement officers by appropriate means, all property within the crime scene in plain

2. The record reveals that defendant did not object to Officer Summers' testimony about the gun. Thus she has waived all objections concerning the gun and its test results. N.C. Gen. Stat. § 15A-1446(b) (1983). Nevertheless, in our discretion we have decided to review the matter.

view which the officer has probable cause to associate with criminal activity is thereby lawfully seized within the meaning of the fourth amendment. Officers arriving at the crime scene thereafter and while it is still secured can examine and remove property in plain view without a search warrant. As the Supreme Court of the United States observed in *Mincey v. Arizona*, 437 U.S. 385, 392-93, 57 L.Ed. 2d 290, 300:

> We do not question the right of the police to respond to emergency situations. Numerous state and federal cases have recognized that the Fourth Amendment does not bar police officers from making warrantless entries and searches when they reasonably believe that a person within is in need of immediate aid. . . . And the police may seize any evidence that is in plain view during the course of their legitimate emergency activities.

(Citations and footnotes omitted.) *Accord Texas v. Brown*, 460 U.S. 730, 739, 75 L.Ed. 2d 502, 512 (1983) ("[I]f, while lawfully engaged in an activity in a particular place, police officers perceive a suspicious object, they may seize it immediately."). The present case is also similar to *State v. Robbins*, 275 N.C. 537, 545, 169 S.E. 2d 858, 863 (1969), in which this Court stated:

> In the instant case the officer was not engaged in a search for evidence to be used in a criminal prosecution. He entered defendant's dwelling at the request of defendant's brothers, who were very apprehensive and worried about defendant. Under the present law the officer would not have had any basis to request a search warrant since he could not allege a particular object which he sought. *State v. Bullard*, 267 N.C. 599, 148 S.E. 2d 565. He was simply lending the strong arm of the law to a distressed family who feared that harm had come to their brother and sister-in-law. The officer's presence was lawful and his testimony as to things in plain view was properly admitted into evidence.

See also Illinois v. Andreas, --- U.S. ---, ---, 77 L.Ed. 2d 1003, 1010 (1983) ("[O]nce police are lawfully in a position to observe an item first-hand, its owner's privacy interest in that item is lost. . . ."). *Cf. United States v. Jacobsen*, --- U.S. ---, ---, 80 L.Ed. 2d 85, 98 (1984) ("The agent's viewing of what a private party had freely made available for his inspection did not violate the Fourth

Amendment."); *Katz v. United States*, 389 U.S. 347, 351, 19 L.Ed. 2d 576, 582 (1967) ("What a person knowingly exposes to the public, even in his own home . . . is not a subject of Fourth Amendment protection."). *See Coolidge v. New Hampshire*, 403 U.S. 443, 29 L.Ed. 2d 564 (1971) (plurality opinion).

This holding is in accord with the following post-*Mincey* cases: *People v. Harding*, 620 P. 2d 245 (1980) (bloodstained wallpaper and bloodstained housecoat properly seized as evidence "in plain view"); *Wooton v. State*, 398 So. 2d 963 (Fla. App. 1981) (stressing seizure was of "items of evidence which were in plain view" and that there "was no inspection of drawers or closets"); *Grant v. State*, 374 So. 2d 630 (Fla. App. 1979) (weapons in plain view near body); *State v. Johnson*, 413 A. 2d 931, 934 (Me. 1980), *appeal after remand*, 434 A. 2d 532 (Me. 1981) (police who initially entered secured the premises and then waited outside until medical examiner and lab technician arrived, and then all entered; held, this a permissible reentry; "the police conducted a very limited search, seizing only items that were in plain view"); *State v. Anderson*, 42 Or. App. 29, 599 P. 2d 1225 (1979), *cert. denied*, 446 U.S. 920 (1980) (proper to maintain control of scene three hours and then record scene with videotape camera where "officers photographed only what was in plain view"); *State v. Eacret*, 40 Or. App. 341, 345, 595 P. 2d 490, 493 (1979) ("officers were entitled to photograph and seize evidence in plain view"); *State v. Martin*, 274 N.W. 2d 893 (S.D.), *cert. denied*, 444 U.S. 883 (1979).

"A 'seizure' of property occurs when there is some meaningful interference with an individual's possessory interests in that property." *United States v. Jacobsen*, --- U.S. ---, ---, 80 L.Ed. 2d 85, 94 (1984) (footnote omitted). When an officer secures a crime scene he has limited the ability of persons other than law enforcement officers to remove items from within the secured area. *State v. Brown*, 306 N.C. 151, 293 S.E. 2d 569 (1982) (crime scene that had been cordoned off and secured by police was within the possession and control of the state); N.C. Gen. Stat. § 15A-903(d) (1983). Such items have thus been "seized." *See Hale v. Henkel*, 201 U.S. 43, 76, 50 L.Ed. 652, 666 (1906). Seizure of evidence in plain view by the securing of a crime scene is also analogous to seizure of a person: "[W]henever a police officer accosts an individual and restrains his freedom to walk away, he

has 'seized' that person." *Terry v. Ohio*, 392 U.S. 1, 16, 20 L.Ed. 2d 889, 903 (1968). *See also Michigan v. Summers*, 452 U.S. 692, 69 L.Ed. 2d 340 (1981).

It is clear that in the instant case Deputy Summers lawfully entered the Jolley residence reasonably believing that a person inside was in need of immediate aid. Defendant herself called the telephone operator to ask specifically that help be sent quickly. When Summers first entered the Jolley house, the rifle at issue was in plain view, six feet from where the victim was felled. Deputy Summers had probable cause to associate the rifle with criminal activity. *Texas v. Brown*, 460 U.S. 730, 75 L.Ed. 2d 502.[3] He thereupon secured the residence by roping it off and posting signs. He thereby lawfully seized the rifle. Because the rifle was lawfully seized, it was properly admitted into evidence. Philbeck, as a law enforcement officer who also arrived at the scene as a result of defendant's call for help, had every right to enter the area secured by Deputy Summers. Once lawfully inside this area he then properly transported to the county jail the rifle which was in plain view and which had been seized by the securing of the crime scene. It follows that the test results were likewise admissible.

We need not decide whether the additional items identified by Major Philbeck were competent as evidence, as defendant is not contesting their admission into evidence. The evidence at issue in this case was not obtained by a search, but was seized by being in plain view within the crime scene when it was secured by Deputy Summers. *See Mincey v. Arizona*, 437 U.S. 385, 57 L.Ed. 2d 290.

The decision of the Court of Appeals is

Reversed.

3. It was not necessary that the officer knew the rifle was evidence of a crime in order to comply with the "immediately apparent" requirement of *Coolidge v. New Hampshire*, 403 U.S. 443, 29 L.Ed. 2d 564 (1971). It is sufficient if the facts available to the officer would warrant a man of reasonable caution in the belief that the rifle may be useful as evidence of a crime. *Texas v. Brown*, 460 U.S. 730, 75 L.Ed. 2d 502 (1983).

STATE OF NORTH CAROLINA v. JOHNNY FOWLER

No. 152A84

(Filed 6 November 1984)

1. **Constitutional Law §§ 28, 56; Criminal Law § 122— court's inquiry into division of jury—no violation of due process and trial by jury rights**

The trial court's inquiry into the numerical division of the jury after the jury reported that it was deadlocked did not as a matter of law violate defendant's right to due process of law or his right to trial by jury under the U. S. Constitution.

2. **Constitutional Law § 56; Criminal Law § 122— court's inquiry into division of jury—no violation of right to jury trial—supervisory jurisdiction of Supreme Court**

The trial court's inquiry into the numerical division of the jury after the jury had reported that it was deadlocked did not constitute a *per se* violation of defendant's right to trial by jury under Art. I, § 24 of the N. C. Constitution where the trial court made it clear that it did not desire to know whether the majority was for conviction or acquittal. Nor did such inquiry into the division of the jury interfere with the proper administration of justice so as to require the Supreme Court to exercise its supervisory power to make such inquiry reversible error.

3. **Criminal Law § 122— court's inquiry into division of jury—no coercion**

The trial court's inquiry into the numerical division of the jury after the jury reported late Friday afternoon that it was deadlocked was not coercive in the totality of the circumstances and was thus not reversible error.

APPEAL by defendant pursuant to N.C. Gen. Stat. § 7A-27(a) (1981) from the judgment entered by *Battle, Judge*, at the 31 October 1983 Criminal Session of WAKE County Superior Court.

Defendant was charged in indictments, proper in form, with rape, kidnapping, and armed robbery. Following verdicts of guilty, sentences of life imprisonment on the rape charge, fourteen years on the armed robbery charge, and nine years on the kidnapping charges were entered, the sentences to run consecutively. We granted the defendant's motion to bypass the Court of Appeals on the kidnapping and armed robbery charges on 4 April 1984.

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

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

COPELAND, Justice.

Defendant's sole assignment of error concerns the inquiry made by the trial judge into the numerical division of the jurors on Friday afternoon. The record discloses that the jury retired sometime near midmorning on Friday, 4 November 1983. They deliberated until the lunch recess and resumed deliberations at 2:00 p.m., remaining in the jury room until late Friday afternoon.

At this point the trial judge called the jury back into the courtroom and inquired as to whether a verdict had been reached. The foreman indicated no verdict had been reached but did say that the jury was making progress. The trial judge then asked if the jury would like to deliberate further that afternoon or recess until Monday morning. The jury wished to continue deliberations.

Sometime later, the jury asked to return to the courtroom where the foreman told the court, "we believe that we are locked and cannot reach a verdict." The following exchange then took place.

> COURT: Well, I don't want to know how many are voting for guilty or not guilty in relation to any of the charges; but I would be interested in knowing how you are divided, whether it's six to six, nine to three.
>
> FOREMAN: Eleven to one.
>
> COURT: Well, the hour is getting on. Still, you really haven't had an opportunity to deliberate all that long, everything considered. I know it will be a hardship on you, but I would very much appreciate your coming back Monday morning to see if after further deliberation it might be possible for you to reach a verdict. So, we will take a recess at this time until 9:30 Monday morning. Of course during the recess please remember all the cautions that I have been giving you over and over again. Please be very careful not to talk with anyone at all about the case during the recess; and please remember not to read, watch or listen to anything about it that might come from any news media. Of course do not allow anyone to talk about it in your presence. It would really be best to the extent you can, just sort of put the matter out of your mind over the weekend. I know that will be

very hard to do, but to the extent you can, just come back fresh Monday morning ready to resume your deliberations.

I very much appreciate the way you have stuck with it and the way you're going about your business. So, thank you very, very much; and you may go at this time and please come right back here to this courtroom and have a seat in the jury box at 9:30 Monday morning. Recess until 9:30 Monday morning.

When the jurors returned on Monday morning the trial judge gave the legislatively approved version of the *Allen* charge, *Allen v. United States*, 164 U.S. 492 (1896), found in N.C. Gen. Stat. § 15A-1235 (1983). The jury then retired at 9:40 a.m. to resume deliberations, took a brief recess around 11:30 a.m. and retired again at 11:55 a.m. At approximately 1:10 p.m. the jury returned to the courtroom with a verdict of guilty on all charges.

Defendant contends that the inquiry into the numerical division of the jury by the trial judge was reversible error because it tended to coerce a verdict. More specifically, defendant argues that asking the jury how it is divided violates the United States Constitution, the North Carolina Constitution, and constitutes prejudicial error under the facts and circumstances of this case. We disagree.

I.

[1] Defendant first argues that questions by the trial court concerning the division of the jury deprived him of his rights to trial by jury and due process of law guaranteed by the federal constitution. Defendant relies on the old case of *Brasfield v. United States*, 272 U.S. 448 (1926). In that case the federal district court judge inquired into the division of the jury and gave the *Allen* charge. 8 F. 2d 472 (9th Cir. 1925). In a rather short opinion the Supreme Court concluded that it was essential to the fair and impartial conduct of the trial that inquiry into the division of the jury be grounds for reversal because such inquiries tended to be coercive. 272 U.S. at 450. Defendant argues that the Court's decision in *Brasfield* is based on the sixth amendment and the due process clause of the fifth amendment, both of which are applicable to the states through the fourteenth amendment. We do not find this argument persuasive.

The propriety of inquiries into the division of the jury had previously been before the Supreme Court in the case of *Burton v. United States*, 196 U.S. 283 (1905). After finding a number of errors which were cause for reversal, the Court noted that it disapproved of the trial judge's inquiry into the division of the jury because it was not necessary and in some cases might lead to improper influences. *Id.* at 307-08. The Court concluded that the proper administration of justice did not permit such questions. *Id.* at 308. When this issue came up in *Brasfield*, the Court noted that there was a division among the circuit courts as to whether the discussion in *Burton* concerning questions on the division of the jury constituted a rule forbidding such questions or was merely an expression of the Court's disapproval of the practice. *Id.* at 449. The Court then held that inquiry by the trial court into the division of the jury constituted reversible error. *Id.* at 450. We conclude that the Supreme Court's ruling in *Brasfield* was based on its supervisory power over the federal courts and thus is not binding on this Court.

The language used in *Burton* indicates that the Court was not announcing a new rule of constitutional law. As in *Brasfield* no sections of the Constitution were cited, and the Court justified its ruling on the basis that it was necessary for the proper administration of justice. We agree with the Fourth Circuit Court of Appeals that *Brasfield* evolved from the rule of *Burton* and that the two cases should be read in conjunction. *Ellis v. Reed*, 596 F. 2d 1195 (4th Cir. 1979), *cert. denied*, 444 U.S. 973 (1979). When that is done, it becomes clear that *Brasfield* was merely intended to show that the language in *Burton* disapproving of questions on the division of the jury was mandatory and required reversal in the federal courts when such questions were asked. Two federal circuit courts in addition to the Fourth Circuit have considered this question in habeas corpus cases and have reached the same conclusion. *United States ex rel. Kirk v. Director*, 678 F. 2d 723 (7th Cir. 1982); *Cornell v. Iowa*, 628 F. 2d 1044 (8th Cir. 1980), *cert. denied*, 449 U.S. 1126 (1981). The Fifth Circuit has gone further and has said that even in the federal courts *Brasfield* is not an inflexible rule. The court held that if the inquiry is unlikely to have a coercive effect it should be disregarded as not affecting substantial rights. *Beale v. United States*, 263 F. 2d 215 (5th Cir. 1959). The Fourth Circuit may also have adopted such a harmless

error standard. *See United States v. Rogers*, 289 F. 2d 433, 435 n. 5 (4th Cir. 1961). A majority of the state courts that have been faced with this issue have declined to follow the rule of *Brasfield*, and some have specifically found that the Supreme Court developed the rule in the exercise of its supervisory powers over the federal courts. *See generally* Annot., 77 A.L.R. 3d 769 §§ 4-6 (1977 & Supp. 1984). At most, *Brasfield* sets out a rule of federal practice and is not binding on our courts. We, therefore, hold that a trial court's question on the division of the jury does not as a matter of law violate a defendant's right to due process of law and trial by jury under the Federal Constitution.

II.

[2] Defendant next argues that inquiry by the trial court into the division of the jury violates the right to trial by jury protected by Art. I, § 24 of the North Carolina Constitution. Defendant has cited no authority to support this argument, and we find it to be without merit.[1] It is true that our constitution has been interpreted to require a jury of twelve and a unanimous verdict. *State v. Hudson*, 280 N.C. 74, 79, 185 S.E. 2d 189, 192 (1971), *cert. denied*, 414 U.S. 1160 (1974). This Court has also recognized the importance of protecting jury deliberations from influences which deprive jurors of their freedom of thought and action. *State v. Lipfird*, 302 N.C. 391, 276 S.E. 2d 161 (1981); *State v. Roberts*, 270 N.C. 449, 451, 154 S.E. 2d 536, 537-38 (1967). We do not consider questions concerning the division of the jury to be a *per se* violation of Art. I, § 24 when the trial court makes it clear that it does not desire to know whether the majority is for conviction or acquittal. Such inquiries are not inherently coercive, and without more do not violate the right to trial by jury guaranteed by the North Carolina Constitution. *State v. Yarborough*, 64 N.C. App. 500, 502, 307 S.E. 2d 794, 795 (1983). The appropriate standard is whether in the totality of the circumstances the inquiry is coercive. *Ellis*, 596 F. 2d at 1200; *Yarborough*, 64 N.C. App. at 502, 307

1. This Court has decided cases where the division of the jury has been a factor, but none have dealt with the issue in this case. *See State v. Barnes*, 243 N.C. 174, 90 S.E. 2d 321 (1955) (per curiam) (not error for judge to instruct jury to make a diligent effort to reach a verdict without doing violence to conscience after a juror spontaneously stated that the jury was divided ten to two in favor of conviction); *State v. Bowers*, 273 N.C. 652, 161 S.E. 2d 11 (1968) (error for trial judge to instruct jury that it must reach a verdict).

S.E. 2d at 795. *See Jenkins v. United States*, 380 U.S. 445, 446 (1965).

The Court of Appeals has correctly pointed out that inquiries into the division of the jury are often "useful in timing recesses, in determining whether there has been progress toward a verdict, and in deciding whether to declare a mistrial because of a deadlocked jury." *Yarborough*, 64 N.C. App. at 502, 307 S.E. 2d at 794-95. The truth of that observation is borne out in this case by the circumstances attendant to the trial court's questioning of the jury. It was late on a Friday afternoon that was the last day of the court term, and the jury had not yet reached a verdict. The trial judge needed to know whether the jury was likely to reach a verdict or was deadlocked. This was necessary so that he would know whether he should plan to resume the trial on Monday and extend the term of court to continue the jurisdiction of the Superior Court. Under the circumstances, the inquiry into the division of the jury aided the trial court in the efficient administration of justice. We conclude that such inquiries into the division of the jury do not interfere with the proper administration of justice and so decline to exercise our supervisory power to make such inquiries reversible error.

III.

[3] Having resolved the constitutional questions, we next consider whether in the totality of the circumstances the trial court's question concerning the division of the jury was coercive. After a careful review of the record, we find that the inquiry was not coercive and that defendant was not prejudiced in any way.

A review of the questions and comments addressed to the jury by the trial judge reveals that they were polite and did not in any way hint that the court was displeased with the jury for its failure to reach a verdict. Once the division of the jury was ascertained, the court dismissed the jurors until Monday morning with thanks for their patience. They were also admonished not to talk with anyone about the case and not to read, watch, or listen to anything about it in the news media. The jurors were not given the modified *Allen* charge found in N.C. Gen. Stat. § 15A-1235 (1983) until they returned on Monday morning. The jury deliberated with some breaks until 1:10 p.m., at which time it returned a verdict of guilty. This is to be contrasted with *Ellis v. Reed*, in

which the trial judge followed his inquiry into the division of the jury with a substantially stronger version of the *Allen* charge. 596 F. 2d at 1196. The jury retired and deliberated for only eight minutes before returning a verdict of guilty. *Id.* The Fourth Circuit held that in the totality of the circumstances the inquiry into the division of the jury and the *Allen* charge were not coercive. *Id.* at 1200. In *State v. Yarborough*, the Court of Appeals found no coercion when the trial judge, in addition to asking for the division of the jury, asked about the number of ballots and immediately sent the jury back for further deliberations. 64 N.C. App. at 501, 307 S.E. 2d at 794-95. While *Ellis* and *Yarborough* are not binding on this Court they are persuasive, and their holdings strongly suggest that defendant was not prejudiced by the trial judge's question. The evidence in the case at bar simply is not susceptible of any reasonable interpretation that would suggest coercion, and we hold that none occurred.

Based on our review of the record, we hold that defendant has received a fair trial free from prejudicial error.

No error.

IN THE MATTER OF: LUCILLE B. GRAD v. LAURIN J. KAASA, M.D.

No. 251A84

(Filed 6 November 1984)

Dead Bodies § 3— wrongful autopsy—evidence insufficient

In an action for wrongful autopsy, summary judgment was properly granted for defendant where the deceased suddenly collapsed without apparent cause and suffered extensive injuries to the head and face, the emergency room doctor was unable to determine the cause of death, defendant could not have ascertained the cause of the deceased's cardiac arrest without performing an autopsy, defendant testified that because of external injuries he would have conducted the autopsy even if he had known the deceased had a history of heart disease, and G.S. 130-200 (1981) required an autopsy if in the medical examiner's judgment it was advisable and in the public interest. Furthermore, defendant was under no duty to examine the deceased's medical records or to ask plaintiff's permission before performing the autopsy, the simple fact that defendant is paid for each autopsy is insufficient to show that he acted with malice or corruption, and an affidavit from plaintiff's expert stating that the autopsy was unnecessary relates primarily to whether defendant was acting

within the scope of his authority, an issue decided by the Court of Appeals and not now relevant. N.C. Rule of Civil Procedure 56(c).

APPEAL of right by plaintiff pursuant to N.C. Gen. Stat. § 7A-30(2) (1981) from the decision of the Court of Appeals (*Judges Wells* and *Phillips* concurring, *Judge Braswell* dissenting) reported at 68 N.C. App. 128, 314 S.E. 2d 755 (1984), which reversed the grant of summary judgment for the defendant by *Bailey, Judge*, on 13 January 1983 in Superior Court, WAKE County. Heard in the Supreme Court 10 September 1984.

The plaintiff, Lucille Grad, is a registered nurse and administrator of the northern and eastern branches of the Wake County Hospital Systems, Inc., and has approximately forty years experience in nursing and allied health care. The defendant, Dr. Laurin Kaasa, is a doctor of medicine licensed by the American Board of Pathology, and is the Medical Examiner for Wake County.

This case was initiated as a civil action against the defendant for his performance of an autopsy on the body of the plaintiff's husband, Carl Edward Grad, deceased. Plaintiff alleges that Mr. Grad died of a heart attack and seeks compensatory and punitive damages for the alleged wrongful autopsy conducted by defendant. Mr. Grad suddenly collapsed while playing tennis on 17 March 1982. He was taken to the emergency room at Wake County Medical Center and was pronounced dead at 1:44 p.m., after resuscitation efforts failed. Mr. Grad had extensive injuries to the head and face. The emergency room physician was unable to determine the cause of Mr. Grad's death and referred the case to defendant pursuant to N.C. Gen. Stat. § 130-198 (repealed 1984) (now controlled by N.C. Gen. Stat. § 130A-383 *et seq.* (1983)). Defendant performed an autopsy and concluded that Mr. Grad had died of a heart attack.

The autopsy performed by defendant was a total autopsy in which all organs were removed and later cremated. Because of her training and experience in the various fields of health care, the plaintiff is intimately acquainted with the procedures used in performing post-mortem autopsies. She has extreme revulsion for the procedure used in performing autopsies and is morally opposed to the burial of bodies when not intact, especially that of

her late husband. The plaintiff did not know an autopsy had been performed until she received the death certificate and would have objected had she been informed that defendant intended to perform an autopsy.

After the pleadings were joined, defendant moved for summary judgment. Defendant's motion was supported by plaintiff's interrogatories to defendant and the defendant's answers thereto, defendant's affidavit, and the affidavit of Dr. Page Hudson, Chief Medical Examiner of North Carolina. In opposition to defendant's motion, plaintiff submitted her interrogatories to defendant and the defendant's answers thereto, plaintiff's affidavit, and the affidavit of Dr. Edward Notari, a physician practicing in Pennsylvania. After reviewing the materials, the trial judge granted defendant's motion for summary judgment. The Court of Appeals reversed and defendant appeals based on the dissent of Judge Braswell.

Jordan, Brown, Price & Wall by Henry W. Jones, Jr., for the plaintiff.

Patterson, Dilthey, Clay, Cranfill, Sumner & Hartzog by Ronald C. Dilthey for the defendant.

COPELAND, Justice.

Plaintiff argues that there are several issues of material fact in this case to be resolved by the jury and that the Court of Appeals correctly reversed the trial court's grant of summary judgment in favor of the defendant. Before we consider the question of whether summary judgment was proper, we note that plaintiff contends that there is a genuine issue of fact as to whether defendant acted outside the scope of his authority. The Court of Appeals, including Judge Braswell in dissent, concluded that defendant was acting within the scope of his office. *Grad*, 68 N.C. App. at 132, 134, 314 S.E. 2d at 759-60. Because the Court of Appeals' opinion on this issue was unanimous, it is not properly before the Court and will not be considered. N.C. R. App. P. 16(b).

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." N.C. R. Civ. P. 56(c). Issues which can be proven by substantial evidence are genuine, and facts are material if they constitute or establish any material element of a claim or defense. *Lowe v. Bradford*, 305 N.C. 366, 369, 289 S.E. 2d 363, 366 (1982). If a party moving for summary judgment meets his burden of proving that there are no disputed issues of material fact and that he is entitled to judgment as a matter of law, then the burden shifts to the opposing party to show that a genuine issue of material fact exists. *Id.* In meeting this burden the opposing party must set forth specific facts that show there is a genuine issue of material fact. *Id.* at 370, 289 S.E. 2d at 366.

"As long as a public officer lawfully exercises the judgment and discretion with which he is invested by virtue of his office, keeps within the scope of his official authority, and acts without malice or corruption, he is protected from liability." *Smith v. State*, 289 N.C. 303, 331, 222 S.E. 2d 412, 430 (1976). A defendant acts with malice when he wantonly does that which a man of reasonable intelligence would know to be contrary to his duty and which he intends to be prejudicial or injurious to another. *Givens v. Sellars*, 273 N.C. 44, 159 S.E. 2d 530 (1968). "An act is wanton when it is done of wicked purpose, or when done needlessly, manifesting a reckless indifference to the rights of others." *Id.* at 50, 159 S.E. 2d at 535 (quoting *Everett v. Receivers*, 121 N.C. 519, 27 S.E. 991 (1897)).

Defendant's forecast of the evidence tended to show that he received a proper death report and made an investigation into the cause and manner of death as required by N.C. Gen. Stat. § 130-199 (1981). Following his investigation, he made a subjective determination that an autopsy was advisable and in the public interest. Defendant was acting within the scope of his office, and his forecast entitles him to summary judgment unless in her forecast of the evidence plaintiff shows by specific facts that a genuine issue of material fact exists. *Lowe*, 305 N.C. at 369-70, 289 S.E. 2d at 366.

Plaintiff contends that a genuine issue of fact exists as to whether defendant acted maliciously or corruptly in conducting the autopsy. In support, plaintiff points to the fact that defendant was well acquainted with her but did not contact her prior to performing the autopsy. Plaintiff knew that her husband had suf-

fered a previous heart attack and had been warned not to overexert himself. The plaintiff's forecast of evidence indicated that defendant could have obtained this information by contacting plaintiff or examining Mr. Grad's medical records. The Court of Appeals concluded that this forecast raised a genuine issue of material fact as to whether defendant acted with reckless disregard of plaintiff's rights by ordering the autopsy without first having made further reasonable investigation into the circumstances of Mr. Grad's death. *Grad*, 68 N.C. App. at 133, 314 S.E. 2d at 760. Plaintiff also argues that the fact that defendant receives $200 for each autopsy he performs as medical examiner raises a genuine issue of fact on the question of whether he acted with corruption. After carefully considering the evidence, we find nothing that raises an issue of material fact as to whether defendant acted maliciously or corruptly.

The regulations of the North Carolina Department of Human Resources, in effect at the time of the autopsy, set forth thirteen types of death that shall be reported to the medical examiner by anyone having knowledge of the death. 10 N.C. Admin. Code § 11.0203 (repealed 1 January 1984). Four of the classifications are relevant to this case: (1) trauma, (2) accident, (3) unknown, unnatural, or suspicious circumstances, and (4) sudden, unexpected deaths not reasonably related to known previous diseases. *Id.* Under N.C. Gen. Stat. § 130-200 (1981), a medical examiner *shall* conduct an autopsy if in his judgment it is advisable and in the public interest. There is abundant evidence in this case to support defendant's conclusion that an autopsy was necessary.

Mr. Grad had suddenly collapsed without apparent cause and had suffered extensive injuries to the head and face. The emergency room doctor had been unable to determine the cause of death. The doctor's conclusion that Mr. Grad died suddenly from a cardiac arrest merely describes the death without explaining why it occurred, and he properly notified defendant who read the emergency room report and conducted an external examination of Mr. Grad's body before ordering an autopsy. As Judge Braswell correctly pointed out, defendant could not ascertain the cause of the cardiac arrest without performing an autopsy. *Grad*, 68 N.C. App. at 135, 314 S.E. 2d at 760 (Braswell, J., dissenting). Further, defendant testified that because of the external injuries Mr. Grad had suffered he would have conducted the autopsy even

if he had known Mr. Grad had a history of heart disease. Defendant was under no legal duty to examine Mr. Grad's medical records or to ask plaintiff for permission before performing the autopsy. There is nothing in the statutes or regulations from which such a duty can be implied, and defendant's prior relationship with plaintiff did not create one. Therefore, plaintiff's forecast of the evidence does not raise an issue of material fact because, if true, it is insufficient as a matter of law to show that defendant acted with malice or corruption. The same is true of plaintiff's evidence that defendant receives $200 for each autopsy he performs as medical examiner. The simple fact that defendant is paid for his services is insufficient to show that he acted with malice or corruption.

We note that the Court of Appeals' holding that plaintiff's forecast of the evidence had created an issue of material fact was based in part on the affidavit of plaintiff's expert, Dr. Edward J. Notari. In the affidavit, Dr. Notari stated that in his opinion there was ample evidence available to exclude the possibility of death by trauma, unknown circumstances or any of the other criteria enumerated in the regulations.

We agree with the Court of Appeals that this is not a medical malpractice action, and Dr. Notari need not state that he is familiar with the standards common to the specialty of pathology or medical examiners in North Carolina in order for his affidavit to be admissible. It is sufficient if Dr. Notari, through study or experience, is better qualified than a jury to form an opinion on the need for an autopsy. *State v. Brown*, 300 N.C. 731, 734, 268 S.E. 2d 201, 203 (1980); *State v. Mitchell*, 283 N.C. 462, 467, 196 S.E. 2d 736, 739 (1983). However, Dr. Notari's affidavit does not raise an issue of material fact because his conclusion that the autopsy was unnecessary relates primarily to whether or not defendant was acting within the scope of his authority. That issue was decided unanimously by the Court of Appeals and is not relevant to this appeal. The fact that the autopsy was needless may be relevant to whether the performance of the autopsy was wanton, but the decision to perform the autopsy must also manifest a reckless indifference to the rights of others. *Givens*, 273 N.C. at 50, 159 S.E. 2d at 535. Since we have already held that plaintiff's forecast does not raise an issue of material fact as to whether defendant acted corruptly or maliciously, Dr. Notari's

opinion that the autopsy was unnecessary is irrelevant in determining whether defendant acted wantonly.

Based on our review of the record, we hold that plaintiff's forecast of the evidence failed to raise a genuine issue of material fact, and the Superior Court properly granted summary judgment in favor of 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, Wake County, for reinstatement of the judgment of the trial court in favor of defendant.

Reversed and remanded.

GEORGE E. FRADY, EMPLOYEE v. GROVES THREAD/GENERAL ACCIDENT INSURANCE COMPANY, AND/OR UNITED SPINNERS/HARTFORD INSURANCE COMPANY, EMPLOYERS, CARRIERS

No. 154PA82

(Filed 6 November 1984)

Appeal and Error § 64— absence of majority vote—Court of Appeals decision undisturbed

Where two members of the Supreme Court did not participate in the consideration or decision of a case, and of the remaining members of the Court there are not four votes either to affirm or reverse the decision of the Court of Appeals, the decision is left undisturbed but should not be considered as having precedential value.

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

ON defendants Groves Thread and General Accident Insurance Company's petition for further review of a decision of the Court of Appeals, 56 N.C. App. 61, 286 S.E. 2d 844 (1982), affirming an award against them for total disability caused by chronic obstructive pulmonary disease.

Hassell, Hudson and Lore, by Charles R. Hassell, Jr., for plaintiff appellee.

Kennedy, Covington, Lobdell and Hickman by William C. Livingston, for Groves Thread Company and General Accident Insurance Company, defendant appellants.

Hedrick, Feerick, Eatman, Gardner and Kincheloe by Edward L. Eatman, Jr. and James F. Wood, III, for United Spinners and Hartford Insurance Company, defendant appellees.

PER CURIAM.

George Frady, employee-plaintiff, was employed during his entire working life from 1943 until 1973 in the textile industry. He worked in various textile mills, including those of the defendants Groves Thread and United Spinners. Eventually Frady, who smoked cigarettes and suffered from frequent lung infections, developed chronic obstructive lung disease which totally incapacitated him for work. After his employment with Groves Thread Frady worked until 1973 for United Spinners which processed only synthetic fibers. In 1978 he worked briefly at Liken Industries. Uncontradicted medical testimony is that although dust from synthetic fibers is not known to put workers at an increased risk of contracting chronic obstructive pulmonary disease, in Frady's case it "played a part in his current condition," as did his exposure to cotton dust, his cigarette smoking, and his chest infections.

Finding that Frady suffered from an occupational disease which caused him to become totally incapacitated for work in 1973 but concluding that under N.C. Gen. Stat. § 97-57 Frady suffered his last injurious exposure to the hazards of his disease at Groves Thread, the Commission awarded plaintiff compensation against Groves Thread and its insurer at the maximum rate provided by N.C. Gen. Stat. § 97-29 as it existed in 1973.

The Court of Appeals, in an opinion by Judge Arnold, concurred in by Judge Wells and Judge, now Justice, Harry Martin, concluded that the Industrial Commission's rulings were correct in all respects. We allowed Groves Thread and General Accident's petition for further review of these determinations.

Because he was a member of the Court of Appeals' panel whose decision is now under review, Justice Martin has taken no part in the consideration or determination of this case. Justice Frye has not participated in the case because he was not a member of the Court when the case was argued. Of the remaining members of the Court there are not four votes either to affirm or reverse the decision of the Court of Appeals. Therefore this

decision is left undisturbed but should not be considered as having precedential value.

Affirmed.

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

STATE OF NORTH CAROLINA v. STANLEY SANDERS

No. 496A82

(Filed 6 November 1984)

1. Criminal Law §§ 146.3, 159— inadequate transcription of trial—remand for new trial—exercise of supervisory powers

In view of the gravity of the offenses for which defendant was tried and the death penalty which was imposed, the Supreme Court vacated the judgments and ordered a new trial in the exercise of its supervisory powers under App. Rule 2 where meaningful appellate review was precluded by the entirely inaccurate and inadequate transcription of the trial proceedings and where no adequate record could be formulated.

BEFORE *Thornburg, Judge*, at the 28 June 1982 Criminal Session of Superior Court, TRANSYLVANIA County, defendant was convicted of first-degree murder, first-degree rape, felonious breaking or entering and felonious larceny. Defendant appeals as of right pursuant to N.C.G.S. 7A-27(a) from judgments imposing the sentence of death for the charge of first-degree murder and from a sentence of life imprisonment for the offense of first-degree rape, the sentence to be served consecutive to his death sentence. Defendant also appeals from the sentence to a term of 10 years imprisonment for the offenses of felonious breaking or entering and larceny, the sentences to be served consecutive to the life sentence imposed for the offense of rape. The defendant's motion to bypass the Court of Appeals on the 10 year sentence was allowed 11 January 1984. Heard in the Supreme Court 8 October 1984.

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

Adam Stein, Appellate Defender, by Ann B. Petersen and James R. Glover, Assistant Appellate Defenders, for the defendant.

PER CURIAM.

The defendant in this appeal presents fifteen questions for review arising out of the guilt and the penalty phases of his trial. Among these questions are serious challenges to the adequacy and accuracy of Judge Thornburg's instructions to the jury in the penalty phase of the defendant's trial on the aggravating circumstances, mitigating circumstances and other elements that the jury must find before it can sentence the defendant to death.

In support of his contentions, defendant has reproduced specific portions of the trial judge's instructions to the jury during the penalty phase of the trial. The portions of the jury instructions before us contain a strikingly large number of incomplete sentences, unintelligible phrases and words so misspelled as to cast doubt upon their meaning. Even by correcting grammatical errors and accounting for what might conceivably have resulted from mere *lapsus linguae* on the part of the trial judge, we are unable to make any reasonable sense of the challenged instructions. Given the nature of these problems, we are entirely convinced that the confusing instruction is not attributable to the able trial judge, but was erroneously transcribed by the court reporter. Indeed, both the State and the defendant concede that "the transcription of the entire trial appears to be incomplete and, at places, simply inaccurate," and that "it is impossible to determine what was a transcription error and what was actually said."

We have repeatedly stated that the record which is certified imports verity, and we are bound by it. *State v. Johnson*, 295 N.C. 227, 244 S.E. 2d 391 (1978); *State v. Williams*, 280 N.C. 132, 184 S.E. 2d 875 (1971); *State v. Fields*, 279 N.C. 460, 183 S.E. 2d 666 (1971). Appellate counsel for the State and for the defendant have diligently attempted to provide us with the best possible record under the circumstances. We are informed that it is unlikely that the record on appeal can be improved from the existing records of

the original court reporter who no longer resides within the state. We are convinced that meaningful appellate review of the serious questions presented by defendant's appeal is completely precluded by the entirely inaccurate and inadequate transcription of the trial proceedings and that no adequate record can be formulated.

In view of the gravity of the offenses for which defendant was tried and the penalty of death which was imposed, we choose to exercise our supervisory powers under Rule 2 of the Rules of Appellate Procedure and, in the interest of justice, vacate the judgments entered and order a new trial. Therefore, we vacate the judgments entered by Judge Thornburg and remand the case to the Superior Court, Transylvania County, for a new trial on all charges.

Vacated and remanded.

STATE OF NORTH CAROLINA v. JEFFERY LEVON EASON

No. 232A84

(Filed 6 November 1984)

Criminal Law § 113.1— instructions—failure to summarize defendant's evidence

The trial court did not commit error in failing to summarize defendant's evidence while instructing the jury pursuant to G.S. 15A-1232.

DEFENDANT appeals as a matter of right pursuant to G.S. 7A-30(2) from a decision of a divided panel of the Court of Appeals, 67 N.C. App. 460, 313 S.E. 2d 221 (1984), affirming the judgment entered by *Brewer, J.*, at the 31 January 1983 Criminal Session of Superior Court, JOHNSTON County, finding defendant guilty of first degree burglary.

Rufus L. Edmisten, Attorney General, by William B. Ray, Assistant Attorney General, for the State-appellee.

Adam Stein, Appellate Defender, by David W. Dorey, Assistant Appellate Defender, for defendant-appellant.

PER CURIAM.

The Court of Appeals correctly held that the trial court did not commit error when the trial judge gave no summary of defendant's evidence while instructing the jury pursuant to G.S. 15A-1232. Defendant argues that *State v. Ardrey*, 232 N.C. 721, 62 S.E. 2d 53 (1950) supports his argument that litigants in North Carolina have traditionally been granted relief when the trial court fails to summarize any evidence in violation of G.S. 15A-1232. Additionally, the defendant and the dissent from the Court of Appeals' majority opinion cite *State v. Best*, 265 N.C. 477, 144 S.E. 2d 416 (1965) for the proposition that "[o]nly when the evidence is simple and direct and without equivocation and complication is the failure to summarize any evidence harmless error." 67 N.C. App. at 465, 313 S.E. 2d at 224 (Becton, J., dissenting).

We cannot uncritically adhere to the holding in *Best* and perpetuate a narrow exception to a rule that did not exist then nor at present. In conducting a keen re-examination of *Best*, we find that the statute in effect at that time, G.S. 1-180 (1953) (repealed 1977), stated that the trial judge "shall not be required to state such evidence except to the extent necessary to explain the application of the law thereto; . . . ." This language is generally equivalent to the current version of the statute contained in G.S. 15A-1232 (1983) that states the judge "is not required to state the evidence except to the extent necessary to explain the application of the law to the evidence."

It appears, however, that the court in *Best* carved an exception to this statute by quoting from and relying upon a case, *Morris v. Tate*, 230 N.C. 29, 51 S.E. 2d 892 (1949),[1] decided pursuant to an earlier version of the same statute, which required the judge to "state in a plain and correct manner the evidence given in the case and declare and explain the law arising thereon." N.C. Gen. Stat. § 1-180 (1943) (repealed 1977). This same statute was also in effect when *Ardrey* was decided. Obviously, the 1943 statute is in

1. This case held that the judge can dispense with a statement of evidence when the facts are simple, thus allowing the judge to bypass the statutory mandate in effect at that time which required a judge to give a plain and correct statement of the evidence presented in the case.

sharp contrast to both the statute in effect at the time *Best* was decided[2] and the current version[3] of the same statute.

It seems, therefore, that the narrow exception to G.S. 1-180 espoused in *Morris v. Tate* was misapplied in *Best*, since the 1943 statute was amended in 1951 and no longer required a trial judge to state or explain the evidence given in the case, unless such an explanation was necessary to an application of the law. Essentially, what was once the exception had since been swallowed up by the general rule.

Accordingly, we agree with the majority of the Court of Appeals that the trial judge did not commit plain error in failing to summarize the defendant's evidence. Neither G.S. 15A-1232 nor the cases previously cited command a different result. The decision of the Court of Appeals is

Affirmed.

STATE OF NORTH CAROLINA v. TERRY ORLANDO REID

No. 209A84

(Filed 6 November 1984)

Criminal Law § 40.2— retrial of indigent defendant—failure to provide transcript of first trial

The retrial of an indigent defendant on rape, burglary and larceny charges without providing him with a transcript of his original trial was error entitling him to a new trial where defendant's first trial ended in a mistrial when the jury was unable to agree; the trial judge allowed defendant's motion for a transcript of his trial; defendant again moved prior to a second trial that he be given a transcript of his first trial before being retried; the court reporter advised the court that she had not had time to prepare the transcript; and the court then denied defendant's motion without evidence or findings that defendant had no need for a transcript or that there was available to defendant a substantially equivalent alternative.

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2. N.C. Gen. Stat. § 1-180 (1953).

3. N.C. Gen. Stat. § 15A-1232 (1983).

State v. Reid

APPEAL by defendant from judgments of *Judge Hamilton Hobgood* entered at the 28 November 1983 Session of FORSYTH Superior Court and imposing sentences of life imprisonment upon defendant's convictions by a jury of first degree rape and first degree burglary. Defendant's motion that a judgment of ten years' imprisonment upon his conviction of felonious larceny, a case joined for trial with the rape and burglary cases, be reviewed before determination by the Court of Appeals was earlier allowed.

Rufus L. Edmisten, Attorney General, by Guy A. Hamlin, Assistant Attorney General, for the State.

Michael R. Greeson, Jr., for defendant appellant.

PER CURIAM.

Defendant was first tried at the 7 November 1983 Session of Forsyth Superior Court before Judge James Long. The proceedings ended in a mistrial when the jury was unable to agree on a verdict. Defendant, an indigent, then moved that he be provided with a transcript of this trial. Judge Long allowed the motion.

At the 28 November 1983 Session of Forsyth Superior Court defendant moved again that he be given a transcript of the first trial before being tried again. He advised the court of Judge Long's order that he be provided a transcript of the first trial; that no transcript had yet been provided; and that he needed the transcript "to effectively cross-examine the State's witnesses at this time." The court reporter for the first trial advised the court that she had not had time to prepare the transcript "since it's only been two weeks" since the first trial but that she could have the transcript prepared in two more weeks. Whereupon the court denied defendant's motion without evidence or findings that defendant had no need for a transcript or that there was available to defendant a substantially equivalent alternative. The trial proceeded without defendant's having been furnished a transcript of the first trial.

Under these circumstances, requiring defendant to be retried without providing him with a transcript of his first trial is error entitling defendant to a new trial. *Britt v. North Carolina*, 404

U.S. 226 (1971); *State v. Rankin*, 306 N.C. 712, 295 S.E. 2d 416 (1982); *State v. McNeill*, 33 N.C. App. 317, 235 S.E. 2d 274 (1977).

New trial.

DONALD S. COLLINS v. BEVERLY ANN DAVIS (WILLIAMS)

No. 359A84

(Filed 6 November 1984)

APPEAL by defendant pursuant to N.C.G.S. § 7A-30(2) from a decision of the North Carolina Court of Appeals reported at 68 N.C. App. 588, 315 S.E. 2d 759 (1984) (*Judge Phillips*, with *Judge Wells* concurring in the result and *Judge Braswell* dissenting). The Court of Appeals found error in the trial judge's ruling granting defendant's motion for a directed verdict at the conclusion of plaintiff's evidence, and remanded for a new trial.

Tate, Young, Morphis, Bogle, Bach & Farthing, by Thomas C. Morphis for the plaintiff-appellee.

Randy D. Duncan for the defendant-appellant.

PER CURIAM.

Affirmed.

STATE OF NORTH CAROLINA v. OGER CUNNINGHAM

No. 281A84

(Filed 6 November 1984)

APPEAL by defendant pursuant to N.C. Gen. Stat. § 7A-30(2) (1983), from a decision of the Court of Appeals (*Judges Hedrick* and *Arnold* concurring, *Judge Becton* dissenting) reported at 68 N.C. App. 117, 314 S.E. 2d 556 (1984) which affirmed the judgment entered by *Sitton, Judge*, on 10 September 1982 in Superior Court, MECKLENBURG County. Heard in the Supreme Court 10 October 1984.

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

Nora Henry Hargrove, for the defendant.

PER CURIAM.

Affirmed.

STATE OF NORTH CAROLINA EX REL. RUFUS L. EDMISTEN, ATTORNEY GENERAL v. THE HONORABLE ELTON G. TUCKER, DISTRICT COURT JUDGE FOR THE FIFTH JUDICIAL DISTRICT; THE HONORABLE PHILIP O. REDWINE, DISTRICT COURT JUDGE FOR THE TENTH JUDICIAL DISTRICT; THE HONORABLE GEORGE R. GREENE, DISTRICT COURT JUDGE FOR THE TENTH JUDICIAL DISTRICT; THE HONORABLE NARLEY L. CASHWELL, DISTRICT COURT JUDGE FOR THE TENTH JUDICIAL DISTRICT; THE HONORABLE DAVID Q. LABARRE, DISTRICT COURT JUDGE FOR THE FOURTEENTH JUDICIAL DISTRICT; THE HONORABLE L. STANLEY BROWN, DISTRICT COURT JUDGE FOR THE TWENTY-SIXTH JUDICIAL DISTRICT; THE HONORABLE LEWIS BULWINKLE, DISTRICT COURT JUDGE FOR THE TWENTY-SEVENTH JUDICIAL DISTRICT; ANTHONY WAYNE ROSE, DEFENDANT, WAKE COUNTY DISTRICT COURT; MAXIE THOMAS COKER, JR., DEFENDANT, WAKE COUNTY DISTRICT COURT; DAVID ADCOCK POWELL, DEFENDANT, WAKE COUNTY DISTRICT COURT; GARY RAYMOND HENRY, DEFENDANT, WAKE COUNTY DISTRICT COURT; WILLIE A. JOHNSON, DEFENDANT, WAKE COUNTY DISTRICT COURT; PATRICK LEWIS HOWARD, DEFENDANT, WAKE COUNTY DISTRICT COURT; STEPHEN J. HARTWIG, DEFENDANT, WAKE COUNTY DISTRICT COURT; DANNY LIN TEW, DEFENDANT, WAKE COUNTY DISTRICT COURT; EUGENE PERRY WATKINS, JR., DEFENDANT, WAKE COUNTY DISTRICT COURT; JOHN TIMOTHY DAVES, DEFENDANT, WAKE COUNTY DISTRICT COURT; LINWOOD EARL MASSEY, DEFENDANT, WAKE COUNTY DISTRICT COURT; ERNEST BRADLEY WILLIAMS, DEFENDANT, DAVIE COUNTY DISTRICT COURT; EILEEN M. SMITH, DEFENDANT, MECKLENBURG COUNTY DISTRICT COURT; LAWRENCE WILSON CROW, DEFENDANT, MECKLENBURG COUNTY DISTRICT COURT; JOHN BERNARD HOWREN, JR., DEFENDANT, GASTON COUNTY DISTRICT COURT

No. 453PA84

(Filed 4 December 1984)

1. **Declaratory Judgment Act § 4.1— constitutionality of statute—necessity for actual controversy**

While a determination of the constitutionality of a statute may be a proper subject for declaratory judgment, jurisdiction under the Declaratory Judgment Act may be invoked only in a case in which there is an actual or real existing controversy between parties having adverse interests in the matter in dispute.

2. **Declaratory Judgment Act § 3— alleging existence of actual controversy**

A complaint brought pursuant to the Declaratory Judgment Act must set forth all of the facts necessary to disclose the existence of an actual or real existing controversy between the parties to the action. If it fails to do this, the court is without jurisdiction, and the complaint must be dismissed.

3. **Declaratory Judgment Act § 4.1— validity and construction of Safe Roads Act —district court judges as defendants—no actual or real existing controversy**

District court judges who ruled adversely to the State on the constitutionality and construction of the Safe Roads Act of 1983 in deciding cases in

their official capacities may not be considered as litigants antagonistic to either the Attorney General or the people of North Carolina in regard to the validity and construction of the Act. Therefore, the trial court properly dismissed the Attorney General's declaratory judgment action against such judges to determine the correctness of their rulings for failure of the complaint to disclose an actual or real existing controversy between the parties. G.S. 1-260; G.S. 11-11; G.S. 114-2(8)(2).

4. **Declaratory Judgment Act § 4.1— validity and construction of Safe Roads Act —individual defendants—no actual or real existing controversy**

Although adversity of interest as to the validity and construction of the Safe Roads Act was properly alleged in a declaratory judgment action brought by the State against individual defendants in whose cases questioned rulings concerning the Act had been made in the district court, the superior court had no jurisdiction of such action because no actual or real existing controversy between the individual defendants and the State could be premised upon pending cases or cases in which judgments had been entered by courts of competent jurisdiction.

5. **Mandamus § 3.1; Prohibition, Writ of § 1— writ to district court judge—no authority by superior court judge**

A judge of the superior court has no authority or jurisdiction to issue a writ of mandamus or prohibition to a district court judge.

6. **Appeal and Error § 5— validity of Safe Roads Act—rulings in district court—declaratory judgment action—supervisory jurisdiction of Supreme Court**

The Supreme Court will not exercise its supervisory power under Art. IV, § 12 of the N. C. Constitution to determine the merits of claims set forth in the State's complaint seeking a declaratory judgment concerning rulings on the constitutionality and construction of the Safe Roads Act in cases in the district court; rather, the questions will have to await decision by the orderly process of judgment and appeal in the individual cases.

APPEAL by the State from the order of *Barnette, J.*, entered at the 28 June 1984 Civil Session of Superior Court, WAKE County, dismissing the State's complaint and petition against all defendants. We granted the State's petition for discretionary review prior to determination by the Court of Appeals pursuant to N.C.G.S. § 7A-31 on 20 August 1984.

This is a civil action instituted by the Attorney General on behalf of the State of North Carolina seeking a declaratory judgment as to the constitutionality of nine (9) provisions of the Safe Roads Act of 1983 (Chapter 435 of the 1983 Session Laws, effective 1 October 1983, as amended by Chapter 1101 of the 1983 Session Laws, Regular Session 1984), and an authoritative declaration as to the proper construction and application of five (5) other pro-

visions of the Act. The State named as defendants in this action seven (7) district court judges (hereinafter "the judicial defendants") who had ruled adversely to the State in various driving while impaired ("DWI") cases, and fifteen (15) individuals in whose district court cases the judicial defendants had made such rulings. The complaint and amended complaint requested that the superior court "construe and interpret" the Safe Roads Act in the manner requested by the State and "declare" the challenged provisions to be constitutional.

As an alternative to the complaint, and in the event that the trial court found no jurisdiction pursuant to the Declaratory Judgment Act, N.C.G.S. § 1-253 *et seq.*, the State requested that the court treat the complaint as a petition for a writ of mandamus or prohibition, requesting that the superior court order the judicial defendants to cease their allegedly erroneous constitutional interpretations of the challenged sections of the Safe Roads Act.

Each of the defendants moved pursuant to Rule 12(b) of the North Carolina Rules of Civil Procedure that the complaint be dismissed for want of subject matter jurisdiction and that the petition be denied. After receiving briefs from the parties and hearing oral arguments, the trial court ruled on the defendants' Rule 12(b) motions. Without reaching the substantive questions presented, Judge Barnette dismissed the State's complaint as to all defendants on the ground that the superior court was without subject matter jurisdiction to entertain the action pursuant to the Declaratory Judgment Act. Judge Barnette further ruled that the superior court is without authority to issue writs of mandamus or prohibition to judges of the district court, reasoning that such authority rests exclusively with the appellate division.

The State does not appeal the dismissal of its action as to District Court Judges Elton G. Tucker, David Q. LaBarre, and L. Stanley Brown, nor as to individual defendants Eileen M. Smith, John Timothy Daves and Ernest Bradley Williams.

Rufus L. Edmisten, Attorney General, by Isaac T. Avery, III, Special Deputy Attorney General, and David Roy Blackwell and W. Dale Talbert, Assistant Attorneys General, for the State.

Tharrington, Smith & Hargrove, by Wade M. Smith, Roger W. Smith, and Douglas E. Kingsberry for defendant-Judges

Philip O. Redwine, George R. Greene, Narley L. Cashwell and Lewis Bulwinkle.

Harris, Bumgardner & Carpenter, by James R. Carpenter and R. Dennis Lorance, for defendant John Bernard Howren, Jr.

Lucas, Brown & Lock, by Thomas H. Lock, for defendant Anthony Wayne Rose.

Van Camp, Gill & Crumpler, by William B. Crumpler, for defendants Stephen J. Hartwig, Willie A. Johnson, Dannie Lin Tew, and Gary Raymond Henry.

Hafer, Hall & Schiller, by Kyle S. Hall, for defendant David Adcock Powell.

*Merriman, Nicholls, Crampton, Dombalis & Aldridge, P.A., by Nicholas J. Dombalis, II, for defendant Maxie Thomas Coker.**

**We have not listed as counsel appearing in this appeal those attorneys representing individual named defendants who did not either file briefs on their own behalf, or adopt the arguments presented by those who did.*

MEYER, Justice.

This unprecedented civil action poses many novel and interesting questions concerning the operation of the Declaratory Judgment Act, G.S. § 1-253 *et seq.* and the process of constitutional adjudication. The narrow legal issues presented by the State's appeal concern whether the complaint alleged a controversy justiciable under the Declaratory Judgment Act and whether the trial court was without jurisdiction to issue the writs of mandamus or prohibition to the judicial defendants.[1] We hold that the State's complaint was properly dismissed and the petition properly denied. A brief summary of the events leading up to this

1. On 23 August 1984, we entered an amended order limiting our consideration in this appeal to the question of the superior court's jurisdiction to enter a declaratory judgment on the substantive issues presented. However, the question of that court's jurisdiction to issue the writs of mandamus or prohibition were also fully briefed and orally argued by the parties. In view of the fact that the question has been squarely presented to the Court at this time, we will exercise our supervisory power under Rule 2 of the Rules of Appellate Procedure and review the question of the court's jurisdiction to enter the writs of mandamus or prohibition.

appeal will precede the examination of the jurisdictional and jurisprudential issues raised.

I.

The present action arose out of the Attorney General's attempt to secure an expedited and conclusive judicial determination of the constitutionality of the Safe Roads Act of 1983. The Act represents a comprehensive and unified approach to the problem of the drunken driver on North Carolina roadways. Its provisions fundamentally altered the substantive and procedural law concerning drunken driving, including the elements of the criminal offense; pre and post-arrest chemical and psycho-motor testing; trial and sentencing procedures, including evidentiary rules; and civil as well as criminal penalties. In short, the Act altered long standing trial practices in the district and superior courts.

The Safe Roads Act carried an effective date of 1 October 1983. Since that time, various defendants across the state have raised numerous questions concerning the Act's application and the constitutional validity of many of its provisions. These challenges initially arose in the district courts as a part of the criminal prosecutions for "driving while impaired" or in review proceedings following civil license revocations. As is customary, individual district court judges ruled upon the legal issues raised by individual defendants on a case-by-case basis. Case-by-case adjudication of challenges to the Safe Roads Act brought the not surprising result of conflicting judicial interpretation of the Act's various provisions. Particular judges found portions of the Act constitutionally infirm, whereas other judges upheld the identical provisions as constitutionally sound. While these cases made their way through the various stages of appeal to the superior court for trial *de novo* and then for further appellate review, the district courts in several of the state's most congested districts built huge backlogs of unadjudicated "driving while impaired" cases. In addition, the conflicting interpretations of the Act's validity from district to district led to different treatment for defendants charged with identical offenses under the Act.

Concern on the part of the Attorney General about the prospect of a long period of uneven enforcement of the Act's provisions while the various individual cases progressed through the superior and appellate courts prompted a comprehensive review

of the issues raised in the Safe Roads Act challenges. Based upon this review, the Attorney General chose to consolidate the various individual challenges to, and judicial rulings on, the main driving while impaired provisions of the Safe Roads Act and to present them for expedited judicial resolution in a single civil lawsuit.

Citing a massive backlog of pending driving while impaired cases in the district courts, limited statutory authority on the part of the State to appeal from adverse rulings in the district courts, and the lengthy, time-consuming process that would normally be afforded the State for resolution of these issues on a case by case basis in the appellate division, the Attorney General, on behalf of the State of North Carolina, filed this declaratory judgment action and, in the alternative, petition for writ of mandamus or prohibition. The action requested a declaratory judgment as to those issues repeatedly raised concerning the constitutionality and application of the Safe Roads Act.[2] Named as party defendant-respondents were those judges who had declared portions of the Act unconstitutional or construed its provisions in a manner adverse to the State. The complaint further named as defendants those individual defendants in whose cases the district court judges had so ruled.

Jurisdiction as to the individual and judicial defendants is alleged in the following manner:

> III GENERAL ALLEGATIONS
>
> C. The judicial defendants named herein have all at one time or another ruled certain provisions of the Safe Roads Act to be unconstitutional or otherwise have construed the statute contrary to the intent of the General Assembly. Likewise, the individual defendants named herein have raised constitutional challenges to the Safe Roads Act at one point

2. In its complaint, the State specifically alleged jurisdiction over the action pursuant to the Declaratory Judgment Act, N.C.G.S. § 1-253 *et seq.*; Rules 57 and 65 of the North Carolina Rules of Civil Procedure; Rule 22 of the North Carolina Rules of Appellate Procedure; Rule 19 of the General Rules of Practice for the Superior and District Courts; and Article IV of the North Carolina Constitution. In addition, the State alleged jurisdiction "pursuant to the common law and the inherent authority of the judicial department to interpret and construe statutes and declare the legal rights and obligations of parties pursuant thereto."

or another or have alleged certain provisions of the Safe Roads Act denied them constitutional rights. They have at one point or another sought to declare the statute unconstitutional or in the alternative to have the charges against them dismissed.

D. All the defendants, by rulings or motions, have taken a position adverse to that of the State. There is a real, substantial and actual controversary [sic] between the parties.

E. The issues raised by the allegations herein are continually raised in the superior and district court divisions of the General Court of Justice. Upon information and belief, the State alleges that these issues will continue to arise and will impede the orderly and efficient administration of justice absent a prompt and definitive ruling.

F. The defendants and judges named herein all have an interest in the resolution of these questions.

G. The State of North Carolina has an interest in swift and orderly administration of justice and in the uniform application of the law throughout the State. The State has a compelling interest and a constitutionally mandated duty to enforce the criminal laws of the State that are designed to protect citizens of the State from the operation of vehicles by persons impaired by an impairing substance. The resolution of these questions is necessary for the State to fulfill its obligations.

The complaint contains a section of "SPECIFIC ALLEGATIONS" which details the various challenges to the Safe Roads Act and judicial rulings entered thereon in the individual cases in the district and superior courts. The statutory provisions, criminal defendant (or civil plaintiff), presiding judge and judicial ruling in the cases[3] alleged in this section of the complaint may be summarized as follows:

1. *N.C.G.S. § 15A-534.2. Detention of impaired drivers.* (Persons who are arrested for DWI, who are intoxicated, and pose a danger to themselves may be held for up to 24 hours.)

3. Unless otherwise noted, all of the cases decided in the lower courts are currently pending for review in either the superior or the appellate courts.

Held: Unconstitutional as it affects the defendant's right of access to counsel.

Cases: A. *State v. Willie A. Johnson*, (Wake County, 84CR5312). B. *State v. Stephen J. Hartwig*, (Wake County, 83CR83444). C. *State v. Dannie Lin Tew*, (Wake County, 84CR15166).

Judge: Narley L. Cashwell.

2. *N.C.G.S. § 20-16.2(a)(6). Implied consent to chemical analysis; mandatory revocation of license in event of refusal; right of driver to request analysis.* (Thirty-minute time limit in which to call an attorney or witness prior to chemical testing procedure.)

Held: Unconstitutional as it fails to afford the defendant effective assistance of counsel, and denies the defendant his right of access to counsel.

Case: *State v. John Bernard Howren, Jr.*, (Gaston County, 83CR23635).

Judge: Lewis Bulwinkle.

3. *N.C.G.S. § 20-16.5. Immediate civil license revocation for certain persons charged with implied-consent offenses.* (Immediate ten-day pretrial license revocation authorized when an individual charged with DWI has an alcohol concentration of 0.10 or more or where he refuses to submit to chemical analysis.)

Held: Constitutional in three revocation proceedings. Statutory revocation provision then challenged by either direct appeal and/or filing of separate civil action by affected defendants.

Defendants: A. Ernest Bradley Williams, (Davie County, 83CVR4048 and 83CVS295). (Challenge subsequently withdrawn by defendant.) B. Gary Raymond Henry, (Wake County, 83CVRS88527 and 84CVS2347). C. Lawrence Wilson Crow, (Mecklenburg County, 83CVR67347) and (*Crow v. State of North Carolina*, C-C-83-0809-P) (W.D.N.C.).

4. *N.C.G.S. § 20-138.1(a). Impaired driving.* Proof of offense either under a theory of impairment as found in subsec-

tion (a)(1), driving "while under the influence of an impairing substance," or the theory of the 0.10 per se offense as found in subsection (a)(2), driving "after having consumed sufficient alcohol that he has, at any relevant time after the driving, an alcohol concentration of 0.10 or more."

Held: Election of theory must be made at time of charging and charge must inform defendant of State's election; charge which fails to so inform the defendant is unconstitutional.

Cases: A. *State v. Maxie Thomas Coker, Jr.*, (Wake County, 83CR77756). B. *State v. David Adcock Powell*, (Wake County, 83CR75410).

Judge: George R. Greene.

5. *N.C.G.S. § 20-138.1(a)(2). Impaired Driving.* The 0.10 per se offense.

Held: Unconstitutionally vague insofar as phrase "relevant time after the driving" failed to establish sufficiently clear standard of conduct.

Case: State v. Anthony Wayne Rose, (Wake County, 83CR69293).

6. *N.C.G.S. § 20-138.1(c). Pleading.* (Statutory short form charge; pleading sufficient if it states time and place of alleged offense and charges driving "while subject to an impairing substance.")

Held: Unconstitutionally vague in seven different respects.

Cases: State v. Maxie Thomas Coker, Jr., (Wake County, 83CR77756); *State v. David Adcock Powell*, (Wake County, 83CR75410).

Judge: George R. Greene.

7. *N.C.G.S. § 20-139.1(b2). Breath Analysis Results Inadmissible if Preventive Maintenance Not Performed.* (Results obtained from a breath testing instrument are admissible into evidence; however, if the defendant objects and shows

that preventive maintenance has not been performed on the instrument, the results are inadmissible.)

Held: Unconstitutional shifting of burden of proof to the defendant on the issue of preventive maintenance.

Case: State v. John Bernard Howren, (Gaston County, 83CR23635).

Judge: Lewis Bulwinkle.

8. *N.C.G.S. § 20-139.1(b3). Sequential Breath Test Required.* (As of 1 January 1985 an individual charged with driving while impaired must have two chemical analyses of the breath performed; currently only one chemical analysis is performed.)

Held: Constitutional as it regards a defendant charged with DWI prior to 1 January 1985.

Judge: Lewis Bulwinkle.

Defendant: John Bernard Howren, Jr. (*State v. John Bernard Howren*, Gaston County, 83CR23635.)

9. *N.C.G.S. § 20-139.1(e1). Use of Chemical Analyst's Affidavit in District Court.* (Sworn affidavit of chemical analyst is admissible into evidence without further authentication in any hearing or trial in a district court with respect to certain facts.)

Held: Unconstitutional as it violates the defendant's right of confrontation.

Cases: A. *State v. Eugene Perry Watkins, Jr.*, (Wake County, 83CRS8057). *Judge Philip O. Redwine.* B. *State v. Diana Sapp*, (Durham County, 83CR30792). *Judge David Q. LeBarre.* (Affidavit ruled inadmissible and defendant found not guilty. Case closed.) C. *State v. Ernest Harlan McKeithan*, (New Hanover County, 83CR21345). *Judge Elton G. Tucker.* D. [NO CASE ALLEGED] *Judge L. Stanley Brown.*

Held: Constitutional.

Defendant: Eilene M. Smith (*State v. Eileen M. Smith*, Mecklenburg County, 83CR75181).

10. *N.C.G.S. § 20-139.1. Procedures governing chemical analyses; admissibility; evidentiary provisions; and controlled drinking programs.*

Held: The intoxilizer, Model 40011AS, as used in Wake County, did not perform a chemical analysis by the use of infrared light and, therefore, its testing results are not admissible under the provisions of N.C.G.S. 20-139.1.

Case: *State v. John Timothy Daves* (Wake County, 83CRS072471).

Judge: George R. Greene.

Defendant: Gary Raymond Henry (*State v. Gary Raymond Henry*, Wake County, 83CVRS88527 and 84CVS2347) also raised this issue.

11. *N.C.G.S. Chapter 20.*

Defendant: Patrick Lewis Howard (*State v. Patrick Lewis Howard*, Wake County, 83CR76220) challenged the charge which appears on the uniform traffic citation which uses the term "operate" as opposed to the statutory term "drive."

12. *N.C.G.S. § 20-138.1(a). The offense of impaired driving.*

Defendant: Patrick Lewis Howard (*State v. Patrick Lewis Howard*, Wake County, 83CR76220). Dismissal of charges sought on ground that the conduct described is not stated to be a criminal offense.

13. *N.C.G.S. § 20-138.1(a)(2). Impaired Driving.* The 0.10 per se offense. The complaint alleges the following with regard to rulings under N.C.G.S. 20-138.1(a)(2) which address the sufficiency of the State's evidence:

"Upon information and belief, Judges Cashwell, Redwine, and Greene have ruled that when the alcohol concentration of a defendant is .10, as shown by the intoxilizer, the State has failed to discharge its burden to prove the element of an alcohol concentration of .10 or more as required by N.C.G.S. 20-138.1(a)(2). The basis of this ruling is that the intoxilizer

manufacturer's specifications state that the instrument is accurate within plus or minus .01."

Judges: Narley Cashwell; Philip O. Redwine; George R. Greene.

14. *N.C.G.S. § 20-179. Sentencing hearing after conviction for impaired driving; determination of grossly aggravating and aggravating and mitigating factors; punishments.* (One of the statutory grossly aggravating factors is a previous conviction for an offense involving impaired driving within seven years of the date of the offense for which the defendant is being sentenced.)

Held: Unconstitutional insofar as statute permitted the use of convictions occurring prior to 1 October 1983 to enhance the defendant's punishment under N.C.G.S. 20-179.

Case: State v. Linwood Earl Massey, (Wake County, 84CR2734).

Judge: George R. Greene.

In its prayer for relief, the State requests that the superior court "construe and interpret the Safe Roads Act of 1983 as constitutional and resolve the issues raised herein." In conclusion, the State added that no injunctive relief was sought "or any order requiring any person named herein to follow the law as declared. It is the opinion of the State that the district court judges named herein will follow the law as this court declares without the necessity of any order."

The State, in its oral argument before this Court, has characterized the issue presented for review as a simple question of whether the State can bring an action to declare "what the law is" and have it ultimately brought to this Court for review. The short answer to the question thus posed is, no; neither the Declaratory Judgment Act nor the writs of mandamus and prohibition permit the State to obtain the relief it seeks under the facts alleged in its complaint.

II.

The Declaratory Judgment Act provides that "[a]ny person . . . whose rights, status or other legal relations are affected by a

statute . . . may have determined any question of construction or validity arising under the . . . statute . . . and obtain a declaration of rights, status or other legal relations thereunder." N.C.G.S. § 1-254. Pursuant to N.C.G.S. § 1-253, the courts of record "shall have power to declare rights, status, and other legal relations, whether or not further relief could be claimed." "The purpose of the Declaratory Judgment Act is to settle and afford relief from uncertainty concerning rights, status and other legal relations, and although the Act is to be liberally construed, its provisions are not without limitation." *Consumers Power v. Power Co.*, 285 N.C. 434, 446, 206 S.E. 2d 178, 186 (1974). "[T]he apparent broad terms of the statute do not confer upon the court unlimited jurisdiction of a merely advisory nature to construe and declare the law." *Tryon v. Power Co.*, 222 N.C. 200, 203, 22 S.E. 2d 450, 452 (1942).

[1] Thus, while a determination of the constitutionality of a statute may be a proper subject for declaratory judgment, jurisdiction under the Declaratory Judgment Act may be invoked only in a case in which there is an actual or real existing controversy between parties having adverse interests in the matter in dispute. *Greensboro v. Wall*, 247 N.C. 516, 101 S.E. 2d 413 (1958); *Lide v. Mears*, 231 N.C. 111, 56 S.E. 2d 404 (1949). The existence of such genuine controversy between parties having conflicting interests is a jurisdictional necessity. *Id.; Lide v. Mears*, 231 N.C. 111, 56 S.E. 2d 404; *Tryon v. Power Co.*, 222 N.C. 200, 22 S.E. 2d 450.

An "actual or real and existing controversy" has been defined as a controversy between parties having *adverse interests* in the matter in dispute.

> An actual controversy between the parties is a jurisdictional prerequisite for a proceeding under the Declaratory Judgment Act in order 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. Dept. of N.E.R. and Everett v. Dept. of N.E.R., 295 N.C. 683, 703, 249 S.E. 2d 402, 414 (1978), *quoting Lide v. Mears*, 231 N.C. 111, 56 S.E. 2d 404. Accordingly, it is essential that the con-

troversy be "between *antagonistic litigants* with respect to *their rights*, status or other legal relations."

[2] It is mandatory that a complaint brought pursuant to the Declaratory Judgment Act set forth all of the facts necessary to disclose the existence of an actual or real existing controversy between the parties to the action. *Lide v. Mears*, 231 N.C. 111, 56 S.E. 2d 404. If it fails to do this, the court is without jurisdiction, and the complaint must be dismissed. *Id.; Tryon v. Power Company*, 222 N.C. 200, 22 S.E. 2d 450; *Light Company v. Iseley*, 203 N.C. 811, 167 S.E. 56 (1933).

The Attorney General's complaint alleges that the parties to this action do have adverse interests with respect to the Safe Roads Act. The complaint alleges that the State has a "compelling interest and a constitutionally mandated duty to enforce the criminal laws of the State," and that a need exists for a resolution of the substantive questions presented so that the State may "fulfill its obligations." The judicial defendants are alleged to be antagonistic litigants on the basis of the fact that they have all "ruled certain provisions of the Safe Roads Act to be unconstitutional or otherwise have construed the statute contrary to the intent of the General Assembly," thereby taking "a position adverse to that of the State." The individual defendants are similarly alleged to be antagonistic in that they have each taken a position adverse to the State by motions in their civil or criminal cases.

The trial court determined that there was no subject matter jurisdiction alleged by virtue of these rulings or motions under the Declaratory Judgment Act. The order recites that such jurisdiction is lacking on the following bases: (1) the pleadings failed to disclose an actual or real existing controversy between antagonistic litigants; (2) the parties are involved in ongoing criminal prosecutions; (3) declaratory judgment would not terminate the uncertainty; and (4) the superior court had no authority to issue the writs of mandamus or prohibition against a district court judge.

A.

[3] As to the alleged "antagonism" between the State and the judicial defendants, the trial court determined that there was no

adversity of interest between the parties over the validity and construction of the Safe Roads Act. The order states:

> Judges of the district court, who are sworn to support and uphold the United States and North Carolina Constitutions, and to apply and support the laws of this State not in violation of said Constitutions, are not "antagonistic litigants" with, nor do they have interests adverse to, the Attorney General or the people of North Carolina, as concerns the constitutionality of the Safe Roads Act. 1983 N.C. Sess. Laws c. 435, s. 1, *et seq.* Though any party may claim an "adverse interest" to a judge who rules against him in a case, judges are, as a matter of law, neutral, uninterested parties with no stake in the outcome of matters brought before them for judicial decisions, and are not, therefor, the adverse, "antagonistic litigants" contemplated by this jurisdictional prerequisite to declaratory relief sought pursuant to the Declaratory Judgment Act.

The trial court's reasoning on this issue is eminently sound and represents an entirely correct application of the law to the facts of this case. The judicial defendants, in their official capacity as judges of the district court, simply may not be considered as litigants antagonistic to either the Attorney General or the people of North Carolina as regards the validity of the Safe Roads Act.

In an effort to bolster its jurisdictional claims, the State contends that the trial court erred in ruling that judges necessarily have no interest in the results of the cases before them by virtue of the fact that they are sworn to uphold the law. The State maintains that the action of the judges in ruling that certain provisions of the Safe Roads Act were unconstitutional demonstrates that the judges are not "upholding" the law; that the "position" taken by a judge on the Act's constitutionality constitutes an "interest" in the matter in dispute; and therefore, judges who strike down portions of the Act as unconstitutional are parties antagonistic to the State with adverse interests in the dispute over the Act's validity. We do not agree.

First, the trial court correctly observed that the judges of the district court are sworn judicial officers. By their oath of office, district court judges swear (or affirm) to "administer justice *without favoritism to anyone or to the State*" and to "faithfully

and *impartially*" discharge the duties of office "*consistent with the Constitution and laws* of the State." N.C.G.S. § 11-11. Implicit in the sworn duties of a judge is the duty to determine whether a statute is consistent with the state and federal constitutions when the validity of that statute is properly challenged by a litigant appearing in a case before him. A judge is under no duty to uphold a legislative enactment which he determines to be in violation of the guarantees of either or both the federal and state constitutions. Consequently, in failing to "uphold" an unconstitutional statute, a judge cannot be said to assume an adversary relationship with the Attorney General or the people of the State.

By the same reasoning, the State's allegation that the judicial defendants are "antagonistic" in that they have construed certain provisions of the Safe Roads Act "contrary to the intent of the General Assembly" must be rejected. It is the duty of the judges, and not the Attorney General, to authoritatively determine what the intent of the legislature is in the course of their construction of a new statute. That officers of two branches of the government—the judicial and the executive—differ in opinion as to legislative intent does not place them in an adversarial relationship.

Moreover, in their capacity as district court judges, the judicial defendants stand completely neutral to all legal claims and arguments brought before them. As the United States Supreme Court recently noted in *United States v. Leon*, --- U.S. ---, ---, --- L.Ed. 2d ---, ---, 35 Crim. Law Rptr. 3273, 3279 (1984): "Judges and Magistrates are not adjuncts to the law enforcement team; as neutral judicial officers, they have no stake in the outcome of particular criminal prosecutions." In the same vein we have stated, "[i]t is axiomatic, of course, that it is the lawful right of every litigant to expect utter impartiality and neutrality in the judge who tries his case. . . . This right can neither be denied nor abridged." *Colonial Pipeline Co. v. Weaver*, 310 N.C. 93, 103, 310 S.E. 2d 338, 344 (1984). Indeed, it is the duty of the presiding judge under both the statutory and decisional law to excuse himself when he has an interest in the outcome of the case before him or when he has any doubt as to his ability to preside impartially or whenever his impartiality can be reasonably questioned. *See, e.g.*, N.C.G.S. § 15A-1223; *Bank v. Gillespie*, 291 N.C.

303, 230 S.E. 2d 375 (1976); *Ponder v. Davis*, 233 N.C. 699, 65 S.E. 2d 356 (1951).

Under the State's reasoning, if the judicial act of passing upon the constitutionality of a statute were sufficient to give the judge an "interest" in the matter, no judge could, consistent with the constitutional rights of litigants to a fair and impartial trial, ever render an opinion and ruling on a statute and decide the case before him. Such a result is patently absurd. A ruling by a district court judge, while conceivably having the incidental effect of providing support for a legal position adverse to that taken by the Attorney General, does not place the judge in the position of being either an advocate or an adversary of the Attorney General or of the people of this State. Nor does such a ruling give the judge an "interest in the matter in controversy." Judges of the district court may, under our system of government, differ with the executive, and for that matter, with the legislative branch as to the constitutionality of any given piece of legislation without that difference giving rise to an actual or justiciable controversy between them as adverse parties under the Declaratory Judgment Act. *Cf. Barbour v. Little*, 37 N.C. App. 686, 247 S.E. 2d 252, *cert. denied*, 295 N.C. 733, 248 S.E. 2d 862 (1978). To hold otherwise would seriously undermine the system of checks and balances inherent in our government's separation of powers and threaten the very concept of an independent judiciary.

Furthermore, common sense dictates that the judicial defendants stand as neutral judicial officers in the legal controversy between the Attorney General, when he brings an action on behalf of the people of the State, and those citizens accused of violating the Safe Roads Act. Whether any provision of the Safe Roads Act is now or later determined by any superior court of the trial division, or any court of the appellate division, to be constitutional or unconstitutional, is of no concern to the *personal* rights, status and legal relations of the judicial defendants.

An "actual or real and existing controversy" means a controversy that arises out of the opposing contentions of the parties as to the validity or construction of a statute or ordinance, whereby the parties to the action have or may have legal rights, or are or may be under legal liabilities which are involved in the controversy. *Consumers Power v. Power Co.*, 285 N.C. 434, 206 S.E.

2d 178; *Light Co. v. Iseley*, 203 N.C. 811, 167 S.E. 56. It is neither alleged in the complaint, nor claimed by the judicial defendants, that they have any legal rights, or are under any legal liabilities, that are in any way involved with the constitutionality of the Safe Roads Act.

This Court's definition of an "actual or real and existing controversy" between "antagonistic litigants" in this context is consistent with the express requirements of the Declaratory Judgment Act itself. N.C.G.S. § 1-260 entitled *Parties*, provides: "When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration. . . ." As to whether this section makes one a necessary party to a declaratory action, this Court has determined that a person is a necessary party only when he has or claims to have a material interest in the subject matter of the complaint; that is, when he is so vitally interested in the controversy involved that a valid judgment cannot be entered in the action which would completely and finally determine the controversy, without that person's presence as a party. *Construction Company v. Board of Education*, 278 N.C. 633, 180 S.E. 2d 818 (1971). Again, it is neither alleged by the complaint, nor claimed by the judicial defendants, that they have any vital or material interest at stake in the constitutionality of the Safe Roads Act.

This principle, that a judge of a trial court has no interest sufficient to create an actual or real existing controversy in a ruling of law made by him when such ruling is made the subject of a declaratory judgment action in a superior court, was implicitly recognized by this Court in *Fuquay Springs v. Rowland*, 239 N.C. 299, 79 S.E. 2d 774 (1954). In *Rowland*, the district court judge directed the court clerk not to tax certain fees in criminal actions in cases brought before him. The Town of Fuquay Springs, claiming a financial interest in the fees to be collected, instituted a civil proceeding under the Declaratory Judgment Act against, *inter alia*, the judge, seeking a declaration as to the items of cost which are properly assessable in a criminal case. The superior court denied the judge's demurrer and directed the clerk to follow a schedule of fees. This Court dismissed the action as to the judicial defendant, stating that "A judge of a court of this State is not subject to civil action for errors committed in the discharge of

his official duties." As to the propriety of the form of action chosen, the Court stated:

> While we concede that the Declaratory Judgment Act . . . is comprehensive in scope and purpose, it does not and was not intended to embrace such an action as this. We cannot perceive that the legislature, in enacting that statute, intended to vest in Superior Court judges the general power to oversee, direct, or instruct officials of inferior courts in the discharge of their official duties.

Fuquay Springs v. Rowland, 239 N.C. at 301, 79 S.E. 2d at 776.

The State contends that the judicial defendants do have an interest adverse to that of the State with respect to their personal rights, status or other legal relations in that they should fear that the State may seek a writ of mandamus or prohibition against them should they continue to construe the Safe Roads Act "contrary to the legislative intent" in the future. Citing language from the recent United States Supreme Court case of *Pulliam v. Allen*, --- U.S. ---, 80 L.Ed. 2d 565 (1984), the State asserts that a judge named in a petition for writ of mandamus himself becomes a party to the action. *See also In re Greene*, 297 N.C. 305, 255 S.E. 2d 142 (1979).

First, the State *assumes* that a writ of mandamus could properly be obtained to direct a judicial officer acting in his judicial capacity, to rule a statute constitutional. For the reasons set forth in Part III of this opinion, we disagree. Second, even assuming *arguendo* that mandamus could properly issue under these circumstances, the State's argument lacks merit.

While it may be true that a trial court judge would have an interest in whether or not a writ is filed against him, that interest is not the kind of "adverse interest" and "stake in the outcome" that is a jurisdictional prerequisite to relief under the Declaratory Judgment Act. Again, "adverse interest" under that Act is an actual interest by the parties in the ultimate resolution of the facts and contentions of law concerning which a declaratory judgment is sought, and not the interest a judge might have in whether or not a writ is filed against him questioning the correctness of his ruling in a case.

Furthermore, assuming *arguendo* that district court judges are the proper party defendants in an action to determine the constitutionality of the Safe Roads Act, the issue remains as to whether the Attorney General is the proper plaintiff. We have often stated that the validity of a statute may be determined under the Declaratory Judgment Act only when some specific provision thereof is challenged by a person who is *directly* and *adversely* affected thereby. *Greensboro v. Wall*, 247 N.C. 516, 101 S.E. 2d 413 (1958). *See also Woodard v. Carteret County*, 270 N.C. 55, 153 S.E. 2d 809 (1967); *Calcutt v. McGeachy*, 213 N.C. 1, 195 S.E. 49 (1938). The reasoning behind this requirement in the context of constitutional adjudication is directly applicable to the case under discussion, and warrants repetition in full:

> The judicial duty of passing upon the constitutionality of an Act of Congress or of an Act of the General Assembly is one "of great gravity and delicacy. . . ." Since "every presumption is to be indulged in favor of" the validity of an Act of the General Assembly . . . the established judicial policy is to refrain from deciding constitutional questions unless (1) the judicial power is properly invoked, and (2) it is necessary to do so in order to protect the constitutional rights of a party to the action. . . . "*A party who is not personally injured by a statute is not permitted to assail its validity*";. . . .
>
> *Persons directly and adversely affected by the decision may be expected to analyze and bring to the attention of the court all facets of a legal problem. Clear and sound judicial decisions may be expected when specific legal problems are tested by fire in the crucible of actual controversy.* So-called friendly suits, where, regardless of form, all parties seek the same result, are "quicksands of the law." *A fortiori*, this is true when the Court is asked to pass upon a complicated and comprehensive statute and multiple actions thereunder when no particular provision thereof or action thereunder is drawn into focus and specifically challenged by a person directly and adversely affected thereby. (Citations omitted.) (Emphasis added.)

Greensboro v. Wall, 247 N.C. at 520, 101 S.E. 2d at 416.

When we examine the executive and judicial parties to this lawsuit, the absence of a "crucible of actual controversy" between

persons directly affected by the Safe Roads Act is manifest. The State relies upon the statutory authority of the Attorney General to provide such a directly affected interest, citing N.C.G.S. § 114-2(8)(a) (Attorney General authorized to institute proceedings affecting the public interest) and N.C.G.S. § 1-260 (requiring litigants to serve the Attorney General with process and permitting the Attorney General to be heard whenever the constitutionality of a statute is challenged). However, while these statutes may provide the Attorney General with *standing* to appear in proceedings in which the constitutionality of a statute is properly challenged, or to institute a proceeding against a proper party defendant where the public interest so requires, such standing does not supply the adversarial relationship necessary to support jurisdiction under the Declaratory Judgment Act.

As we noted earlier, whether any provision of the Safe Roads Act is now or later determined to be constitutionally valid or infirm is of *no* concern to the personal rights, status and legal relations of the judicial defendants. The jurisdictional prerequisite of an actual and existing case or controversy between antagonistic litigants stands to insure that when a dispute is brought before a judge for issuance of a declaratory judgment, all parties will be sufficiently and sincerely interested and motivated by their stake in the outcome of the litigation to present all facets of the issue under consideration. Clearly it is the individual defendants who possess such direct interests in the outcome of the legal issues alleged in the Attorney General's complaint, and not the district court judges who presided over their criminal trials.

In conclusion, although the Attorney General has a "compelling interest" in the enforcement of the criminal laws, such an interest does not entitled him to maintain a declaratory judgment proceeding against judges of the district court who rule adversely to the State in the discharge of *their* constitutionally mandated duties to exercise the judicial power in deciding cases brought before them. The judicial rulings at issue simply may not be considered *impediments* to the discharge of the Attorney General's duties; they are necessary *constituent parts* in the process of criminal justice which both parties serve. Accordingly, the trial court correctly concluded that the judicial defendants are not "antagonistic litigants" with, nor parties with adverse interests to, the Attorney General or the people of North Carolina, as con-

cerns the Safe Roads Act, and properly dismissed the complaint as to the judges on this basis.

B.

[4] In a related argument, the State attempts to bootstrap its claims of jurisdiction as to the judicial defendants onto the actual controversy alleged to exist between the State and the individual defendants in whose criminal cases the questioned judicial rulings were made. The trial court apparently rejected this contention on the grounds that the court is without subject matter jurisdiction to grant declaratory relief, in the form of a determination of the constitutionality of a criminal statute, as to *parties* who are involved in an ongoing criminal prosecution. The trial court reasoned that the same issues concerning the constitutionality of the criminal statute may be properly determined in an orderly manner by the court having jurisdiction to try the guilt or innocence of the criminal defendant. Thus, no underlying real or existing controversy remained as to those issues which required declaratory relief in an independent legal proceeding as to either the judicial or the individual defendants.

The State concedes that the constitutionality of a criminal statute may be determined in the course of a criminal trial, but argues that "the existence or nonexistence of another forum in which the Attorney General might resolve these issues appears irrelevant" to the determination of jurisdiction pursuant to the Declaratory Judgment Act. The State makes the following arguments in support of its claim of subject matter jurisdiction:

> 1. A declaratory judgment action may lie to determine matters of law and potential criminal liability under a criminal statute when that statute threatens protected interests.
>
> 2. The State of North Carolina possesses a compelling State interest in highway safety and in the removal of drunken drivers from its highways.
>
> 3. The Attorney General's statutory authority to institute proceedings affecting a public interest is at least as adequate as a criminal's property interest to support jurisdiction in this case.

4. The ordinary trial and appellate process of constitutional adjudication is slow, cumbersome and inefficient.

5. The Declaratory Judgment Act provides an independent cause of action separate and apart from other litigation for the determination of the constitutionality of and matters of law found in a criminal statute.

We disagree.

First, it is elementary that declaratory judgment statutes themselves are not jurisdictional and they do not create or grant jurisdiction where it does not otherwise exist, nor do they enlarge or extend the jurisdiction of the courts over the subject matter or the parties. 22 Am. Jur. 2d Declaratory Judgments § 75 (1965). Contrary to the State's assertion, the Act creates a new remedy, not a new source of legal rights and obligations.

In the abstract it may be said that the validity and proper construction of the Safe Roads Act are proper *subjects* for declaratory judgment. Moreover, we have recognized that a petition for declaratory judgment is a particularly appropriate means for determining the constitutionality of a statute when the parties' desire and the public need requires a speedy determination of the important public interests involved. *See Woodard v. Carteret County*, 270 N.C. 55, 153 S.E. 2d 809. It is beyond dispute that important public interests are implicated by the uncertainty surrounding the proper construction and validity of the Safe Roads Act and that the public need for a speedy judicial resolution of the questions raised thereunder is manifest. However, the conceded public interest in the expeditious determination of the Act's constitutionality may not be allowed to supplant the fundamental jurisdictional prerequisite that an actual or real existing controversy between antagonistic litigants be disclosed by the pleadings before declaratory relief may be obtained. *See Lide v. Mears*, 231 N.C. 111, 56 S.E. 2d 404.

Nor may the desire to "accelerate" the judicial process displace the general rule that courts will not entertain a declaratory judgment proceeding if there is pending, at the time of commencement of the action for declaratory relief, another action in which the same persons are parties and in which the same issues involved in the declaratory action may be adjudicated. 22 Am.

Jur. 2d Declaratory Judgments § 16. In such cases, it is generally held that there exists no actual or real existing controversy with which to invoke the subject matter jurisdiction of the latter court. *See, e.g., Trimble v. City of Prichard*, 438 So. 2d 745 (Ala. 1983); *Sim v. Comiskey*, 216 Neb. 83, 341 N.W. 2d 611 (1983); *Haas & Haynie Corp. v. Pacific Millwork Supply*, 2 Hawaii App. 132, 627 P. 2d 291 (1981).

Furthermore, the general rule against entertaining a declaratory judgment proceeding if there is a pending action involving the same parties and issues has particular applicability in criminal cases. It is widely held that a declaratory judgment is not available to restrain enforcement of a criminal prosecution. 22 Am. Jur. 2d Declaratory Judgments § 24. Such relief is "particularly inappropriate where a criminal action involving the identical question is already pending." *Id.* at 868. In *Jernigan v. State*, 279 N.C. 556, 184 S.E. 2d 259 (1971), we discussed this rule as it applies to a determination of the constitutionality of a criminal statute.

> A declaratory judgment is a civil remedy which may not be resorted to to try ordinary matters of guilt or innocence. It will not be granted when its only effect is to determine questions which properly should be decided in a criminal action. 22 Am. Jur. 2d *Declaratory Judgments* § 28 (1965); Annot., *Declaratory Relief—Criminal Statutes*, 10 A.L.R. 3d 727 (1966). For instance, one charged with the violation of a statute is not entitled to a declaratory judgment adjudicating its constitutionality, a matter which can be authoritatively settled in the criminal action. *Spence v. Cole*, 137 F. 2d 71 (4th Cir. 1943). *See Chadwick v. Salter*, 254 N.C. 389, 119 S.E. 2d 158; 26 C.J.S. *Declaratory Judgments* § 33 (1956). "*The rationale seems to be that if the facts upon which the propriety of a criminal prosecution are in dispute, the dispute ought to be resolved by the trier of the facts in a criminal prosecution in accordance with the rules governing criminal cases. . . . This reasoning, however, is inapplicable if the crucial question is one of law, since the question of law will be decided by the court in any event and not by the triers of the facts.*" *Bunis v. Conway*, 234 N.Y.S. 2d 435, 437, 17 App. Div. 2d 207. *See* 22 Am. Jur. 2d *Declaratory Judgments* § 24 (1965); Annot., 10 A.L.R. 3d 733 (1966). . . .

> *The courts do not lack power to grant a declaratory judgment merely because a questioned statute relates to penal matters.* When a plaintiff has a property interest which may be adversely affected by the enforcement of the criminal statute, he may maintain an action under the Declaratory Judgment Act to determine the validity of the statute in protection of his property rights. *Calcutt v. McGeachy*, 213 N.C. 1, 195 S.E. 49; *Bryarly v. State*, 232 Ind. 47, 111 N.E. 2d 277 (1953), and cases therein cited. (Emphasis added.)

Id. at 560-61, 184 S.E. 2d at 263-64.

The State places great reliance upon the emphasized portions of *Jernigan* in support of its contentions (1) that "a declaratory judgment action may lie to determine matters of law and potential criminal liability under a criminal statute when that statute threatens a protected interest"; (2) that the "State of North Carolina possesses a compelling State interest in highway safety and in the removal of drunken drivers from its highways"; and (3) that the "Attorney General's statutory authority is at least as adequate as a criminal's property interest to support jurisdiction in this case."

The State's reliance upon *Jernigan* is misplaced for several reasons. The key to whether or not declaratory relief is available to determine the constitutionality of a criminal statute is whether the *plaintiff* can demonstrate that a criminal prosecution is imminent or threatened, and that he stands to suffer the loss of either fundamental human rights or property interests if the criminal prosecution is begun and the criminal statute is enforced. *See Jernigan v. State*, 279 N.C. at 562, 184 S.E. 2d at 264; *Calcutt v. McGeachy*, 213 N.C. at 4, 195 S.E. at 51. If a plaintiff alleges these facts in his complaint, he has stated a cause of action for declaratory relief. If no criminal prosecution is imminent or threatened, however, or if the criminal prosecution has already begun, declaratory relief by a separate judicial tribunal is inappropriate.

Furthermore, the State has overstated the scope of *Jernigan* in permitting declaratory relief under statutes "relat[ing] to penal matters." In *Jernigan*, an inmate serving a sentence for a crime committed during his parole challenged a statute governing sentencing by way of the Declaratory Judgment Act. This Court ob-

served that the sentencing statute was not a criminal law, in the sense that it does not define or prohibit specific crimes and held that declaratory judgment was appropriate since the crucial question was a "pure question of law," decided by the court and not by the triers of fact. 279 N.C. at 561, 184 S.E. 2d at 263. The nature of the plaintiff's interest in the matter in controversy upon which a declaration was sought was characterized in the following manner:

> If the statute is unconstitutional, petitioner will be entitled to his release from prison at the conclusion of the ten-year-sentence he is now serving. If the statute is constitutional, at the completion of his present sentence he will begin the unserved portions of the previous sentences from which he was paroled. *Fundamental rights are involved.* Petitioner is entitled to know what effect the statute has upon his future. (Emphasis added.)

279 N.C. at 562, 184 S.E. 2d at 264.

Similarly, in *Calcutt v. McGeachy*, 213 N.C. 1, 195 S.E. 49 we stated that the jurisdiction of a court under the Uniform Declaratory Judgment Act extends to penal statutes "only insofar as the legislative act . . . affects the civil 'rights, status and other relations' in the present actual controversy between the parties." *Id.* at 4, 195 S.E. at 51. The plaintiff in *Calcutt* was engaged in the business of managing and selling, in both intra and interstate commerce, amusement machines and was threatened with prosecution under a statute making the possession of certain types of slot machines illegal and authorizing their confiscation. Jurisdiction was therefore premised upon the direct effect of the penal statute on the plaintiff in his trade or business. Thus, the nature of the legal rights and question to be decided under the criminal statute are relevant to the determination of whether declaratory relief is appropriate even when the issue may be characterized as a "pure question of law."

This is consistent with the rule in other jurisdictions in which courts have held that, under certain circumstances, declaratory judgments may be entertained on matters of criminal law. In general, those cases have involved questions of whether a particular publication, unchanging in nature, is obscene as a matter of law, or whether plaintiffs with vested proprietary or business

interests will be irreparably harmed if a statute is enforced. *See, e.g., Bunis v. Conway*, 17 A.D. 2d 207, 234 N.Y.S. 2d 435 (1962), *app. dis'd*, 12 N.Y. 2d 882, 237 N.Y.S. 2d 993, 188 N.E. 2d 260 (1963) (question of obscenity of a particular book appropriate for declaratory judgment because it is solely a question of law, not fact, and relief prevents informal censorship by police and district attorney); *Doyle v. Clark*, 220 Ind. 271, 41 N.E. 2d 949, *app. dis'd*, 317 U.S. 590, 87 L.Ed. 483 (1942) (language of declaratory judgment act broad enough to determine validity of penal statute prohibiting display of iced beer because the penal statute affected persons in their trade or business).

Although many of the questions alleged in the Attorney General's complaint upon which a declaration is sought may be denominated "pure questions of law," such a showing alone is insufficient to invoke the trial court's jurisdiction under the Declaratory Judgment Act. The jurisdictional prerequisite of adverse parties with a stake in the outcome of the matters in dispute as it affects their civil rights, status and other relations remains, and has not been satisfied in this case.

It is evident that the Attorney General has alleged no direct interest in the constitutionality of the Safe Roads Act comparable to the interests alleged by the plaintiffs in both *Jernigan v. State* and *Calcutt v. McGeachy*. The State's interest in the removal of drunken drivers from its highways and the enforcement of the Safe Roads Act will be adequately served through the normal channels of criminal prosecution and appeal. We are cognizant of the fact that driving while impaired prosecutions represent an unfortunately significant portion of the district court calendar. As a consequence, any successful defense challenge to the provisions of the Safe Roads Act will have a disproportionately large impact on the disposition of other cases as compared to similar challenges to criminal laws which affect fewer of our citizens. However, this problem is merely an unfortunate by-product of the operation of an orderly criminal justice system which time and experience have shown to be both reliable and efficacious.

No threat of irreparable injury has been alleged on the part of the State which would warrant the circumvention of the ordinary processes of the criminal justice system. Under circumstances such as these, the criminal defendant or potential

criminal defendant would be barred from bringing an independent declaratory judgment proceeding seeking restraint of an ongoing criminal prosecution. *See Chadwick v. Salter*, 254 N.C. 389, 119 S.E. 2d 158 (1961). The State has presented no convincing argument for permitting the Attorney General to maintain such an action under the facts alleged in the complaint.

Furthermore, the lack of the pendency of criminal prosecutions in either *Jernigan v. State* or *Calcutt v. McGeachy* was critical to this Court's finding of subject matter jurisdiction under the Declaratory Judgment Act. Here, the Attorney General's complaint alleges as its subject matter defense motions and judicial rulings involving some fourteen different questions which arose under the main "driving while impaired" provisions of the Safe Roads Act during the course of the individual defendants' criminal prosecutions or civil revocation proceedings. With one exception,[4] all of the cases named in the complaint were pending for disposition or review in either the trial or appellate divisions at the time this action was commenced. Therefore, the general rule against entertaining a declaratory judgment complaint if there is simultaneously pending either a criminal or civil action involving the same parties and issues is directly applicable to the facts of this case. The interests of the State and of the individual defendants under the Safe Roads Act are matters which can be authoritatively settled in the various pending criminal prosecutions and civil revocation proceedings in an orderly and thorough manner.

The issues raised concerning the construction and validity of the Safe Roads Act in the criminal prosecutions and civil revocation proceedings of the individual defendants may not, therefore, serve as real existing controversies to establish jurisdiction under

4. The only case which was not pending at the time the complaint was filed is *State v. Diana Sapp*, (Durham County, 83CR30792). That case involved the constitutionality of N.C.G.S. § 20-139.1(e1) insofar as it permits the admission of the chemical analyst's affidavit into evidence in the district court trial of a person charged with driving while impaired. Judge David Q. LeBarre ruled the provision unconstitutional as violative of the defendant's sixth amendment right of confrontation; refused to admit the affidavit into evidence under it; and consequently found the defendant not guilty. The State did not name Diana Sapp as a defendant in this action, and has not appealed from the dismissal of the complaint as to Judge LeBarre. Therefore, the question of the propriety of the State's seeking declaratory relief as to rulings entered in closed criminal cases, although addressed by the trial court, is not presented for review in this appeal.

the Declaratory Judgment Act between the State and the individual defendants. For this reason, the State may not successfully bootstrap its jurisdictional allegations against the judicial defendants for the rulings they entered on defense motions in those criminal trials onto its allegations against the individual defendants. The correctness of the judicial rulings in the individual defendants' criminal trials will be adequately addressed by both the State and the real parties in interest as those appeals work their way through the trial and appellate process. As the State has based its allegations of an actual or real existing controversy on cases currently pending in courts of competent jurisdiction, the trial court correctly dismissed the complaint as to all defendants for lack of jurisdiction.

C.

We make one final observation with regard to the institution of this lawsuit. All of the cases named in the complaint were pending before courts of competent jurisdiction at the time of commencement of this action. In all but a handful of these cases, the State had obtained a judgment at either the district or superior court level of the trial division and, where permissible, appeal had been noted to the appellate division by either the State or the individual defendant. With regard to the latter category of cases, those upon which a judgment has previously been entered, it is clear that the underlying controversy has been settled, subject only to further judicial review through the statutory appeal process.

The ostensible purpose of a civil declaratory judgment proceeding joining the fifteen individual defendants and the seven judicial defendants into a single lawsuit was to obtain an "accelerated" review of all of the constitutional challenges lodged and not yet ruled upon as well as those challenges upon which judgment has been entered and appeals noted.

It is clear, however, that the Declaratory Judgment Act may not be used as a substitute for the traditional processes of adjudication. The rule is well-established that the Declaratory Judgment Act is not a permissible vehicle by which to attack a prior judgment, so long as the prior judgment was entered by a court of competent jurisdiction. *Howland v. Stitzer*, 231 N.C. 528, 58 S.E. 2d 104 (1950). The courts of other states have similarly con-

strued the Uniform Declaratory Judgment Act and have consistently dismissed complaints seeking declaratory relief where the action was no more than an attempt to review a prior judgment entered by a court of competent jurisdiction. *See, e.g., Flanary v. Rowlett*, 612 S.W. 2d 47 (Mo. App. 1981); *Crofts v. Crofts*, 21 Utah 2d 332, 445 P. 2d 701 (1968); *Mills v. Mills*, 512 P. 2d 143 (Okla. 1973); *Speaker v. Lawler*, 463 S.W. 2d 741 (Tex. Civ. App. 1971); *Glassford v. Glassford*, 76 Ariz. 220, 262 P. 2d 382 (1953).

The reasons for this long-standing rule are two-fold. First, if this were not the rule, there would never be an end to litigation in any given case; a dissatisfied litigant could continually bring declaratory judgment actions against adverse judicial rulings until satisfactory rulings were obtained. Second, without this rule, declaratory judgment actions could be used to circumvent the statutory appeal process. *See Alabama Public Service Com'n v. AAA Motor Lines, Inc.*, 272 Ala. 362, 131 So. 2d 172, *cert. denied*, 368 U.S. 896, 7 L.Ed. 2d 93 (1961).

In *Fuquay Springs v. Rowland*, 239 N.C. 299, 79 S.E. 2d 774, this Court clearly stated that the Declaratory Judgment Act was not intended by our General Assembly to vest in the superior courts of the State the power to "oversee, supervise, direct, or instruct officials of inferior courts in the discharge of their official duties." *Id.* at 301, 79 S.E. 2d at 776. The soundness of this principle is self-evident and we reaffirm the rule today. In order that we insure the survival of an independent judiciary in this State, the judges of the district courts may not be made subject to a civil declaratory judgment action by the dissatisfied litigant when the judge is called upon to construe a statute, ordinance or other document in the course of deciding the case before him. Differences of opinion between the losing party and the presiding judge concerning the meaning of a statute simply do not give rise to an "actual controversy" justiciable under the Declaratory Judgment Act; they give rise to the basis for an appeal.

This construction of the Declaratory Judgment Act is in conformity with the majority view that a complaint will be dismissed when it is merely an attempt by the plaintiff to use the Act as a substitute for appeal from a lower court ruling or judgment. *See, e.g., Tucker v. Board of Ed. of Town of Norfolk*, 190 Conn. 748,

462 A. 2d 385 (1983); *Conoco, Inc. v. State Dept. of Health, Etc.*, 651 P. 2d 125 (Okla. 1982); *Tillman v. Sibbles*, 292 Ala. 355, 294 So. 2d 436 (1974).

The Supreme Court of Kansas aptly summarized the reasons behind the rule in *Williams v. Flood*, 124 Kan. 728, 262 P. 563 (1928). There, the plaintiff brought a declaratory judgment action in a superior court against the judge of the lower court on the basis of an adverse ruling by that judge in a separate case involving the plaintiff and another party. In dismissing the complaint the court stated:

> What is the controversy between the plaintiff and the defendant? It is one concerning the meaning of a statute; in other words, one concerning what the law is. *Controversies involving the interpretation of statutes may be settled under the Declaratory Judgment Law, but those controversies must include right claimed by one of the parties and denied by the other. Here the plaintiff is not claiming any right and the defendant is not denying the plaintiff any right. The controversy is such a one as is likely to arise in the trial of any action. Controversies of that character cannot be determined by this court except on an appeal in the action in which the controversy arises. It is not such a controversy as gives to the party complaining any right of action under the statute against the court who may be making a mistake of law.* (Emphasis added.)

124 Kan. at 729-30, 262 P. at 563-64.

We fully agree with this interpretation of the scope of jurisdiction under the Declaratory Judgment Act: the Act may not be used to obtain review of lower court rulings by our superior courts. The remedies for those rare instances of judicial abuse and derogation of duty, or for actions taken which are outside the authority of the judge, or for failure to perform a ministerial duty of the office remain the extraordinary writs of mandamus or prohibition. In the ordinary course of affairs, such as are presented by the cases involved in this matter, review of lower court rulings must be pursued through the orderly statutory appeal process, and not by collateral lawsuit in the form of an action under the Declaratory Judgment Act.

D.

In conclusion, the trial court properly dismissed the complaint for failure to disclose the existence of an actual or real existing controversy between the parties to the action necessary to invoke the court's jurisdiction under the Declaratory Judgment Act. *Lide v. Mears*, 231 N.C. 111, 56 S.E. 2d 404; *Tryon v. Power Company*, 222 N.C. 200, 22 S.E. 2d 450. As to the judicial defendants, no adversity of interests exists and they may not be considered as parties to the underlying controversies in the criminal prosecutions over which they presided in their official capacities. As to the individual defendants, although adversity of interest as to the validity and construction of the Safe Roads Act was properly alleged, no actual or real existing controversy between these parties and the State may be premised upon pending cases or cases in which judgments have been entered by courts of competent jurisdiction.

Accordingly, because the State failed to allege facts disclosing the existence of these necessary jurisdictional prerequisites in its complaint, the trial court was without jurisdiction "of a merely advisory nature to construe and declare the law." *Tryon v. Power Co.*, 222 N.C. at 203, 22 S.E. 2d at 452. Under these circumstances, dismissal of the complaint was entirely proper.

In view of our conclusion that the trial court correctly dismissed the complaint on the grounds that it failed to disclose the existence of an actual or real existing controversy between antagonistic litigants as to all defendants, we need not address the trial court's alternative ground for dismissal of the complaint under N.C.G.S. § 1-257 (permitting court to refuse to render a declaratory judgment where court determines in its discretion that the judgment would not terminate the uncertainty or controversy over the issues raised).

III.

[5] In its complaint, the State requested that the court treat the complaint as a petition for writ of mandamus or prohibition in the event the trial court found no jurisdiction pursuant to the Declaratory Judgment Act, and requested that the court order the judicial defendants to cease their "erroneous" interpretations of

the constitutionality of the challenged sections of the Safe Roads Act.

The trial court determined that it was without jurisdiction to grant such relief for the following reasons:

> As to the Judicial Defendants, this court is without authority or jurisdiction to issue the remedial writs of *mandamus* or *prohibition* to judges of the district court of the trial division. Authority and jurisdiction to issue these extraordinary writs to courts of the trial division is vested solely in the courts of the appellate division. Article IV, Section 12 of the North Carolina Constitution vests only the North Carolina Supreme Court with jurisdiction to issue the remedial writs. NC Gen Stat § 7A-32 expands this authority, and affords jurisdiction to both the North Carolina Supreme Court and the North Carolina Court of Appeals to issue the remedial writs. Rules 1 and 22 of the North Carolina Rules of Appellate Procedure further clarify and detail this jurisdictional grant to the appellate division. No provision is made in either the North Carolina Constitution, or in any statute or rule of this state, that affords a superior court of the trial division authority or jurisdiction to issue the remedial writs of *mandamus* or *prohibition* to a judge of the district court of the trial division.

For the reasons stated in *In re Redwine*, 312 N.C. 482, 322 S.E. 2d 769 (1984), we hold that the trial court correctly denied the State's petition for writ of mandamus or prohibition in this case.

We decline to exercise this Court's authority to treat this appeal as a petition to this Court for writs of mandamus or prohibition.

IV.

[6] In the concluding section of its brief, the State requests this Court to either decide the merits of the claims in the complaint pursuant to our supervisory power as set forth in article IV, section 12 of the North Carolina Constitution, or to certify the matter back to superior court for findings of fact and certification back to this Court for final decision. We decline to do so for several reasons.

First, as is evidenced by the terms of the State's request itself, no findings of fact have been entered by the trial court as to any of the State's substantive claims. Indeed, the judicial defendants have not yet filed pleadings responsive to the allegations in the complaint. Of the fifteen individual defendants, some have answered the complaint and moved to dismiss it, while others have only filed motions to dismiss.

The trial court has only ruled upon the jurisdictional issues of this case, and it is only the issues raised by this ruling that are the "subject matter of this appeal." By the express terms of the North Carolina Constitution, the appellate jurisdiction of this Court is "to review upon appeal any decision of the courts below." N.C. Const., art. IV, § 12(1). We have interpreted this provision to mean that this Court's function "is to review alleged errors and rulings of the trial court, and unless and until it is shown that the trial court ruled on a particular question, it is not given to us to make specific rulings thereon." *Greene v. Spivey*, 236 N.C. 435, 442, 73 S.E. 2d 488, 493 (1952); *accord, Smith v. State*, 289 N.C. 303, 222 S.E. 2d 412 (1976).

Aside from the obvious procedural and jurisdictional bars to our reaching the substantive claims presented by the complaint, the vast majority of the questions of law upon which the State seeks declaratory relief have been addressed and decided in five other "driving while impaired" cases heard in this Court on 9 October 1984 and filed contemporaneously with this case. *See State v. Smith*, 312 N.C. 361, 323 S.E. 2d 316 (1984); *State v. Howren*, 312 N.C. 454, 323 S.E. 2d 335 (1984); *State v. Rose*, 312 N.C. 441, 323 S.E. 2d 339 (1984); *State v. Coker*, 312 N.C. 432, 323 S.E. 2d 343 (1984); *State v. Shuping*, 312 N.C. 421, 323 S.E. 2d 350 (1984).

The only issues alleged in the complaint and not addressed in the above mentioned cases concern (1) the constitutionality of N.C.G.S. § 15A-534.2 (pretrial detention of impaired drivers); N.C.G.S. § 20-16.5 (pretrial civil license revocation); and N.C.G.S. § 20-179 (sentencing; enhancement of punishment by prior DUI convictions); and (2) whether N.C.G.S. § 20-138.1(a) makes the conduct described as impaired driving a criminal offense. These is-

sues arise in the cases of individual defendants Johnson, Hartwig, Tew, Henry, Howard, Crow and Massey. The record on appeal concerning these cases consists of no more than the allegations contained in the State's complaint. Of the individual defendants who are involved in these cases, some have filed only motions to dismiss and no responsive pleadings. Others have filed both, and have controverted certain factual allegations of the State in their answers. Thus, the record on appeal is totally inadequate for the purposes of reaching a decision on the merits of these claims, even were we so disposed.

Conceivably, this Court could render an opinion on the abstract question of whether the challenged provisions of the Safe Roads Act are constitutional *as drawn*. However, it would be impossible, on the record before us, to make the determination of whether those provisions were constitutional *as applied to the individual defendants* upon whose challenges we are asked to rule. As we observed in *Greensboro v. Wall*, 247 N.C. at 520, 101 S.E. 2d at 416:

> [C]onfusion is caused "by speaking of an act as constitutional in a general sense. . . ." The validity or invalidity of a statute, in whole or in part, is to be determined in respect to its adverse impact upon personal or property rights in a specific factual situation.

What we have stated concerning the Declaratory Judgment Act has bearing upon our supervisory jurisdiction as well:

> The statute 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. . . .
>
> "It is no part of the function of the courts, in the exercise of the judicial power vested in them by the constitution, to give advisory opinions, or to answer moot questions, or to maintain a legal bureau for those who may chance to be interested, for the time being, in the pursuit of some academic matter". . . . "The judicial power does not extend to a determination of abstract questions." (Citations omitted.)

Tryon v. Power Co., 222 N.C. at 204, 22 S.E. 2d at 453.

In the interest of keeping our decisions within the traditional judicial function, we must decline the invitation to exercise our supervisory authority and reach the merits of the remaining substantive questions presented by the State's complaint at this time. The questions presented by these cases will have to await decision by the orderly process of judgment and appeal. For this reason also we decline to grant the State's request that we certify the matter back to the superior court for findings of fact and certification back to this Court for final decision in the cases of defendants Johnson, Hartwig, Tew, Henry, Howard, Crow and Massey.

We affirm the trial judge's order dismissing the complaint and petition against all defendants.

Affirmed.

STATE OF NORTH CAROLINA v. EILEEN M. SMITH

No. 271PA84

(Filed 4 December 1984)

Automobiles and Other Vehicles § 126.2; Constitutional Law § 70— driving while impaired—use of affidavit to prove alcohol concentration—no violation of right to confrontation

G.S. 20-139.1(e1), which provides for the introduction of an affidavit from a chemical analyst to prove alcohol concentration, does not violate a defendant's Sixth Amendment right to confrontation. Although the affidavit is a form of hearsay, the Legislature has created a statutory exception to the hearsay rule, based on the business and public records exception, which is constitutionally permissible because the science of breath analysis for alcohol concentration has become increasingly reliable, increasingly less dependent on human skill of operation, and increasingly accepted as a means for measuring blood alcohol concentration; the information the analyst is required to record is precisely the sort of evidence that the traditional business and public records exception is intended to make admissible, and does not call for an opinion or conclusion from the analyst; the nature of the evidence and the carefully delineated guidelines for the analyst make the need for and the utility of confrontation at trial minimal, especially when North Carolina has an educated and experienced factfinder in the district court judge; the admission of affidavits to prove alcohol concentration represents a distinct exception to the hearsay rule governed by the procedures followed by analysts in impaired driving cases, including the requirement that the report be sworn to and properly executed

before an authorized official; and defendant may subpoena the analyst in district court and has the absolute right to trial *de novo* in superior court, where the analyst must appear. North Carolina Constitution Art. I, §§ 19 and 23; G.S. 8C-1, Rules 802 and 803; G.S. 20-139.1(b4); G.S. 7A-290.

Justice MARTIN dissenting.

Justices EXUM and FRYE join in the dissenting opinion.

ON discretionary review of an Order of *Judge William T. Grist* entered at the April 2, 1984 Mixed Session of Superior Court, MECKLENBURG County. On May 15, 1984, the Court of Appeals allowed the defendant's petition for writ of certiorari. On July 7, 1984, the Supreme Court allowed the State's petition for discretionary review prior to determination by the Court of Appeals. N.C.G.S. § 7A-31(b). Heard in the Supreme Court on October 9, 1984.

Rufus L. Edmisten, Attorney General, by Isaac T. Avery, III, Special Deputy Attorney General, David Roy Blackwell, Assistant Attorney General, and W. Dale Talbert, Assistant Attorney General, for the State.

Haywood, Carson & Merryman, by Lyle J. Yurko, J. Marshall Haywood, Eben T. Rawls, and Joseph L. Ledford for defendant appellant.

MITCHELL, Justice.

The defendant was charged under N.C.G.S. § 20-138.1 with the offense of impaired driving. Prior to trial the defendant filed and served a motion to suppress an affidavit prepared pursuant to N.C.G.S. § 20-139.1(e), contending that its admission into evidence would violate her right to confrontation. Following a hearing in District Court, Judge W. Terry Sherrill denied the motion. Upon the defendant's petition to Superior Court for a writ of certiorari, Judge Grist affirmed. Judge Grist's Order recites *inter alia* the following facts pertinent to this appeal:

> 2. On December 6, 1983, defendant Eileen M. Smith appeared in District Court on a North Carolina Uniform Citation charging her with the offense of driving while impaired on November 2, 1983.

3. Prior to trial, the defendant made a motion through her attorneys, J. Marshall Haywood, Eben T. Rawls, and Lyle J. Yurko of the Mecklenburg County Bar, that the Honorable W. Terry Sherrill, District Court Judge Presiding, prohibit the State of North Carolina from introducing at her trial the affidavit of the chemical analyst to prove her alcohol concentration as provided in N.C.G.S. 20-139.1(e1). It was stipulated for purposes of the motion that the State would offer the affidavit at the criminal trial and that the affidavit met all the requirements for admissibility mandated by N.C.G.S. 20-139.1 (e1).

4. On February 15, 1984, having considered the evidence offered, the argument of counsel and the memoranda submitted by both parties, Judge Sherrill ruled that the affidavit provisions of N.C.G.S. 20-139.1(e1) do not violate the defendant's right to confront the witness against her and her right to a fair trial as secured by the Sixth and Fourteenth Amendments to the Constitution of the United States and the Constitution of the State of North Carolina.

5. On March 15, 1984, upon petition by the defendant for certiorari review of the District Court's ruling pursuant to Rule 19 of the General Rules of Practice for the Superior and District Courts, the Honorable William T. Grist, Resident Superior Court Judge granted said petition and scheduled arguments for April 5, 1984.

6. Article IV, section 13 of the Constitution of the State of North Carolina provides that the General Assembly has the authority to determine the rules of practice and procedure in the District Court Division as long as such rules of procedure do not violate the Constitution.

Based on these and other findings, Judge Grist concluded that:

1. It is presumed that N.C.G.S. 20-139.1(e1) is constitutional and that who attacks it must overcome this presumption.

2. The use of a chemical analyst's affidavit, in lieu of the analyst's live appearance, by the State in a criminal trial in the District Court Division of the General Court of Justice as

proof of the facts noted in the chemical analyst's affidavit, does not deny to the criminal defendant any right or privilege granted by the Constitution of the United States or the Constitution of the State of North Carolina.

3. N.C.G.S. 20-139.1(e1) is constitutional under the provisions of the Sixth Amendment to the United States Constitution and sections 19 and 23 of Article I of the Constitution of the State of North Carolina.

The Court of Appeals allowed the defendant's petition for certiorari to review the Order of the Superior Court. We allowed the State's petition for discretionary review prior to a determination by the Court of Appeals.

The defendant challenges the constitutionality of a statutory provision which the State contends is necessary for the effective administration of the Safe Roads Act, N.C.G.S. §§ 20-138.1 to 140. The section in question, N.C.G.S. § 20-139.1(e1), provides:

(e1) Use of Chemical Analyst's Affidavit in District Court.—An affidavit by a chemical analyst sworn to and properly executed before an official authorized to administer oaths is admissible in evidence without further authentication in any hearing or trial in the District Court Division of the General Court of Justice with respect to the following matters:

(1) The alcohol concentration or concentrations of a person given a chemical analysis and who is involved in the hearing or trial.

(2) The time of the collection of the blood or breath sample or samples for the chemical analysis.

(3) The type of chemical analysis administered and the procedures followed.

(4) The type and status of any permit issued by the Department of Human Resources that he held on the date he performed the chemical analysis in question.

(5) If the chemical analysis is performed on a breath-testing instrument for which regulations adopted pursuant to subsection (b) require preventive maintenance, the date the

> most recent preventive maintenance procedures were performed on the breath-testing instrument used, as shown on the maintenance records for that instrument.
>
> The Department of Human Resources must develop a form for use by chemical analysts in making this affidavit. If any person who submitted to a chemical analysis desires that a chemical analyst personally testify in the hearing or trial in the District Court Division, he may subpoena the chemical analyst and examine him as if he were an adverse witness.

It is the defendant's contention that evidence of her alleged impairment, as demonstrated by the results of a chemical analysis performed on a breath-testing instrument, must be introduced in District Court through the in-court testimony of the analyst in order to assure her right to confront and cross-examine witnesses against her. The defendant specifically rejects any notion that her constitutional right in this regard is adequately protected by her statutory right to subpoena the analyst. Nor is the defendant willing to concede that her constitutional right to confrontation is adequately preserved in that the presence of the analyst is assured should she choose to exercise her right to a trial *de novo* in Superior Court pursuant to N.C.G.S. § 7A-290.

For the reasons set forth herein, we hold that our legislature, through N.C.G.S. § 20-139.1(e1), has enacted a constitutionally permissible procedure attuned to scientific and technological advancements which have insured reliability in chemical testing for blood alcohol concentration. We further hold that this statutory procedure does not violate the accused's right to confrontation.

The defendant's constitutional challenge to N.C.G.S. § 20-139.1(e1) evolves from the fact that the evidence presented in the form of an affidavit is hearsay. "Whenever the assertion of any person, other than that of the witness himself in his present testimony, is offered to prove the truth of the matter asserted, the evidence so offered is hearsay." 1 Brandis on North Carolina Evidence § 138 (1982). The primary purpose for the hearsay rule is to insure an opportunity for cross-examination.

> If the declarant were testifying, the adverse party could by cross-examination inquire into the narrator's capacity and opportunity to observe the facts which he related, the reliabili-

> ty of his memory, his ability to express his thoughts intelligibly and accurately, and his disposition to tell the truth generally or with respect to the particular case. When his hearsay statements are offered the opportunity to test these qualities of perception, memory, narration and veracity is greatly lessened and often completely destroyed.

Id. § 139.

N.C.G.S. § 20-139.1(e1) has effectively created a statutory exception to the hearsay rule. This Court has recognized the authority of the legislature, our law-making body, to make such exceptions. *See In re Arthur*, 291 N.C. 640, 231 S.E. 2d 614 (1977). *See also* 1 Brandis on North Carolina Evidence § 165 ("Affidavits relating to particular matters have in some instances been made admissible by statute."). Our recently enacted Rules of Evidence, provide that "[h]earsay is not admissible *except as provided by statute* or by these rules." (Emphasis added.) N.C.G.S. § 8C-1, Rule 802. The legislature therein codified its own inherent right to enact, under appropriate circumstances, statutory exceptions to the hearsay rule.

By recognizing the authority of the legislature in this instance to enact N.C.G.S. § 20-139.1(e1) as an exception to our traditional hearsay rule, we do not intend to intimate that the challenged provision came as a result of arbitrary action unrelated to the general policies or purposes underlying the rules against hearsay. Indeed, we believe that N.C.G.S. § 20-139.1(e1) reflects a rationale which complies fully with historically recognized legitimate reasons for exceptions to the general rule against hearsay evidence. Furthermore, we are cognizant of the fact that a statutory exception to the hearsay rule may nevertheless violate constitutional guarantees of the right of confrontation. *See California v. Green*, 399 U.S. 149 (1970).

For purposes of our analysis, however, we do not intend to discuss the defendant's constitutional issue in academic isolation. To do so would be to ignore the practical, common-sense rules which, over the years, our courts have applied in dealing with the competing interests of the accused who asserts a right to confront and cross-examine witnesses and the State which asserts a need to introduce relevant hearsay evidence. Indeed, a literal reading of the Sixth Amendment's Confrontation Clause would require

the exclusion of any statement made by a declarant not present at trial and "abrogate virtually every hearsay exception, a result long rejected as unintended and too extreme." *Ohio v. Roberts*, 448 U.S. 56, 63 (1980). Thus, although the right of confrontation is a fundamental right, it "must occasionally give way to considerations of public policy and the necessities of the case." *Mattox v. United States*, 156 U.S. 237, 243 (1895). For example, in *Ohio v. Roberts* the Supreme Court recognized that "every jurisdiction has a strong interest in effective law enforcement, and in the development and precise formulation of the rules of evidence applicable in criminal proceedings," and further noted that "competing interests, if 'closely examined,' *Chambers v. Mississippi*, 410 U.S. at 295, 93 S.Ct. at 1046, may warrant dispensing with confrontation at trial." 448 U.S. at 64.

In addition, it has been recognized that the "Sixth Amendment's Confrontation Clause and the evidentiary hearsay rule stem from the same roots," *Dutton v. Evans*, 400 U.S. 74, 86 (1970), and that they are "generally designed to protect similar values." *California v. Green*, 399 U.S. 149 (1970). Like the hearsay rule, "[t]he main and essential purpose of confrontation is *to secure for the opponent the opportunity of cross-examination.*" 5 Wigmore on Evidence § 1395 (Chadbourn rev. 1974).

In determining that the prodecure set forth in N.C.G.S. § 20-139.1(e1) is constitutionally sound and rejecting the defendant's contention that the State must, as a prerequisite to the admissibility of the analyst's affidavit, show that the analyst is unavailable to testify, we refer to Justice Harlan's concurring opinion in *Dutton v. Evans*. There, Justice Harlan reevaluated his earlier position in *California v. Green*, to the extent that he had advocated a "preferential rule, requiring the prosecutor to avoid the use of hearsay where it is reasonably possible for him to do so." He concluded that:

> A rule requiring production of available witnesses would significantly curtail development of the law of evidence to eliminate the necessity for production of declarants where production would be unduly inconvenient and of small utility to a defendant. Examples which come to mind are the Business Records Act, 28 USC §§ 1732-1733, and the exceptions to the hearsay rule for official statements, learned treatises,

> and trade reports. See, e.g., Uniform Rules of Evidence 63(15), 63(30), 63(31); *Gilstrap v. United States*, 389 F. 2d 6 (CA 5 1968) (business records); *Kay v. United States*, 255 F. 2d 476 (CA 4 1958) (laboratory analysis). If the hearsay exception involved in a given case is such as to commend itself to reasonable men, production of the declarant is likely to be difficult, unavailing, or pointless. In unusual cases, of which the case at hand may be an example, the Sixth Amendment guarantees federal defendants the right of compulsory process to obtain the presence of witnesses, and in *Washington v. Texas*, 388 U.S. 14, 18 L.Ed. 2d 1019, 87 S.Ct. 1920 (1967), this Court held that the Fourteenth Amendment extends the same protection to state defendants.

400 U.S. at 95-96.

Against this background we consider whether the State of North Carolina may constitutionally rely upon the affidavit of a chemical analyst during a trial in District Court in order to sustain a charge of impaired driving. The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." In *Pointer v. Texas*, 380 U.S. 400 (1965), the Supreme Court held that the Sixth Amendment right of confrontation includes the opportunity to cross examine and applies to state proceedings as well as to the federal courts. The Constitution of North Carolina incorporates a similar right. N.C. Const. Article I, §§ 19 and 23. *See State v. Watson*, 281 N.C. 221, 188 S.E. 2d 289, *cert. denied*, 409 U.S. 1043 (1972). In *California v. Green*, the Supreme Court offered the following insight concerning the underlying purpose of the Sixth Amendment right to confrontation:

> Our own decisions seem to have recognized at an early date that it is this literal right to "confront" the witness at the time of trial that forms the core of the values furthered by the Confrontation Clause:
>
> "The primary object of the constitutional provision in question was to prevent depositions or ex parte affidavits, such as were sometimes admitted in civil cases, being used against the prisoner in lieu of a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting

> the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief." *Mattox v. United States*, 156 U.S. 237, 242-243, 39 L.Ed. 409, 411, 15 S.Ct. 337 (1895).

399 U.S. at 157-58.

Unquestionably, testing the accuracy and credibility of witnesses presented against an accused is vital to the factfinding process. Equally true is that where there has been "substantial compliance with the purposes behind the confrontation requirement," hearsay evidence may be admitted. *California v. Green*, 399 U.S. at 166. For example, it is well established that certain exceptions to the hearsay rule, such as the business and public records exceptions, "rest upon such solid foundations that admission of virtually any evidence within them comports with the 'substance of the constitutional protection.'" *Ohio v. Roberts*, 488 U.S. at 66. *See Mattox v. United States*, 156 U.S. 237 (1895).

Because we believe that the statutory exception to the hearsay rule created by N.C.G.S. § 20-139.1(e1) has as its basis the sound reasoning which gave rise to the business and public records exceptions to the rule, it is helpful to view the statute in that context. In his treatise on evidence, Wigmore explains that although "[t]he principle of necessity . . . in one form or another is found in all the hearsay exceptions," under some circumstances, including the official statements (business and public records) exception,

> something less than an absolute impossibility is regarded as sufficient. The necessity reduces itself to a high degree of expediency. In none of these exceptions is it required that the witness be shown to be *unavailable by reason of death, absence*, or the like circumstances.
>
> In the present exception, it is easy to see why it is highly expedient, if not practically necessary, to accept the hearsay statement of an official, in certain classes of cases, instead of summoning him to attend and testify viva voce before a court or by deposition before a commissioner. The public officers are few in whose daily work something is not

> done which must later be proved in court; and the trials are rare in which testimony is not needed from official sources. Were there no exception for official statements, hosts of officials would be found devoting the greater part of their time to attending as witnesses in court or delivering their depositions before an officer. The work of administration of government and the needs of the public having business with officials would alike suffer in consequence. Although, then, there is strictly no necessity for employing hearsay in the sense that the personal attendance of the officer is corporally impossible to obtain, there is nevertheless a high degree of expediency that the public business be not deranged by insisting on the strict enforcement of the hearsay rule.

5 Wigmore on Evidence § 1631 (Chadbourn rev. 1974).

Wigmore continues by noting that "the second essential for an exception to the hearsay rule is that some circumstantial probability of trustworthiness be found, to take the place of cross-examination so far as may be." As to official statements, trustworthiness stems from the presumption that

> public officers do their duty. When it is a part of the *duty of a public officer* to make a statement as to a fact coming within his official cognizance, the great probability is that he does his duty and makes a correct statement. The consideration that regularity of habit, a chief basis for the exception for regular entries . . . will tend to this end is not here an essential one; for casual statements, such as certificates, may be admissible, as well as a regular series of entries in a registry. The fundamental circumstance is that an official duty exists to make an accurate statement, and that this special and weighty duty will usually suffice as a motive to incite the officer to its fulfilment. The duty may or may not be one for whose violation a penalty is expressly prescribed. The officer may or may not be one from whom in advance an express oath of office is required. No stress seems to be laid judicially on either of these considerations; nor need they be emphasized. It is the influence of the official duty, broadly considered, which is taken as the sufficient element of trustworthiness, justifying the acceptance of the hearsay statement.

Id.

As recently applied in a case involving the analysis of a controlled substance, one court discussed the rationale for the rule governing admissibility of a written statement of an act done or an act, condition or event observed by a public official as follows:

> The rule is both realistic and practical. Being charged with the obligation of accuracy, a public official's report is accorded a presumption of trust. And to require that a public official relinquish continued attention to the other tasks within his responsibility merely to repeat orally that which he has already written disserves the public. The rule is to be viewed and implemented in this context.

State v. Malsbury, 186 N.J. Super. 91, 97, 451 A. 2d 421, 424 (1982). The exception to the hearsay rule governing public records and reports has been invoked consistently by courts as the basis for admitting into evidence certificates concerning qualifications of the individual calibrating the breathalyzer instrument; calibration, maintenance, inspection, and testing of the instrument; approval of the laboratory testing the sample; testing of ampules and similator solutions used in such instruments, including the fact that they contained properly compounded materials; and the results of analysis. *See, e.g., State v. Huggins*, 659 P. 2d 613 (Alaska App. 1982); (relying on *Wester v. State*, 528 P. 2d 1179 (Alaska 1974), *cert. denied*, 423 U.S. 836 (1975)); *Best v. State*, 328 A. 2d 141 (Del. 1974); *Douglas v. State*, 145 Ga. App. 42, 243 S.E. 2d 298 (1978); *People v. Black*, 84 Ill. App. 3d 1050, 406 N.E. 2d 23 (1980); *State v. Jensen*, 351 N.W. 2d 29 (Minn. App. 1984); *State v. Becker*, 429 S.W. 2d 290 (Mo. App. 1968); *State v. Conners*, 129 N.J. Super. 476, 324 A. 2d 85 (1974); *People v. Freeland*, 118 Misc. 2d 486, 460 N.Y.S. 2d 907 (1983); *State v. Walker*, 53 Ohio St. 2d 192, 374 N.E. 2d 132 (1978); *Brown v. State*, 584 P. 2d 231 (Okla. 1978); *State v. Smith*, 66 Or. App. 703, 675 P. 2d 510 (1984); *Commonwealth v. Sweet*, 232 Pa. Super. 372, 335 A. 2d 420 (1975); *State v. Robbins*, 512 S.W. 2d 265 (Tenn. 1974); *Murray City v. Hall*, 663 P. 2d 1314 (Utah 1983). *Cf.*, N.C.G.S. § 20-139.1(b4) (Interim Supp. 1984) (Business Record exception to the hearsay rule for reports, logs and certificates relating to breath-testing instruments).

In each of the above cases a court was presented with the accused's argument that he was entitled to confront and cross-examine the individual responsible for preparing the document in question. In each case, the court found, explicitly or implicitly, that the document was not primarily testimonial but rather was merely the recordation of a fact as easily and as reliably proved by the document itself as by live testimony. Furthermore, the information contained in the document was of a type which by its mere recordation in the ordinary course of business, would be sufficiently reliable to be accepted as trustworthy evidence.

We recognize that each of these cases rests on its own facts, each construes statutes and rules of evidence which differ from those of North Carolina, and each involves a breathalyzer procedure unique to the particular equipment used. From these cases, however, emerges one significant fact: the science of breath analysis for alcohol concentration has become increasingly reliable, increasingly less dependent on human skill of operation, and increasingly accepted as a means for measuring blood alcohol concentration.

In this regard we have taken judicial notice of the fact that in North Carolina breath testing for blood alcohol concentration generally is conducted on equipment which requires minimal operator assistance. For example, The Intoxilizer, Model 4011AS, which uses a technique called infrared absorption, requires the operator to perform the following steps to conduct the test:

> (1) Insure "READY" light is on and that breath tube is connected to pump tube;
>
> (2) Insert test record. Turn mode selector to "ZERO SET". Turn zero adjust until .000 appears. Turn mode selector to "AIR BLANK";
>
> (3) Insure alcoholic breath simulator thermometer shows proper operating temperature. After "AIR BLANK" cycle is completed, turn mode selector to "ZERO SET" and connect breath and pump tube to alcoholic breath simulator;
>
> (4) Turn zero adjust until .000 appears and turn mode selector to "CALIBRATOR". Insure expected results are displayed and record time;

(5) Connect breath tube to pump tube. Turn mode selector to "AIR BLANK". After cycle is complete, turn mode selector to "ZERO SET";

(6) Insure observation period requirements have been met;

(7) Turn zero adjust until .000 appears. Turn mode selector to "BREATH";

(8) Turn digital display off;

(9) Collect breath sample. Record time;

(10) Turn digital display on;

(11) Connect breath tube to pump tube. Turn mode selector to "AIR BLANK". After cycle is complete, turn mode selector to "ZERO SET";

(12) For second test, repeat steps (6) through (11);

(13) Remove test record and record results.

If the alcohol concentrations differ by more than 0.02, a third or subsequent test shall be administered as soon as feasible by repeating steps (6) through (11) and (13).

N. C. Admin. Code tit. 10, § 7B.0344 (effective January 1, 1985). The results of the test are recorded on a computer printout card. The Breathalyzer, Model 2000, and the Intoximeter, Model 3000 also employ computer technology to test and record the results of breath samples. Regulations for the operation of these instruments are similar.

In short, the scientific and technological advancements which have made possible this type of analysis have removed the necessity for a subjective determination of impairment, so appropriate for cross-examination, and have increasingly removed the operator as a material element in the objective determination of blood alcohol concentration. Indeed, our legislature's recognition of this reliable and accurate innovation of blood alcohol concentration testing is manifested in N.C.G.S. § 20-138.1(a)(2) which now provides that a person who "after having consumed sufficient alcohol that he has, at any relevant time after driving, an alcohol concentration of 0.10 or more" commits the offense of impaired driving.

The defendant argues, and we agree, that the result of a breathalyzer analysis is crucial to a conviction. It has been suggested that the breathalyzer procedure now available for objectively determining blood alcohol concentration lends itself to the somewhat startling conclusion that in reality the "witness" against the defendant, the source of the crucial and incriminating evidence, is not the analyst but the machine itself. In *State v. Robbins*, 512 S.W. 2d 265 (Tenn. 1974), the court concluded as much in holding that the laboratory technician who analyzed a specimen of the defendant's breath for the purpose of determining its alcoholic concentration, was not a "witness" for purposes of confrontation. The court relied on the reasoning of *United States v. Beasley*, 438 F. 2d 1279 (6th Cir.), *cert. denied*, 404 U.S. 866, *reh. denied*, 404 U.S. 1006 (1971). In *Beasley*, the defendant contended that the Government's failure to call the technician who processed the defendant's latent palm print from a holdup note violated his Sixth Amendment right to confrontation. The Court responded that:

> [T]here could have been nothing accusatorial in the technician's testimony that he properly performed the mechanical test of "bringing out" the latent prints on the note paper; therefore he was not a witness "against" the Appellant, and the Sixth Amendment guarantee of confrontation and cross examination does not apply.

438 F. 2d at 1281.

In the present case, N.C.G.S. § 20-139.1(e1) permits the chemical analyst to attest by affidavit to certain objective facts which he or she has a statutory duty to record after complying with certain procedures and guidelines adopted by the Commission for Health Services. The analyst is at no time called upon to render an opinion or to draw conclusions. *See, e.g., State v. Watson*, 281 N.C. 221, 188 S.E. 2d 289, *cert. denied*, 409 U.S. 1043 (1972) (error to admit hearsay and conclusory statement as to cause of death pursuant to N.C.G.S. § 130-66). The analyst is required at the time of testing to record the alcohol concentration as indicated by the machine, the time of collection, the type of analysis performed, the type and status of his permit, and the date of the most recent preventive maintenance. N.C.G.S. § 20-139.1(e1)(1)-(5). The resulting information is precisely the sort of

evidence that the traditional business and public records exceptions to the hearsay rule intended to make admissible. " 'It cannot be thought that the Constitution was intended to close the door to the legislative department of government to establish new public records with like probative value.' " *Kreck v. Spalding*, 721 F. 2d 1229, 1243 (9th Cir. 1983) (quoting *Commonwealth v. Slavski*, 245 Mass. 405, 140 N.E. 465 (1923)). It bears repeating that the exceptions to the hearsay rule are not static, "but may be enlarged from time to time if there is no material departure from the reason of the general rule." *Id.* (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 107 (1934)).

The significance of applying the rationale underlying the business and public records exceptions to the hearsay rule in the present case thus becomes obvious: first, the exceptions may be invoked irrespective of the availability of the maker of the document; and second, admissibility is not limited to non-crucial evidence. For purposes of admissibility, the critical question becomes one of reliability. Reliability, when translated into terms of the accused's Sixth Amendment right to confront and cross-examine witnesses, has been described as

> an inquiry into the likelihood that cross-examination of the declarant at trial could successfully call into question the declaration's apparent meaning or the declarant's sincerity, perception, or memory.

Kreck v. Spalding, 721 F. 2d at 1244 (citing to Congressional Research Service Library of Congress, *The Constitution of the United States of America—Analysis and Interpretation* 1214 (1973), explaining the rule in *Dutton v. Evans*).

It is unlikely in cases such as the case before us that cross-examination of the chemical analyst at trial could "successfully call into question the declaration's apparent meaning or the declarant's sincerity, perception or memory." Rather, to require every analyst to testify in such cases would be "unduly inconvenient and of small utility." *Dutton v. Evans*, 400 U.S. at 96 (Harlan, J. concurring). As Justice Harlan concluded in *Dutton*, "[i]f the hearsay exception involved in a given case is such as to commend itself to reasonable men, production of the declarant is likely to be difficult, unavailing, or pointless." *Id. See United States v. Yakobov*, 712 F. 2d 20 (2d Cir. 1983). When we consider the nature

of the evidence—a well recognized scientifically designed test for determining blood alcohol concentration—together with the duty of the analyst to follow carefully delineated guidelines in conducting the test and the objective nature of the facts recorded, both the need for *and* the utility of confrontation at trial in District Court appear minimal.

The State correctly points out that in District Court in North Carolina we have an educated and experienced fact-finder. The District Court Judge presides over hundreds of DWI cases each year. He hears testimony almost every day in numerous cases concerning analysis of alcohol concentration by different instruments. Cross-examination of analysts and all the arguments concerning whether the defendant had a blood alcohol concentration at a certain level have been made in court before him. The need for him to judge the demeanor of the analyst is greatly reduced. In addition, the testimony will be limited to the procedures set forth in N.C.G.S. § 20-139.1 and the rules of the Department of Human Resources. The demeanor of a witness in testifying whether he followed the rules is of limited value under this system.

Finally, we find persuasive the reasoning of *Kay v. United States*, 255 F. 2d 476 (4th Cir.), *cert. denied*, 358 U.S. 825 (1958), and *State v. Larochelle*, 112 N.H. 392, 297 A. 2d 223 (1972). In *Kay* the Court specifically held that the admission of a certificate which showed the alcohol concentration of an accused's blood sample as determined by chemical analysis did not deprive the accused, charged with reckless and drunken driving, of his federal or state constitutional right to confrontation. At the time that the blood test was administered in *Kay*, Virginia law did not require one so charged to submit to the chemical analysis. *See* Code Va. 1950 §§ 18-75, 18-75.1 to 75.3, 18.76 (repealed by Acts 1960, c. 358). Those statutory provisions have since been amended to require submission to chemical analysis. *See* Code Va. § 18.2-268 (Cum. Supp. 1984). Since the decision in *Kay*, Virginia has made it "unlawful for any person to drive or operate any motor vehicle . . . while such person has a blood alcohol concentration of 0.15. . . ." Code Va. § 18.2-266. However, *Kay* continues to be cited with approval both in Virginia and in other jurisdictions. *See, e.g., Dutton v. Evans*, 400 U.S. 74 (1970); *State v. Bauer*, 109 Wis. 2d 204, 325 N.W. 2d 857 (1982); *United States v. Yakobov*, 712 F. 2d

20 (2d Cir. 1983); *Kreck v. Spalding*, 721 F. 2d 1229 (9th Cir. 1983); *Robertson v. Cox*, 320 F. Supp. 900 (W.D. Va. 1970); *SAS v. State of Maryland*, 295 F. Supp. 389 (D. Md. 1969); *Howard v. United States*, 473 A. 2d 835 (D.C. App. 1984); *State v. Malsbury*, 186 N.J. Super. 91, 451 A. 2d 421 (1982); *People v. Hayes*, 470 N.Y.S. 2d 485 (1983).

In *Kay* the court recognized that the presumptions in the statute relating to alcoholic concentration in the blood were "not merely procedural," but "amount[ed] to a redefinition of the offense," much as the 0.10 blood alcohol concentration under N.C.G.S. § 20-138.1 now defines an offense of impaired driving. 255 F. 2d at 479. In addressing the defendant's Sixth Amendment argument, the court wrote:

> Admission of the certificate did not deprive the defendant of his right of confrontation by witnesses. Neither the Sixth Amendment to the Constitution of the United States nor Article I, Section 8 of the Constitution of Virginia can be said to have incorporated the rule against hearsay evidence, as understood at the time of their adoption. Each was intended to prevent the trial of criminal cases upon affidavits, not to serve as a rigid and inflexible barrier against the orderly development of reasonable and necessary exceptions to the hearsay rule.
>
> The power of Congress and of a state legislature to provide for the admission of evidence is not subject to any such arbitrary limitation as the defendant supposes. They may carve out a new exception to the hearsay rule, without violating constitutional rights, where there is reasonable necessity for it and where it is supported by an adequate basis for assurance that the evidence has those qualities of reliability and trustworthiness attributed to other evidence admissible under long established exceptions to the hearsay rule. See *Tot v. United States*, 319 U.S. 463, 63 S.Ct. 1241, 87 L.Ed. 1519; *United States v. Leathers*, 2 Cir., 135 F. 2d 507; *Matthews v. U.S.*, 5 Cir., 217 F. 2d 409.
>
> Certificates quite comparable to this one have been held admissible over objection upon similar constitutional grounds. See *Bracey v. Commonwealth*, 119 Va. 867, 89 S.E. 144; *State v. Torello*, 103 Conn. 511, 131 A. 429; *Commonwealth v. Slav-*

ski, 245 Mass. 405, 140 N.E. 465, 29 A.L.R. 281; *Commonwealth v. Stoler*, 259 Mass. 109, 156 N.E. 71. The alcoholic content of the blood, the evidentiary fact sought to be proved by the certificate may be accurately determined by well recognized chemical procedures. It is an objective fact, not a mere expression of opinion, and its proof by introduction of the certificate violates no constitutional right of the defendant.

255 F. 2d at 480-81.

In *State v. Larochelle*, 112 N.H. 392, 297 A. 2d 223 (1972), the Supreme Court of New Hampshire recognized the inherent reliability of various blood alcohol concentration tests and held that when "gathered and recorded pursuant to a public duty" and admitted in compliance with statutory requirements, the tests carry "sufficient characteristics of trustworthiness to be safely placed before the trier of fact without confrontation of the tester." *Id.* 397, 297 A. 2d at 226. *See State v. Dunsmore*, 112 N.H. 382, 297 A. 2d 230 (1972); *see also State v. King*, 187 Conn. 292, 445 A. 2d 901 (1982). The court in *Larochelle* cited as authority for its holding *Dutton v. Evans*, 400 U.S. 74 (1970) and *Kay v. United States*, 255 F. 2d 476 (4th Cir.), *cert. denied*, 358 U.S. 825 (1958). The court noted that the statute in question, RSA 262-A:69K (supp.), which provides that the official report of the test is deemed conclusive evidence of the test results unless the accused files notice requiring the attendance of the certified operator, indicated a "legislative reliance upon the common-law official written statements exception to the hearsay rule." *Id.* at 394, 297 A. 2d at 225. We reach a similar conclusion.

In reaching our result in the present case, we are aware of the contrary line of cases originating with the decision in *United States v. Oates*, 560 F. 2d 45 (2d Cir. 1977), particularly in light of the fact that our legislature has recently enacted the North Carolina Rules of Evidence which substantially track the Federal Rules of Evidence. *See* N.C.G.S. § 8C-1. In *Oates*, the court was asked to construe Rule 803(8) of the Federal Rules of Evidence which permits, as do our North Carolina rules, admitting into evidence all

> —Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the

> activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law-enforcement personnel, or (C) in civil cases and proceedings and against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

Id. at 66-67. The court held that exhibits purporting to be the official report and accompanying worksheet of a United States customs service chemist who analyzed a white powdery substance determined to be heroin were inadmissible under the "law enforcement official" exception to Rule 803(8). The court found that the evidence was "crucial" to the government's case to prove an essential element of the crime, and that the government therefore had to "bear the burden of producing extra-judicial declarants, or of demonstrating their genuine unavailability. . . ." *Id.* at 83. The court strongly intimated that the evidence would be inadmissible under any rule governing the admissibility of hearsay statements.

In response to the defendant's argument that *Oates* is controlling in this case, we first reiterate that although we have recognized our legislature's reliance on the traditional business records and public records exceptions to the hearsay rule in enacting N.C.G.S. § 20-139.1(e1), the statute represents a separate and distinct exception governed by the procedures followed by chemical analysts in impaired driving cases. Important among these is that the report be "*sworn to* and properly executed before an official authorized to administer oaths . . ." N.C.G.S. § 20-139.1(e1) (emphasis added). A recent amendment to N.C.G.S. § 20-139.1 indicates that the legislature was aware of the statutorily enacted Code of Evidence, particularly Rule 803(8). N.C.G.S. § 20-139.1(b4) was added effective July 6, 1984, and provides:

> (b4) Introducing Routine Records Kept as Part of Breath-Testing Program.—In civil and criminal proceedings, any party may introduce, without further authentication, simulator logs and logs for other devices used to verify a breath-testing instrument, certificates and other records concerning the check of ampules and of simulator stock solution and the

> stock solution used in any other equilibration device, preventive maintenance records, and other records that are routinely kept concerning the maintenance and operation of breath-taking instruments. In a criminal case, however, this subsection does not authorize the State to introduce records to prove the results of a chemical analysis of the defendant or of any validation test of the instrument that is conducted during that chemical analysis.

This provision clearly authorizes the introduction of reports, logs and certificates dealing with the procedures involved in the operation of the breathalyzer. Only the results of the test are excluded under this section. When those results meet the additional requirements of N.C.G.S. § 20-139.1(e1), however, they are admissible in District Court. Thus we view the (b4) amendment as a codification of the business records exception for the purposes of records and reports pertaining to the operation and maintenance of breath-testing equipment, which in no way affects a separate determination of whether the results of the tests would be admissible under N.C.G.S. § 20-139.1(e1) *when sworn to* and properly executed before an official authorized to administer oaths.

Furthermore, the reasoning of *Oates* has been questioned by the very court rendering the decision in that case. *See* Annot. 56 A.L.R. Fed. 168 § 5 (1982), *United States v. Cambindo Valencia*, 609 F. 2d 603 (2d Cir. 1979), *cert. denied*, 446 U.S. 940 (1980); *United States v. Grady*, 544 F. 2d 598 (2d Cir. 1976); *see also United States v. Neff*, 615 F. 2d 1235 (9th Cir.), *cert. denied*, 447 U.S. 925 (1980). More persuasive than *Oates* are two cases decided subsequent thereto—one concerning the admissibility of certificates of breathalyzer machine inspections, *State v. Smith*, 66 Or. App. 703, 675 P. 2d 510 (1984), and the second concerning the admissibility of the report of a chemical analysis of drugs pursuant to the Uniform Controlled Substances Act, *Howard v. United States*, 473 A. 2d 835 (D.C. App. 1984). In *Smith*, the defendant argued that the Oregon Evidence Code 803(8)(b) excluded the certificates of breathalyzer inspections because the individual conducting the inspection was "law enforcement personnel" and the certificates related to "matters observed" in connection with a "criminal case." The defendant relied on *Oates*. The Oregon court disagreed:

> We conclude that, in adopting FRE 803(8)(B), Congress did not intend to change the common law rule allowing admission of public records of purely "ministerial observations." Rather, Congress intended to prevent prosecutors from attempting to prove their cases through police officers' reports of their observations during the investigation of crime. *United States v. Grady*, 544 F. 2d 598, 604 (2d Cir. 1976). We infer that the state legislature adopted OEC 803(8)(b) with the same intent.

66 Or. App. at ---, 675 P. 2d at 512. *See State v. Huggins*, 659 P. 2d 613 (Alaska App. 1982).

In *Howard v. United States*, 473 A. 2d 835 (D.C. App. 1984), the court was clearly aware of the decision in *Oates* but chose to follow a long line of cases including *In re Arthur*, 291 N.C. 640, 231 S.E. 2d 614 (1977), in holding that evidence consisting of the written reports of chemical analysis by the Drug Enforcement Agency was admissible under the business records exception to the hearsay rule. The court noted that the identity of the substance was determined by a well-recognized chemical procedure, the reports contained objective facts rather than expressions of opinion, and the chemists who conducted the tests did so routinely and generally did not have an interest in the outcome of trials. The court furthermore held that because the "[a]dmission of the reports into evidence [did] not preclude a defendant from inquiring into the reliability of the testing procedure or the qualifications of the chemists" in that he was "free to subpoena the reporting chemist without cost," the defendant was not "substantially disadvantaged by the government's failure to call the out-of-court declarant, and confrontation rights [were] effectively preserved." *Id.* 839.

We do not find the reasoning of *Oates* persuasive. Instead, we adopt the reasoning of the overwhelming majority of courts which have considered issues such as those raised by the defendant in this case. Accordingly, we hold that the right to confrontation guaranteed by the Sixth Amendment to the Constitution of the United States and Article I, §§ 19 and 23 of the Constitution of North Carolina is not violated by the procedure provided by N.C.G.S. § 20-139.1(e1) for admission into evidence of the affidavit of an analyst who does not testify at trial.

Even if it is assumed *arguendo* that the defendant has an absolute constitutional right to confront and cross-examine the analyst in cases such as the present case—an idea we reject—that right is fully protected at two levels. At the District Court level, the defendant is entitled to subpoena the analyst and examine him as an adverse witness, as on cross-examination. The defendant contends, however, that this unfairly shifts the burden to a defendant to prove non-compliance with some aspect of the procedure and does not "cure" the alleged constitutional error. We do not agree. Unless the information contained in the affidavit is challenged, it is presumed correct. *See State v. Larochelle*, 112 N.H. 392, 297 A. 2d 223 (1972). Failure to summon the analyst results in a waiver of any right to examine the analyst and contest the findings. *Id. See Howard v. United States*, 473 A. 2d 835 (D.C. App. 1984); *State v. Robbins*, 512 S.W. 2d 265 (Tenn. 1974) (defendant waived a "personal constitutional right" to confront a chemical analyst by "knowingly" failing to subpoena him); *see also Stroupe v. Commonwealth*, 215 Va. 243, 207 S.E. 2d 894 (1974) (with respect to the regularity of the test, the statute affords the defendant the right to prove noncompliance with test procedures and such evidence affects the weight rather than the admissibility of the certificate).

Finally, the defendant's right to confront the analyst is ultimately guaranteed by her absolute right to trial *de novo* in Superior Court. In this regard, the defendant argues that a violation of her constitutional rights in District Court cannot be cured merely because the case is subject to appeal and trial *de novo* in a higher court. She cites as authority *Ward v. Monroeville*, 409 U.S. 57 (1972). In *Ward* the Supreme Court rejected the argument that a violation of the accused's right to a neutral and detached judge in the first instance was rendered constitutionally acceptable where the accused was permitted to appeal for a trial *de novo*. We do not find *Ward* controlling in the present case.

In *State v. Spencer*, 276 N.C. 535, 173 S.E. 2d 765 (1970), this Court held that the right of an appeal from District Court resulting in a trial *de novo* in Superior Court effectively preserved the defendant's right to a trial by jury. We stated:

> Infringement upon the constitutional right of these defendants to trial by jury is not apparent. Although initially

> tried in the district court before the judge without a jury, defendants had, and exercised, an absolute right to a jury trial *de novo* in the superior court pursuant to G.S. 7A-288 (now G.S. 7A-290) and G.S. 15-177.1. It is established law in North Carolina that trial *de novo* in the superior court is a new trial from beginning to end, on both law and facts, disregarding completely the plea, trial, verdict and judgment below; and the superior court judgment entered upon conviction there is wholly independent of any judgment which was entered in the inferior court. "The fact that a right of appeal was given where the defendant was convicted in the lower court without the intervention of a jury has generally been regarded as a sufficient reason, in support of the validity of such trials without a jury in the inferior tribunal, as by appealing the defendant secures his right to a jury trial, in the Superior Court, and therefore cannot justly complain that he has been deprived of his constitutional right." *State v. Pulliam*, 184 N.C. 681, 114 S.E. 394. Accord: *State v. Norman*, 237 N.C. 205, 74 S.E. 2d 602.

Id. at 543, 173 S.E. 2d at 771. *See Ludwig v. Massachusetts*, 427 U.S. 618 (1976); *see also North v. Russell*, 427 U.S. 328 (1976) (accused, subject to possible imprisonment, is not denied due process when tried before a nonlawyer police court judge with a later trial *de novo* available under a State's two-tier court system).

The two-tier court system in North Carolina provides simple and speedy trials of misdemeanor cases in District Court, while at the same time insuring every defendant the absolute right to a full jury trial in Superior Court. In *Justices of Boston Municipal Court v. Lydon*, --- U.S. ---, 80 L.Ed. 2d 311 (1984), the Supreme Court, in the context of a double jeopardy issue, described the *de novo* hearing as follows:

> While technically [the defendant] is "tried again," the second stage proceeding can be regarded as but an enlarged, fact—sensitive part of a single, continuous course of judicial proceedings during which, sooner or later, a defendant receives more—rather than less—of the process normally extended to criminal defendants in this nation.

Id. at ---, 80 L.Ed. 2d at 325. In his concurring opinion, Justice Brennan noted that the two-tier system provides a defendant

with two full opportunities to be acquitted *on the facts*, and commented that

> Perhaps more importantly, the defendant's realization throughout the first-tier trial that he has an absolute right to a second chance necessarily mitigates the sense of irrevocability that normally attends the factfinding stage of criminal proceedings, from beginning to end. For these reasons, the defendant's prospective knowledge of his entitlement to a second factfinding opportunity substantially diminishes the burden imposed by the first proceeding as well as the significance of a guilty verdict ending that proceeding.

Id. at ---, 80 L.Ed. 2d at 335. We believe that the language quoted above represents a recognition that for purposes of protecting certain constitutional rights, the two-tier system must frequently be viewed as providing a single continuous proceeding in which those rights are preserved for the "second factfinding opportunity." In the present case the defendant's opportunity to confront and cross-examine the chemical analyst is not foreclosed but appropriately preserved for a *de novo* trial before a jury in Superior Court.

Indeed, this Court has itself implicitly recognized that, where the opportunity to confront and cross-examine a chemical analyst is ultimately assured in Superior Court, a statute providing for the admission of the analyst's report in District Court is not unconstitutional. *In re Arthur*, 291 N.C. 640, 231 S.E. 2d 614 (1977). In *Arthur* we considered whether N.C.G.S. § 90-95(g) applied to delinquency proceedings. The statute provided the basis for the admission into evidence of a written report of an S.B.I. laboratory analysis which concluded that certain "green vegetable material" found in the defendant's possession was marijuana. The chemical analyst did not testify at the defendant's trial in District Court. The statute authorized the admission of such reports "without further authentication in all proceedings in the district court division of the General Court of Justice. . . ." Because in delinquency proceedings "the district court [was] the ultimate fact-finding forum," and the juvenile was afforded no opportunity for a trial *de novo* in Superior Court, we held that N.C.G.S. § 90-95(g) did not apply. *Id.* at 643, 231 S.E. 2d at 617. In construing the import

of the statute we stated that we were "confident that the legislature at the time of its enactment had in mind the great majority of district court criminal proceedings . . . in which, in misdemeanor cases, an *appeal of right to the superior court lies for a trial de novo.*" 291 N.C. at 642-43, 231 S.E. 2d at 616 (emphasis added). We noted further that:

> [t]he policy underlying General Statute 90-95(g) is obviously one of convenience to the state. By permitting the written report of the chemical analysis to serve as evidence of the truth of the analysis itself the statute relieves busy SBI and other chemists from having to spend time traveling to and from courthouses throughout the state for the purpose of testifying.

Id. at 643, 231 S.E. 2d at 616.

Based upon the foregoing authority and reasoning we conclude that even when it is assumed *arguendo* that the defendant has a constitutional right to confront the chemical analyst who conducted the breathalyzer test pursuant to N.C.G.S. § 20-139.1, the right is guaranteed during the *de novo* trial on appeal to Superior Court which offers the second factfinding opportunity in the continuous proceeding provided by our two-tier court system. Since N.C.G.S. § 20-139.1(e1) states that the defendant additionally may subpoena the analyst and examine him as an adverse witness in any hearing or trial in District Court, the defendant in fact is given an easy method for confronting the analyst at each factfinding opportunity in our two-tier system. Far from denying the defendant the opportunity to confront and cross-examine the analyst, the statute grants an *additional opportunity* for confrontation and cross-examination. It violates neither the Sixth Amendment to the Constitution of the United States nor the Constitution of North Carolina. The order of the Superior Court, Mecklenburg County, which is the subject of this appeal is

Affirmed.

Justice MARTIN dissenting.

I respectfully dissent. The recent efforts of the Governor and General Assembly of North Carolina to improve highway safety are indeed laudatory. It is essential to the safety of the public

that the dangers of drinking and driving be reduced and eliminated. However, even in such praiseworthy pursuits, constitutional principles must be preserved. *See Coolidge v. New Hampshire*, 403 U.S. 443, 29 L.Ed. 2d 564 (1971).

I find that the use of the affidavit as evidence pursuant to N.C.G.S. 20-139.1(e1) violates the confrontation clause of the federal and state constitutions. U.S. Const. amend. VI; N.C. Const. art. I, § 23.

A brief look at the historical reasons for the confrontation clause is helpful. At the common law in the seventeenth century it was a common practice to try criminal defendants on evidence which consisted solely of ex parte affidavits or depositions, thus denying the defendant the opportunity to challenge his accuser in a face-to-face encounter in front of the trier of the fact. The confrontation clause was included in the federal and state constitutions for the purpose of preventing this method of trial. *California v. Green*, 399 U.S. 149, 26 L.Ed. 2d 489 (1970). Among the purposes of the confrontation clause are: (1) to ensure that the witness will give his testimony under oath, impressing upon him the seriousness of the matter and guarding against the lie by the possibility of a penalty for perjury, (2) requiring the witness to submit to cross-examination, certainly the greatest method of discovering the truth, and (3) to allow the fact finder to observe the demeanor of the witness and determine the credibility to be given to his testimony. *Id.* The famous case of the trial of Sir Walter Raleigh for treason in 1603 gave strong impetus to the development of the confrontation clause. The crucial evidence against Raleigh consisted of a series of statements by one Cobham, charging Raleigh with complicity in a plot to seize the English throne. Raleigh demanded that Cobham be produced to testify face to face at his trial. This request was denied. Subsequently, after a long period of incarceration in the Tower of London, Raleigh was executed.

The right of confrontation is broader than the right of cross-examination. A defendant has a right to face his accusers and to have the witnesses against him appear before the fact finder and give their testimony under oath, as well as to be subject to cross-examination in the event that the defendant desires to do so.

> These means of testing accuracy are so important that the absence of proper confrontation at trial "calls into question the ultimate 'integrity of the fact-finding process.'" *Chambers v. Mississippi*, 410 U.S. 284, 295, 35 L.Ed. 2d 297, 93 S.Ct. 1038 (1973), quoting *Berger v. California*, 393 U.S. 314, 315, 21 L.Ed. 2d 508, 89 S.Ct. 540 (1969).

Ohio v. Roberts, 448 U.S. 56, 64, 65 L.Ed. 2d 597, 606 (1980). The primary objective of the confrontation clause is to prevent the use of depositions or ex parte affidavits in criminal cases in lieu of a personal examination and cross-examination of the witness in which the accused has an opportunity not only of testing the recollection and sifting the conscience of the witness, but also of compelling him to stand face to face with members of the jury in order that they may look at him and judge him by his demeanor upon the stand and the manner in which he gives his testimony to determine what weight and credit they should give to the same. *Mattox v. United States*, 156 U.S. 237, 39 L.Ed. 409 (1895). This cannot be done when the witness comes before the court in the garb of an affidavit.

Today one cannot doubt the fundamental nature of the right of confrontation. Along with the right to be represented by counsel, the right to present evidence, and the right to an impartial judiciary, the right of confrontation lies at the very core and foundation of the criminal trial process. These are the hallmarks of a fair criminal trial. While the legislature may adopt reasonable rules of evidence, it may not encroach upon fundamental constitutional guarantees. The legislature has the power to alter or create rules of evidence, except for rules of evidence which have been expressly sanctioned by the constitution, such as the privilege against self-incrimination and the right of confrontation and cross-examination. *State v. Scoggin*, 236 N.C. 19, 72 S.E. 2d 54 (1952). There are occasions when the confrontation rule must yield to exceptional circumstances. Principally, they are when the witness is truly unavailable because of death or other similarly compelling circumstances and when there has been provided sufficient indicia of reliability of the evidence that would afford the trier of fact an opportunity for evaluating the truth of the evidence. *Ohio v. Roberts*, 448 U.S. 56, 65 L.Ed. 2d 597; *Mattox v. United States*, 156 U.S. 237, 39 L.Ed. 409. But the confrontation clause requires the state to produce any *available* witness whose declarations it

seeks to use in a criminal trial. *California v. Green*, 399 U.S. 149, 174, 26 L.Ed. 2d 489, 506 (Justice Harlan concurring). Also, if the evidence to be offered does not address an essential issue in the case, there is less reason to rigidly adhere to the requirements of the confrontation clause. In other words, such an exception would not be likely to result in prejudicial error.

Turning now to the majority opinion, it attempts to justify the result reached by first asserting that what the legislature has done is to create a statutory exception to the hearsay rule. As stated above, the legislature has the authority to so do, provided it does not thereby trample upon constitutional guarantees such as the right to be represented by counsel or the rights under the confrontation clause. *State v. Scoggin*, 236 N.C. 19, 72 S.E. 2d 54. The issue at bar is not a simple one of whether the challenged evidence is admissible as an exception to the hearsay rule. It is a constitutional issue.

The majority analyzes the issue as being similar to the hearsay exception for business and public records. The affidavit as allowed by the challenged statute is not a business or public record within the meaning of that exception to the hearsay rule. While it is true that evidence in certificate or affidavit form concerning the qualifications of a breathalyzer operator, the inspection and testing of such machines, and the testing of the ampules and other materials used in the test have been admitted into evidence as an exception to the hearsay rule on the basis of business or public records, that evidence is substantially different from an affidavit which purports to show the essential gravamen of the charged offense, namely, the alcohol concentration of the defendant. N.C. Gen. Stat. § 20-138.1(a)(2) (1983). The above referred to exceptions concern themselves with things done in the ordinary course of maintaining the equipment and maintaining the skill of the operator of the equipment, and those records are entered in the normal course of business. They are made ante litem motam, that is, when the declarant had no motive to distort the truth in the keeping of these records. Specific prosecution against a particular defendant is not in mind at the time these records are made.

However, the affidavit in the present case was prepared for the specific purpose of being used by the state in the prosecution

and trial of this defendant. Therefore, there is clearly reason to determine that such evidence does not bear the indicia of reliability required of all exceptions to the hearsay rule: the person preparing the affidavit is not preparing business records from a position of neutrality with respect to prosecution of criminal defendants; instead, he is an agent of the state whose accuracy in performing the incriminating test and recording its results deserves the most rigorous examination. *See Ohio v. Roberts*, 448 U.S. 56, 65 L.Ed. 2d 597.

The majority argues that the equipment used for the purpose of performing these tests is extremely accurate and that there is very little opportunity for the operator to influence the result of the test. However, critical evidence of a key element of an offense, such as the affidavit in this case, should never be admissible without compliance with the confrontation clause, regardless of how reliable and accurate the evidence appears to be. Although the operator has a statutory duty to prepare the affidavit in question, the fact that it is required by statute does not cure the constitutional defect. Additionally, even though required by statute, that does not guarantee the accuracy or trustworthiness of the affidavit. The majority would hold that if the evidence is reliable, then it should be competent, regardless of the confrontation clause. This appears to be putting the cart before the pony, because it is the process of confrontation that makes the evidence reliable.

The majority says that the district court judge is an educated and experienced fact finder. This of course may very well be true in some cases, but in others a defendant can just as easily be tried the first day that a district court judge is upon the bench. This seems to me to be a slender reed upon which to establish an exception to a constitutional requirement.

The majority relies upon *Kay v. United States*, 255 F. 2d 476 (4th Cir.), *cert. denied*, 358 U.S. 825 (1958). It must be remembered that in *Kay* the results of the blood alcohol analysis were only *evidence* of the defendant's guilt of driving under the influence. In the present prosecution, the *results* of the analysis for alcohol constitute the very crucial element of the offense to be proved: if the defendant has a alcohol concentration greater than the statutory maximum, he is guilty of the offense. This was not so in

Kay. This fact is a powerful distinction between the two cases. The evidence in the *Kay* fact situation comes closer to being a peripheral or nonessential factor of the offense, rather than being the central issue in the case as is true in the present appeal. I find the reasoning in *United States v. Oates*, 560 F. 2d 45 (2d Cir. 1977), to be more persuasive. In that case the Court held that where the evidence was necessary to prove an essential element of the offense, the government had the burden to produce the witnesses or to demonstrate that they were in truth unavailable to testify. The affidavit in question before us is not one based upon purely ministerial observations, but is one designed specifically to prosecute and convict the defendant in the very case in question.

Next, the majority argues that because the statute grants the defendant the right to call the operator as an adverse witness, it serves as a saving clause for the statute. This part of the statute does not grant the defendant anything new. Prior to the statute he had a constitutional right to call the operator as a witness. Moreover, allowing the defendant to call the operator and examine him as an adverse witness does not solve the constitutional dilemma. The state has the burden of proving all of the elements of the offense. *In re Winship*, 397 U.S. 358, 25 L.Ed. 2d 368 (1970). Procedures which shift the burden of persuasion of an element of the offense to the defendant are constitutionally impermissible. *Mullaney v. Wilbur*, 421 U.S. 684, 44 L.Ed. 2d 508 (1975). Requiring the defendant to produce the witness, who will provide critical evidence of the essential element of the offense, so as to safeguard the defendant's right to confront that very witness surely offends due process standards. Further, the statute apparently contemplates the defendant calling the operator as a witness after the state has introduced the affidavit into evidence. The statute expressly states that the affidavit, if properly executed, is admissible in evidence without further authentication. This means that when the defendant calls the operator for the purpose of cross-examining him concerning the facts surrounding the alcohol level test, he is doing so after the state has established a prima facie case. The evidence adduced by such cross-examination would not go to the admissibility of the affidavit in question but would simply go to the credibility of the facts stated in the affidavit. By the time the defendant is allowed to begin the

race, the state has already crossed the finish line, and defendant is faced with the unpleasant duty of attempting to demonstrate to the trier of fact, the judge, that he should give little weight to the affidavit in deciding the factual issues.

If the legislature had made a provision in the statute that upon motion the defendant could call the operator as a witness in a voir dire hearing to determine the admissibility of the affidavit, the constitutional issue with respect to confrontation would not be so pivotal. This would allow a defendant to attack the admissibility of the affidavit and the test results before they were allowed into evidence, and the calling of the operator would be a meaningful exercise of the defendant's right of cross-examination and confrontation. However, this the General Assembly did not do, leaving the defendant with the meaningless cross-examination of the operator after the state has made out its case against the defendant by the admission of the affidavit.

The majority then seeks to justify its holding by reciting that the defendant has a right to a trial de novo before a jury in the superior court.[1] This, of course, is true. To me, this is simply a statement that constitutional rights are not guaranteed in the district court and that this is not error because one can assert them on trial de novo in the superior court. As we all know, practically all criminal cases that are tried in the district court are finally disposed of in that court. Only a small percentage are appealed to the superior court for trial de novo. Not all defendants have the financial means to bring their cases to the superior court, and if the expense of such trials is placed upon the state, additional financial burdens will be lodged against the taxpayers. This could be easily avoided by protecting defendants' constitutional rights at the trial of first instance.

I find the case of *Ward v. Monroeville*, 409 U.S. 57, 34 L.Ed. 2d 267 (1972), both instructive and persuasive. In *Ward* the defendant was tried in the first instance by a mayor who had inconsistent responsibilities for revenue production and law en-

1. Whether the affidavit is admissible as evidence in the superior court is an open question. However, if the majority's position that the confrontation clause is not violated by the use of the affidavit in the district court is sound, there appears to be no reason why the affidavit, properly authenticated, would not be admissible in the superior court.

forcement. The defendant contended that this violated his due process rights, particularly the guarantee of a trial before a disinterested and impartial judicial officer. In that case the Supreme Court held that even though the defendant was entitled to an appeal as a matter of right and a trial de novo, an accused is entitled to a neutral and detached judge in the first instance and the trial by the mayor was not constitutionally acceptable. The *Ward* Court's holding is very appropriate here in that although the state eventually offers the defendant a fair trial, that does not mean that his initial trial can be constitutionally defective. The right of confrontation is a core element of a fair trial and, as *Ward* demonstrates, a trial procedure containing a constitutional defect cannot stand. The principle in *Ward* is also distinguishable from those cases that hold that the right to trial by jury is not violated where a defendant has a de novo right of appeal to obtain a trial by jury, the difference being that a defendant can have a fair trial without a jury. A judge can give a defendant just as fair a trial as a defendant can receive when he is tried by a jury, but where a fundamental right of a defendant is violated in a trial, whether by jury trial or bench trial, that violation cannot be cured by a trial de novo. It is the very fairness issue which has been violated in the initial trial and which cannot be cured by subsequent retrial. For these reasons, I find *State v. Spencer*, 276 N.C. 535, 173 S.E. 2d 765 (1970), and *Ludwig v. Massachusetts*, 427 U.S. 618, 49 L.Ed. 2d 732 (1976), to be distinguishable. Both of those cases deal with the right of trial de novo for the purpose of obtaining a jury trial. In neither of these cases is it argued or contended that the defendant did not receive a fair trial at his trial in the inferior court. Defendant simply argued that he was entitled to a jury trial in the court of first instance. In this regard the majority cites *In re Arthur*, 291 N.C. 640, 231 S.E. 2d 614 (1977). This case concerned delinquency proceedings and was a case of statutory construction. *Arthur* did not reach the constitutional issue with which this Court is now faced. In *Arthur* the Court, through Justice Exum, expressly stated that no opinion as to the correctness of the constitutional arguments was made by the Court, the case being decided upon statutory issues rather than constitutional principles.

Further support for this dissent is found in *Dist. of Columbia v. Clawans*, 300 U.S. 617, 81 L.Ed. 843 (1937), where defendant

was charged with an offense triable at the first instance without a jury. The Supreme Court held that as the offense was punishable by not more than ninety days, it was a "petty" offense and could be tried without a jury. However, the Court further held that defendant's conviction must be reversed because the trial court had prejudicially restricted defendant's constitutional right of confrontation. Where fundamental rights affect the fairness of a trial, they must be safeguarded at the initial trial.

Finally, I find that *State v. Watson*, 281 N.C. 221, 188 S.E. 2d 289, *cert. denied*, 409 U.S. 1043 (1972), strongly supports a defendant's right of confrontation. *Watson* was a case involving the use in evidence of an authenticated copy of a death certificate for the purpose of proving an essential element of the homicide charge, the cause of death. In discussing the defendant's constitutional right of confrontation with respect to the North Carolina and federal constitutions, this Court, through Justice (now Chief Justice) Branch, stated:

> The right of confrontation confirms the common-law rule that, in criminal trials, the witnesses must be present and subject to cross-examination. . . . The right of confrontation is an absolute right rather than a privilege, and it must be afforded an accused not only in form but in substance.

Id. at 230, 188 S.E. 2d at 294 (citations omitted). This statement of principle applies with equal fervor in the present appeal. I find N.C.G.S. 20-139.1(e1), in its present form, to be a violation of the defendant's constitutional right of confrontation.

Justices EXUM and FRYE join in this dissenting opinion.

RAY LIVINGSTON JONES v. MATT GWYNNE, CHRISTAL NEWTON, RAMONA GALARZA AND McDONALD'S CORPORATION

No. 531A83

(Filed 4 December 1984)

1. Malicious Prosecution § 11.1 — indictments after dismissal of warrants — no evidence of probable cause

In a malicious prosecution action based on warrants charging defendant with embezzlement, plaintiff showed that criminal proceedings based on the

warrants were terminated in his favor when he showed that the prosecutor voluntarily dismissed the warrants, notwithstanding plaintiff was later indicted for embezzlement, since the return of the indictments for embezzlement did not constitute a continuation of the proceedings based upon the warrants but was the initiation of new proceedings against plaintiff. Therefore, the indictments were *prima facie* evidence of probable cause only in the proceedings initiated by the return of the indictments, and the trial court properly instructed the jury in the malicious prosecution action that the indictments could not be considered as evidence of probable cause in that action.

2. Malicious Prosecution § 15— punitive damages—manner of investigation—wanton disregard of plaintiff's rights

In a malicious prosecution action based upon charges against plaintiff for embezzlement from the fast-food restaurant which he managed, the evidence was sufficient to warrant submission of a punitive damages issue to the jury on the theory that the manner in which the investigation of the alleged embezzlement was conducted by the individual defendant, who was an employee of the corporate defendant, showed a reckless and wanton disregard of plaintiff's rights where it tended to show that the bulk of the incriminating evidence implicating plaintiff consisted of observations by two employees of him ringing up "no sales" while placing customers' money in the register; the individual defendant, a man with extensive training in criminal investigation, conducted only a superficial and cursory investigation to determine the truthfulness of statements by the employees or a plausible explanation of plaintiff's actions; the individual defendant failed to discover that time cards showed that one employee had worked on less than half the days she claimed to have seen plaintiff ring the "no sales" and failed to determine what impact the second employee's animosity toward plaintiff could have had on her decision to initiate the investigation of plaintiff; and no audit was conducted of the restaurant's records to determine whether there was a shortage of money at any time.

3. Corporations § 27.2— malicious prosecution—liability of corporation for punitive damages

Defendant corporation was liable under the doctrine of *respondeat superior* for punitive damages awarded to plaintiff for the tort of malicious prosecution committed by an employee of the corporation in the course of his employment.

4. Corporations § 27— liability of corporation for torts of employee—statement in case disapproved

A statement in *Jones v. Gwynne*, 64 N.C. App. 51, suggesting that a corporation may not be held liable for torts committed by its employees unless they are parties to the lawsuit or found by the jury to have committed a specific tort is disapproved.

APPEAL of right pursuant to G.S. 7A-30(2), by the defendants, Matt Gwynne and McDonald's Corporation, from the decision of a divided panel of the Court of Appeals, 64 N.C. App. 51, 306 S.E.

2d 574 (1983), which found no error in the trial for malicious prosecution and the jury award of compensatory damages to the plaintiff. Plaintiff's petition for discretionary review pursuant to G.S. 7A-31 was allowed on 12 January 1984 for the purpose of reviewing that portion of the decision vacating the award of punitive damages to the plaintiff.

Teague, Campbell, Conely & Dennis, by C. Woodrow Teague and Dayle A. Flammia, and Smith, Dickey & Parish, by W. Ritchie Smith, Jr., for the plaintiff-appellee and cross-appellant.

Hunton & Williams, by Odes L. Stroupe, Jr., and David Dreifus, for defendant-appellants and cross-appellees.

FRYE, Justice.

On defendants' appeal, the issue is whether the Court of Appeals correctly found no error when the trial court instructed the jury in a malicious prosecution action that subsequent indictments by a grand jury could not be considered as evidence of probable cause. On plaintiff's cross-appeal, we review that portion of the Court of Appeals' decision which holds that the plaintiff's evidence was insufficient to sustain a jury award of punitive damages. On defendants' appeal, we affirm. On plaintiff's cross-appeal we reverse the decision of the Court of Appeals and reinstate the judgment of the trial court.

I.

This is a civil action for malicious prosecution. By complaint filed 29 June 1979, the plaintiff, Ray Livingston Jones, alleged that on and prior to 18 May 1979, he was employed by McDonald's Corporation as manager of its business located at 3002 Raeford Road, Fayetteville, North Carolina; that the individual defendants, Christal Newton and Ramona Galarza (cashiers at the Raeford Road store), and Matt Gwynne, regional security officer, were on that date acting as the employees, servants and agents of the corporate defendant, McDonald's Corporation; that on or about 18 May 1979, the individual defendants wilfully, wrongfully, maliciously and without just and probable cause instituted, or caused to be instituted, two criminal actions against plaintiff, charging the plaintiff with embezzling from McDonald's Corporation the sum of $1.50 on or about 15 May 1979 and an "indeter-

minate amount" at some time prior to and after 13 April 1979; that such charges were false and untrue and known at the time by the defendants to be false and untrue; that said criminal charges were terminated in favor of the plaintiff on 26 June 1979, when the said charges were voluntarily dismissed by the district attorney; that the defendants acted without justification or probable cause and acted with actual malice towards the plaintiff, entitling the plaintiff to both compensatory and punitive damages; that by reason of the acts and conduct of the defendants, plaintiff was arrested and taken into custody, lost his job, opportunity of advancement and former good standing with McDonald's Corporation, was humiliated and caused great grief, embarrassment, etc.; compensatory damages of $200,000 and punitive damages of $100,000 were sought against all defendants, jointly and severally.

On 13 August 1979, while the present action was pending, the Cumberland County Grand Jury returned three true bills of indictment against Mr. Jones for embezzlement from the McDonald's restaurant.[1]

On 20 August 1979, defendants filed an answer in this malicious prosecution action, admitting residence of the parties and that the individual defendants were, on or about 18 May 1979, acting as the employees, servants and agents of McDonald's Corporation. The remaining allegations of the complaint were denied.

Plaintiff was tried on the criminal charges in February 1980. After hearing the State's evidence on the indictment for embezzling $1.51 from McDonald's, which was considered by the assistant district attorney to be his strongest case, the trial judge dismissed the case. Thereafter, the assistant district attorney took voluntary dismissals on the remaining charges.

The present malicious prosecution action was tried in January 1982. The trial court allowed Defendants Newton and Galarza's motions for a directed verdict at the end of the

1. The indictments charged Jones with embezzling from McDonald's:

79 CRS 36133—$122.13 on March 23, 1979;

79 CRS 36132—$1.51 on May 15, 1979;

79 CRS 35879—$68.95 on April 13, 1979.

plaintiff's evidence but denied Defendants Gwynne and McDonald's Corporation's motions for a directed verdict.

The jury returned a verdict finding that defendants Matt Gwynne and McDonald's Corporation had "maliciously prosecute[d] criminal charges of embezzlement, issued on May 18 1979, against the Plaintiff, Ray Jones." The jury awarded plaintiff $200,000 for compensatory damages and $100,000 for punitive damages.

On appeal, a sharply divided panel of the Court of Appeals (one judge writing for the majority, one judge concurring in the result and one judge dissenting) found no error in the trial proceedings leading to the jury award of compensatory damages. However, the court unanimously voted to vacate the award of punitive damages because there was insufficient evidence adduced at trial to support such an award.

Other facts necessary for a determination of the issues raised on appeal will be incorporated in this opinion.

II.

[1] "An action in tort for malicious prosecution is based upon a defendant's malice in causing process to issue." *Middleton v. Myers*, 299 N.C. 42, 44, 261 S.E. 2d 108, 109 (1980). A plaintiff must prove four essential elements to establish a malicious prosecution claim against an accuser. He must prove "[1] that defendant initiated the earlier proceeding, [2] that he did so maliciously and [3] without probable cause, and [4] that the earlier proceeding terminated in plaintiff's favor." *Stanback v. Stanback*, 297 N.C. 181, 202, 254 S.E. 2d 611 (1979).

In the instant case, defendants' appeal to this Court relates to an alleged error in the trial court's instruction to the jury on the question of probable cause. That instruction is as follows:

> The question presented here is not one of the guilt or innocence of Ray Jones. Rather, it is the question of probable cause. Now, probable cause does not depend upon the guilt or innocence of the person accused but upon whether the Defendants had reasonable grounds for the suspicion supported by circumstances sufficiently strong in themselves to warrant cautious man to believe that the accused is guilty of the of-

> fense. And I am referring to the events with which he is ultimately charged on the eighteenth day of May 1979. And in this case I refer specifically to the two felony embezzlement warrants issued by a magistrate on the eighteenth day of May 1979. This case is based upon those two warrants and not upon any bills of indictment which may have subsequently been returned by the Grand Jury. . . . And I instruct you that you may not consider the evidence of the return by the Grand Jury of the bills of indictment as true bills on this question because it occurred after the filing of this action. However, you may consider the finding of the bills of indictment and Ray Jones' acquittal there on the question of whether or not the proceedings commenced by the issuance of the warrants has actually terminated in favor of the Plaintiff.

The defendants argue in this Court, as they did in the Court of Appeals, that the above instruction is erroneous as a matter of law. Stated more specifically, the defendants contend that "the jury was erroneously instructed that it could not consider the grand jury indictments as evidence of probable cause."

In concluding that the trial court had not erred in giving the challenged instruction, Judge Hedrick, author of the majority opinion of the Court of Appeals, reasoned as follows:

> While the general rules governing the admissibility of grand jury indictments in malicious prosecution cases are clear, it is true, as defendants concede in their memorandum of additional authority, that '[t]he factual situation in this case has never been ruled upon by a North Carolina appellate court.' In this case, the indictments defendants sought to introduce were issued after the present action for malicious prosecution was commenced. Plaintiff in the present case based his complaint not on the indictments, but rather on the arrest warrants issued months before. When the district attorney took a voluntary dismissal on the warrants, the criminal proceedings against Jones terminated for the purpose of this action, and the tort was complete. *Taylor v. Hodge*, 229 N.C. 558, 50 S.E. 2d 307 (1948); *Perry v. Hurdle*, 229 N.C. 216, 49 S.E. 2d 400 (1948). *See also* W. Prosser, Handbook of the Law of Torts Sec. 119, at 839 (4th ed. 1971).

> While we could avoid deciding the question by agreeing with plaintiff that the challenged instruction, if error, was not prejudicial, we choose to be more definitive and declare that the better rule in such a case bars consideration of later indictments on the issue of probable cause. We note that the inquiry into probable cause seeks to establish whether there existed 'such facts and circumstances, known to [the defendant] at the time, as would induce a reasonable man to commence a prosecution.' *Pitts v. Pizza, Inc.*, 296 N.C. 81, 87, 249 S.E. 2d 375, 379 (1978) (citation omitted). We do not believe that a grand jury determination of the existence of probable cause, issued after the alleged tort is complete and the complaint filed, is relevant to this inquiry. We thus hold that the trial judge did not err in giving the challenged instructions.

Jones v. Gwynne, 64 N.C. App. 51, 56, 306 S.E. 2d 574, 577 (1983). Judge Hill concurred in the result, stating that he believed that the trial judge erred by instructing the jury "not to consider the return of true bills of indictment as evidence of probable cause." However, he thought the instruction was "harmless under the facts of the case." *Gwynne*, 64 N.C. App. at 60, 306 S.E. 2d at 579-80 (Hill, J., concurring). Judge Webb, in a dissenting opinion, stated that he believed that the trial court had erred in instructing the jury not to consider the grand jury's return of true bills of indictment as evidence of probable cause. *Gwynne*, 64 N.C. App. at 60-61, 306 S.E. 2d at 580 (Webb, J., dissenting).

The defendants contend that the Court of Appeals' holding, that the challenged jury instructions were correct, was "based upon the erroneous assumption that the criminal proceedings against Jones terminated with the voluntary dismissal of the warrants on June 26, 1979." Defendants further contend that "[t]here can be no dispute that if the criminal proceedings against Jones did not terminate until February 1980 [the date on which the superior court dismissed the charges against plaintiff based on the indictments], the jury should have been instructed to consider the indictments as evidence of probable cause." We hold that the criminal proceedings terminated in plaintiff's favor on 26 June 1979, the date on which the assistant district attorney took a voluntary dismissal on the warrants.

This Court has previously held that a plaintiff in a malicious prosecution case has shown a favorable termination of a criminal proceeding when he shows that the prosecutor voluntarily dismissed the charges against him. *Pitts v. Pizza, Inc.*, 296 N.C. 81, 249 S.E. 2d 375 (1978); *Taylor v. Hodge*, 229 N.C. 558, 50 S.E. 2d 307 (1948). *See also* Prosser and Keeton on the Law of Torts, § 119, at 874-75 (5th ed. 1984). Therefore, once the plaintiff presented evidence in this case that the assistant district attorney had voluntarily dismissed the embezzlement charges against him, he had shown a termination of the criminal proceedings favorable to him.

In *Marcus v. Bernstein*, 117 N.C. 31, 23 S.E. 38 (1895), this Court stated the following concerning the requirement that plaintiff show a termination of the prior prosecution:

> The essential thing is that the prosecution on which the action for damages is based should have come to an end. How it came to an end is not important to the party injured, for whether it ended in a verdict in his favor, or was quashed, or a *nol. pros.* was entered, he has been disgraced, imprisoned and put to expense, and the difference in the cases is one of degree, affecting the amount of recovery.

Id. at 33, 23 S.E. at 39.

Ordinarily the termination of the proceeding must result in a discharge of the plaintiff so that new process must issue in order to revive the proceeding against him. *See Brinkley v. Knight*, 163 N.C. 194, 79 S.E. 260 (1913).

The issuance of a new process in order to revive the proceedings against the plaintiff is exactly what occurred in the instant case. After the assistant district attorney had voluntarily dismissed the embezzlement charges based upon warrants issued against the plaintiff, it was necessary for the district attorney to resort to a new process in order to revive the charges. Specifically, he had to and did seek the return of true bills of indictment from the grand jury. This evidence affirmatively shows that the criminal proceedings based upon the warrants had terminated.

Defendants argue that the assistant district attorney indicated his intention to seek grand jury indictments (which he subsequently did) at the time he voluntarily dismissed the

embezzlement charges against the plaintiff.[2] Since these true bills of indictment were returned against the plaintiff, then the criminal proceedings against plaintiff did not terminate "until a verdict was directed in his favor [during his trial for embezzlement in February 1980]."

It is defendants' position that the subsequent attempt and actual procurement of true bills of indictment after warrants for embezzlement have been voluntarily dismissed effectively prevents a plaintiff from showing a termination of criminal proceedings in his favor, sufficient to support a malicious prosecution action. We disagree.

Without attempting to set out the majority and minority rules concerning when there has been a termination favorable to the plaintiff in a malicious prosecution action, we note that the California Supreme Court discussed the necessity of a "final termination" at great length in *Jaffe v. Stone*, 18 Cal. 2d 146, 114 P. 2d 335 (1941). In *Jaffe*, the California Supreme Court stated:

> In stating the requirement of termination, courts often say that the proceeding must be 'finally' terminated. Such a statement is entirely accurate if the ordinary reasonable meaning of the words is taken. The *proceeding* must be finally terminated; that is, the particular criminal proceeding commencing, for example, by complaint and arrest, must have passed through some such stage as preliminary hearing and dismissal, or trial and acquittal or abandonment by the prosecuting authorities. When this has occurred, *that proceeding is finally terminated.* If the termination was such as not to constitute a bar to a new prosecution, the accused may be charged and tried again for the same offense; but this will be a *new proceeding*, with a new court number, new pleadings, new judge and jury, and a new judgment. (Emphases in original.)
>
> . . . .
>
> Mistaken emphasis is placed upon the idea of 'final' rather than 'favorable' termination; and the *offense* is confused with

2. The argument is based on the assistant district attorney's notation "Vol Diss to go to GJ," which appeared on the warrant shucks.

> the *proceeding*. When we look at the problem in the light of the background of the tort and the purpose of the requirement of favorable termination, we perceive that freedom of the accused from new prosecutions is not involved in all cases. Such freedom may be assured by an acquittal at the trial, or by some other termination at the trial to which jeopardy attaches. But where the proceeding is dismissed by a magistrate, there is no jeopardy, and no bar to a new prosecution until the statute of limitations runs on the offense. In the case of the usual felony, this is three years in California (citation omitted), but in a few instances (murder, embezzlement of public money, falsification of public records) there is no limitation and the prosecution is *never barred*. Consider, then, the effect of this doctrine upon the rights of a plaintiff who is wrongfully and maliciously accused of a felony, arrested and brought before a magistrate, and is discharged because no case against him is made. He must ordinarily wait three years before he may sue for malicious prosecution. In some instances, he must wait longer; and in others it would seem that he cannot sue at all because the statute of limitations does not run on the offense. There is no rational basis for this result, nor any justification for it in policy.

Id. at 152-55, 114 P. 2d at 339-40. (Emphases in original.)

The present law of North Carolina as stated in *Bernstein*, *Brinkley*, and *Taylor* is in accord with the above quoted language of *Jaffe*. Those cases collectively stand for the proposition that a plaintiff has proven a termination in his favor in a malicious prosecution action when he shows that the prosecutor has voluntarily dismissed the charges against him thereby having to resort to the institution of new proceedings in order to further prosecute the case. Accordingly, the assistant district attorney's voluntary dismissal of the charges against the plaintiff in the instant case terminated that prosecution. Plaintiff's later indictment by a grand jury did not constitute a continuation of the proceedings based upon the warrants but instead was the initiation of new proceedings against the plaintiff. That being so, it is clear that the criminal proceedings terminated in plaintiff's favor on 26 June 1979.

Defendants further argue that even if the criminal proceedings against the plaintiff terminated on 26 June 1979, the

jury still should have been allowed to consider the subsequently returned true bills of indictment on the question of probable cause. They contend that since grand jury bills of indictment are *prima facie* evidence of probable cause, the trial court erred in instructing the jury not to consider the indictments on the issue of probable cause. We disagree.

We are not prepared to hold that a grand jury indictment, returned after a criminal proceeding initiated by the issuance of a warrant has been voluntarily dismissed, is *prima facie* evidence of probable cause in a malicious prosecution action based upon the criminal proceedings initiated by the warrant. As previously stated herein, the criminal proceedings upon which plaintiff based his present malicious prosecution action were terminated in plaintiff's favor on 26 June 1979. At that time, the alleged tort was complete. Thus, the grand jury indictments, which were returned on 13 August 1979, had no bearing on, and were largely irrelevant to, the question of whether, on 18 May 1979, there existed "such facts and circumstances, known to [the defendants] at the time, as would induce a reasonable man to commence a prosecution." *Pitts v. Pizza, Inc.*, 296 N.C. 81, 87, 249 S.E. 2d 375, 379 (1978). In short, the indictments in the instant case were only *prima facie* evidence of probable cause in the proceedings which were initiated by the return of the grand jury indictments. Since plaintiff's present malicious prosecution action was based upon the arrest warrants and their subsequent dismissal, the grand jury indictments were not *prima facie* evidence of probable cause in this case. This assignment of error is rejected.

III.

[2] We next address the issue of whether the jury award of punitive damages to the plaintiff is supported by the evidence adduced at trial. The jury returned a verdict finding that Matt Gwynne and McDonald's Corporation maliciously prosecuted the plaintiff, Ray Jones, and assessed punitive damages in the amount of $100,000 against Mr. Gwynne and McDonald's Corporation. The trial court entered judgment accordingly. Plaintiff cross-assigns as error that portion of the Court of Appeals' opinion which vacates the portion of the judgment awarding punitive damages to the plaintiff because the evidence was insufficient as a matter of law to support such an award. Plaintiff contends as follows on this issue:

> [Plaintiff] alleged and presented evidence of actual malice and a sense of personal ill will toward the [plaintiff] on the part of [defendant] McDonald's agents within the scope of their employment. [Plaintiff's] evidence also raised the issue that the tort was done under circumstances of insult and rudeness and in a manner which showed a reckless and wanton disregard or an indifference for plaintiff's rights. Under either or both showings the [plaintiff] was entitled as the Court ruled, to allow questions of fact to be presented to the jury for its determination.

We agree with the contentions of the plaintiff.

On appeal to the Court of Appeals, defendants contended that their motion for judgment notwithstanding the verdict regarding the issue of punitive damages was improperly denied by the trial court. The Court of Appeals held that plaintiff's evidence was insufficient as a matter of law to support a finding of "actual malice" in the sense of personal ill will on the part of Mr. Gwynne. The Court of Appeals also held that the evidence was insufficient as a matter of law to support a finding under the theory of *respondeat superior* that McDonald's Corporation acted out of actual malice in instituting the criminal proceedings against the plaintiff. The Court of Appeals stated:

> We next turn to the question whether the evidence is sufficient to permit a finding under a theory of *respondeat superior* that McDonald's Corporation acted out of actual malice in instituting proceedings against the plaintiff. The law is clear that '[p]unitive damages may be awarded . . . from [sic] a corporation for a tort wantonly committed by its agents in the course of their employment.' *Clemmons v. Insurance Co.*, 274 N.C. 416, 424, 163 S.E. 2d 761, 767 (1968) (citations omitted). In the present case, the jury found that Gwynne had committed a tort, and that he was acting in the course of his employment when he did so. We have concluded, however, that the evidence of Gwynne's actual malice is insufficient to permit imposition of punitive damages on that basis. It follows that McDonald's cannot be said to have acted out of actual malice based on the acts of Gwynne.

Id. at 59, 306 S.E. 2d at 579.

The Court of Appeals also concluded that the evidence was insufficient to show that the prior criminal proceedings were instituted in a manner which established "reckless and wanton conduct on the part of the defendants." *Id.* at 60, 306 S.E. 2d at 579.

Before punitive damages may be awarded to the plaintiff, the jury must find that the defendant committed an actionable legal wrong against the plaintiff or his property and it must award the plaintiff either compensatory or nominal damages. *Clemmons v. Life Ins. Co.*, 274 N.C. 416, 163 S.E. 2d 761 (1968); *Parris v. Fischer & Co.*, 221 N.C. 110, 19 S.E. 2d 128 (1942). Since we have upheld the jury award of compensatory damages to the plaintiff, we are only concerned here with the sufficiency of the plaintiff's evidence to support the submission of the issue of punitive damages to the jury. G.S. 1A-1, Rule 50; *Meacham v. Board of Education*, 59 N.C. App. 381, 297 S.E. 2d 192 (1982), *cert. denied*, 307 N.C. 577, 299 S.E. 2d 651 (1983). In order for a plaintiff to recover punitive damages in a malicious prosecution action, he must "offer evidence tending to prove that the wrongful action of instituting the prosecution 'was done for actual malice in the sense of personal ill-will, or under circumstances of insult, rudeness or oppression, or in a manner which showed the reckless and wanton disregard of the plaintiff's right.' " *Brown v. Martin*, 176 N.C. 31, 33, 96 S.E. 642, 643 (1918) (quoting *Stanford v. Grocery Co.*, 143 N.C. 419, 428 (1906)).

We agree with the Court of Appeals' conclusion that there was insufficient evidence to justify submission of the issue of punitive damages to the jury based on the "actual malice" of Mr. Gwynne, in the sense of personal ill will. However, the following evidence, viewed in the light most favorable to the plaintiff, was sufficient to justify submission of the issue of punitive damages to the jury based on the fact that the investigation by Mr. Gwynne, which precipitated the prosecution of the plaintiff, was conducted "in a manner which showed the reckless and wanton disregard of the plaintiff's rights."

Mr. Gwynne was the Field Security Manager for McDonald's Corporation covering the Raleigh region and the Greenville, South Carolina region. He conducted the investigation concerning the plaintiff's alleged embezzlement of money from McDonald's,

and he directly participated in the final decision to bring charges against the plaintiff. As Field Security Manager, Mr. Gwynne was responsible for the security of McDonald's assets and he also made security presentations to all McDonald's employees.

In 1970, prior to beginning work with McDonald's, Mr. Gwynne was a Special Agent with the North Carolina State Bureau of Investigation. He conducted criminal investigations in a three-county area. After leaving the employment of the SBI, Mr. Gwynne worked for the district attorney's office for the Ninth Judicial District as an Administrative Assistant and Investigator. In 1974, Mr. Gwynne worked for the Sheriff's Department of Nash County as the Chief Deputy in charge of the Administration and Investigative Division. In 1977 Mr. Gwynne was hired by McDonald's Corporation in his present capacity. This evidence certainly indicates that Mr. Gwynne possessed the necessary background and expertise in investigatory work to enable him to conduct a thorough and proper investigation of Mr. Jones.

Ramona Galarza testified that in March she saw the plaintiff ring numerous consecutive "no sales" and put the money in the register. However, time cards showed that Ms. Galarza had worked on less than half the days she claimed to have seen Mr. Jones ring the "no sales." As a part of Mr. Gwynne's investigation, he reviewed the daily store records, the register journal tapes, the managers' schedules, the crew schedules, and the employee time cards for March, April, and May 1979. In reviewing the time cards, Mr. Gwynne made no notations of when Ms. Galarza worked; nor were these cards available at trial. Mr. Gwynne testified that he did not know where the time cards could be located. Ms. Galarza's absences, if noted by Mr. Gwynne, could have cast serious doubts on her alleged "observations" of plaintiff's activities.

Additionally, Ms. Galarza stated to Mr. Gwynne that on one occasion she saw plaintiff take money from beneath the cash register drawer, put it into his pocket, and then leave the store. However, no evidence was adduced at trial that the McDonald's restaurant showed a shortage of money for any day or that any McDonald's money was ever missing from that store. In investigating this allegation, Mr. Gwynne never performed an audit of the McDonald's managed by plaintiff nor did he order that an

audit of the store's records be performed. Furthermore, plaintiff's evidence tended to show that his food-cost ratio, which is the relationship the cost of food bears to the gross income, was second best of six McDonald's restaurants in the city of Fayetteville and normally second best in the entire Raleigh market.

Shelia Stewart, second assistant to the plaintiff, also testified that she had seen Mr. Jones ring up "no sales." Ms. Stewart contacted Paul Craddock, the Fayetteville Area Supervisor for McDonald's, in mid-May 1979 to report the "no sales." Mr. Craddock then informed Mr. Gwynne on 15 May 1979 that Ray Jones was suspected of embezzling money from the McDonald's restaurant that he managed.

There was plenary evidence, however, that Shelia Stewart wanted to be store manager and intensely disliked Jones. Two fellow employees interviewed by Mr. Gwynne testified that Ms. Stewart had threatened to "get" the plaintiff "if it's the last thing I do." Mr. Gwynne, who had interviewed the morning shift employees, should have discovered and determined during his investigation what impact Ms. Stewart's animosity toward Mr. Jones could have had on her decision to initiate the investigation of Mr. Jones.

Mr. Gwynne testified that he had interviewed all the people on Mr. Jones' staff. However, Hazel Bido and Pam Lawson testified that he had never interviewed them. These two witnesses had first-hand knowledge that was favorable to Mr. Jones. No statement was taken from Bea Howell who was interviewed by Mr. Gwynne. This witness also made exculpatory statements regarding Mr. Jones.

Two other morning shift employees, Christal Newton and Stephanie Williams, had seen Mr. Jones ring a "no sales" once in three months. Ms. Williams admitted this could have been proper. Written statements were obtained by Mr. Gwynne from these two witnesses. Henrietta Purcell testified that she never saw Mr. Jones ring a "no sales." She further testified that she, Ramona Galarza, and Hazel Bido often played with the cash registers and rang up "no sales." In fact, a person standing at the register, not waiting on customers, could punch sixty consecutive "no sales" into the register in less than thirty seconds. Mr. Gwynne, being familiar with McDonald's restaurants and their operation, was

aware of this fact which would tend to mitigate suspicions about Mr. Jones' "no sales."

Mr. Gwynne apparently failed to present the foregoing exculpatory evidence to the police, when he obtained assistance from the Fayetteville Police Department on 16 May 1979. On 18 May 1979, at the request of Mr. Gwynne, two detectives went to the restaurant and observed Mr. Jones for forty minutes but saw nothing unusual. Nevertheless, after reporting Mr. Jones' benign activities to Mr. Gwynne and Mr. Craddock, all four men returned to the store and handcuffed Mr. Jones in front of his employees and customers. Thereafter, he was taken to the Law Enforcement Center where he was questioned for several hours.

While Ray Jones was being questioned, Mr. Gwynne talked to two of his superiors about the case, J. D. Bell, Operations Manager, and Rick DeSota, National Security Director for McDonald's. Then he talked to Detectives Post and Kraus and told them that he thought that they had enough evidence to charge Ray Jones with embezzlement. At the suggestion of Mr. Gwynne, Detective Post called Assistant District Attorney Michael Winesette and informed him of the facts of the case, in an attempt to determine its possible merits. Mr. Winesette informed Detective Post that it sounded like a good case but "if he could get more information as to the actual conversion of the money . . . it certainly would be better." After Mr. Craddock had talked to Mr. Bell and the detectives, Detective Post swore out two warrants against the plaintiff charging him with the embezzlement of money from McDonald's.

In summary, the bulk of the incriminating evidence implicating Mr. Jones consisted primarily of two witnesses' observations of him ringing "no sales" while placing customers' money in the register. As the above evidence indicates, Mr. Gwynne, a man with extensive training in criminal investigation, conducted a superficial and cursory investigation to determine the truthfulness of these statements or a plausible explanation of Mr. Jones' actions. We believe that this evidence, when viewed in the light most favorable to the plaintiff, is sufficient to warrant submission of the punitive damages issue to the jury on the question of whether the manner in which the investigation was conducted by Mr. Gwynne showed a "reckless and wanton disregard of the

plaintiff's rights." The jury determined that the evidence adduced at trial proved to its satisfaction that Mr. Gwynne conducted an investigation that showed a "reckless and wanton disregard of the plaintiff's rights." Consequently, this Court must reverse the Court of Appeals' decision that vacates the portion of the superior court judgment awarding plaintiff punitive damages.

[3] We also note that at all times relevant to the facts of this case, Mr. Gwynne was an employee of the McDonald's Corporation. The investigation that was conducted by Mr. Gwynne was done in the course of his employment and it was within the scope of his authority. "The general rule is well established that a corporation is liable for the torts and wrongful acts or omissions of its agents or employees acting within the scope of their authority or the course of their employment." *Raper v. McCrory-McLellan Corp.*, 259 N.C. 199, 205, 130 S.E. 2d 281, 285 (1963). Based on the theory of *respondeat superior*, it has been held that punitive damages may be awarded against a corporation for a tort wilfully, wantonly and maliciously committed by an employee in the course of his employment. *Clemmons v. Insurance Co.*, 274 N.C. 416, 163 S.E. 2d 761 (1968). Therefore, based upon the theory of *respondeat superior*, we hold that McDonald's Corporation is also liable for the punitive damages awarded to the plaintiff. Based upon all of the foregoing, Matt Gwynne and McDonald's Corporation are jointly and severally liable to the plaintiff for the compensatory and punitive damages awarded by the jury.

[4] Plaintiff additionally contends that there was sufficient evidence of actual malice and personal ill will that was exhibited toward the plaintiff by other McDonald's employees acting within the scope of their employment which also supports the submission to the jury of the punitive damages issue against McDonald's. Regarding this issue, the Court of Appeals stated:

> While plaintiff argues that there were other employees of McDonald's who bore him ill will, we note that only Gwynne was found to have committed a tort. While a corporation may be liable for torts committed by its employees, punitive damages based on actual malice may not be predicated on the non-tortious acts of its employees.

Jones v. Gwynne, 64 N.C. App. 51, 59, 306 S.E. 2d 574, 579 (1983).

We agree that a corporation may be held liable for torts committed by its employees; however, we disagree with the above statement to the extent that it suggests that a corporation may not be held liable for torts committed by its employees, unless they are parties to the lawsuit or found by the jury to have committed a specific tort. However, we find it unnecessary to consider the evidence concerning the other employees' actions, since the evidence of Mr. Gwynne's "reckless and wanton" investigation was sufficient to warrant the submission of the punitive damages issue against McDonald's to the jury.

In summary, we affirm the conclusion reached in the Court of Appeals' opinion that no error occurred in the proceedings leading to the jury award of compensatory damages to the plaintiff. However, we reverse that portion of the Court of Appeals' opinion which vacated the judgment of the trial court to the extent that it awarded the plaintiff punitive damages. Therefore, the opinion of the Court of Appeals is affirmed in part and reversed in part. This case is remanded to the Court of Appeals for further remand to the Superior Court, Cumberland County, for reinstatement of the judgment entered by the trial court.

Affirmed in part; reversed in part.

MARGARET S. POWE v. A. G. ODELL, JR. AND ODELL ASSOCIATES, INC.

No. 88PA84

(Filed 4 December 1984)

1. Insurance § 110.1; Interest § 2; Judgments § 55— prejudgment interest—claims covered by liability insurance—constitutionality of statute

The statute providing for prejudgment interest on non-contract claims covered by liability insurance, G.S. 24-5, does not violate the equal protection provisions of the Fourteenth Amendment to the U. S. Constitution or Art. I, § 19 of the N. C. Constitution.

2. Appeal and Error § 3— review of constitutional questions

The Supreme Court will not pass upon a constitutional question unless it affirmatively appears that such question was raised and passed upon in the court below.

Justice MEYER dissenting.

Justices COPELAND and MITCHELL join in this dissenting opinion.

ON discretionary review, prior to determination by the Court of Appeals, of the order signed by *Allen, J.*, on 15 November 1983 in Superior Court, MECKLENBURG County.

Plaintiff seeks prejudgment interest on an award of damages for personal injuries which were sustained as the result of an automobile collision involving a vehicle owned and operated by defendants. After a jury trial, judgment was entered on 25 October 1983 awarding plaintiff $100,000 in damages, plus $432 in court costs. On the same date plaintiff filed a motion to amend the judgment to include prejudgment interest pursuant to N.C.G.S. 24-5, alleging that the omission of this interest had been a clerical error.[1] Plaintiff had not requested prejudgment interest in her pleadings, nor did she request that an issue concerning it be submitted to the jury. Following a hearing the trial court entered an order denying plaintiff's motion for prejudgment interest, holding that N.C.G.S. 24-5 violates the equal protection provisions of the constitutions of the United States and of North Carolina. From this order plaintiff requested discretionary review by this Court pursuant to N.C.G.S. 7A-31 (Cum. Supp. 1983). Plaintiff's petition was allowed 30 April 1984, and oral arguments on the case were heard 11 September 1984.

Parker, Poe, Thompson, Bernstein, Gage & Preston, by William E. Poe and Christian R. Troy, for plaintiff.

Boyle, Alexander, Hord and Smith, by B. Irvin Boyle, for defendants.

Henson, Henson & Bayliss, by Paul D. Coates, Perry C. Henson, and Perry C. Henson, Jr., for Samuel Ingham Tarble and ARA Services, Inc., amici curiae.

MARTIN, Justice.

[1] The sole question properly before the Court for review is whether the trial court erred in holding that N.C.G.S. 24-5 vio-

1. On 27 October 1983, defendants' liability insurer, The Travelers Insurance Company, paid the sum of $100,432 to the Clerk of the Superior Court of Mecklenburg County in satisfaction of the judgment.

lates the equal protection clause of the fourteenth amendment to the Constitution of the United States and article I, section 19 of the Constitution of North Carolina. We hold that the trial court did err in holding that the statute violates these constitutional provisions.

N.C.G.S. 24-5 (Cum. Supp. 1983) provides as follows:

> All sums of money due by contract of any kind, excepting money due on penal bonds, shall bear interest, and when a jury shall render a verdict therefor they shall distinguish the principal from the sum allowed as interest; and the principal sum due on all such contracts shall bear interest from the time of rendering judgment thereon until it is paid and satisfied. The portion of all money judgments designated by the fact-finder as compensatory damages in actions other than contract shall bear interest from the time the action is instituted until the judgment is paid and satisfied, and the judgment and decree of the court shall be rendered accordingly. The preceding sentence shall apply only to claims covered by liability insurance. The portion of all money judgments designated by the fact-finder as compensatory damages in actions other than contract which are not covered by liability insurance shall bear interest from the time of the verdict until the judgment is paid and satisfied, and the judgment and decree of the court shall be rendered accordingly.

In determining whether a statute violates the equal protection clause of the fourteenth amendment to the United States Constitution or article I, section 19 of the North Carolina Constitution, we must decide whether the legislative classification in the statute could provide a reasonable means to a legitimate state objective. As this Court stated in *Glusman v. Trustees and Lamb v. Board of Trustees*, 281 N.C. 629, 638, 190 S.E. 2d 213, 219 (1972), *vacated on other grounds*, 412 U.S. 947 (1973):

> The traditional equal-protection test does not require the very best classification in the light of a legislative or regulatory purpose; it does require that such classification in relation to such purpose attain a minimum (undefined and undefinable) level of rationality. "In the area of economics and social welfare, a state does not violate the Equal Protection Clause merely because the classifications made by its

> laws are imperfect. If the classification has some 'reasonable basis,' it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality.' " *Dandridge v. Williams*, 397 U.S. 471, 485, 25 L.Ed. 2d 491, 501-02, 90 S.Ct. 1153, 1161 (1970).

As long as a legislative classification in a statute concerning matters of economics or social welfare has a reasonable basis and is rationally related to a governmental objective which is permissible under the state and federal constitutions, this Court will defer to the wisdom of the legislature.

Defendants concede that the probable goals of N.C.G.S. 24-5 are legitimate state purposes. These include:

> (a) to compensate a plaintiff for loss of the use value of a damage award or compensation for delay in payment;[2]
>
> (b) to prevent unjust enrichment to a defendant for the use value of the money, and
>
> (c) to promote settlement.[3]

However, defendants argue that N.C.G.S. 24-5 violates the principles of equal protection because the statute's classification of claims covered by liability insurance and claims not covered by liability insurance does not have any reasonable basis and therefore is not rationally related to the legitimate state purposes. Thus the instant controversy centers on the question whether the legislative classification of claims in N.C.G.S. 24-5 is rationally related to achievement of the statute's purposes.

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2. This goal is in accord with the policy allowing compensation for delay in payment of awards for damages in eminent domain cases. *DeBruhl v. Highway Commission*, 247 N.C. 671, 102 S.E. 2d 229 (1958).

3. The insurance carrier has the right to settle any claim covered by the policy. N.C. Gen. Stat. § 20-279.21(f)(3) (1983). "The law imposes on the insurer the duty of carrying out in good faith its contract of insurance. The policy provision giving the insurer the right to effectuate settlement was put in for the protection of the insured as well as the insurer. It is a matter of common knowledge that fair and reasonable settlements can generally be made at much less than the financial burden imposed in litigating claims." *Alford v. Insurance Co.*, 248 N.C. 224, 229, 103 S.E. 2d 8, 12 (1958).

Under *Glusman*, we need only determine if the classification's relation to the objectives sought by the General Assembly attains a minimum level of rationality. As long as there exist reasonable facts on which the legislature could have relied in creating the classification, we will not interfere with the legislature's decision. *See Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 66 L.Ed. 2d 659 (1981).

> Although no precise formula has been developed, the Court has held that the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.

McGowan v. Maryland, 366 U.S. 420, 425-26, 6 L.Ed. 2d 393, 399 (1961).

Defendants contend that there is no rational reason why claims against self-insurers should not be subject to prejudgment interest to the same extent that claims covered by liability insurance are so subject. Defendants argue that the claim holders in both instances are similarly situated with respect to litigating claims and paying judgments and thus should not be treated differently. Either all defendants in non-contract actions should be required to pay prejudgment interest, or none should be.

In so arguing defendants overlook the fundamental differences between self-insurers and liability insurance companies. Self-insurers are basically concerned with the operation of their businesses, e.g., sales, manufacturing, utilities. The business of liability insurance companies is the receiving and investing of insurance premiums and the settling and payment of insurance claims. Self-insurers only incidentally settle claims; it is the business of liability carriers.

The General Assembly could have taken note that insurance companies have an incentive to delay litigation involving claims

they insure. This incentive stems from the fact that unlike self-insurers, insurance companies are required by statute to establish loss reserves, which are invested for profit until specific claims are paid off. *See* N.C. Gen. Stat. § 58-35.2 (1982). While self-insurers and other defendants can also delay trial of an action, they do not have the incentive to delay the time when claims must be paid in order to maximize the investment of legislatively mandated loss reserves. The legislature's recognition of this difference could have led it to attempt to curb some of the pretrial delay in non-contract cases handled by insurance companies by providing for prejudgment interest in such cases. Because the insurance company defending a non-contract claim would have to pay interest on the judgment from the time the suit is filed until judgment is paid, insurance companies would have an incentive not to delay trial but, instead, to speed up the process leading to settlement or trial.[4]

Providing for prejudgment interest on claims covered by liability insurance is thus a rational step to achieve the legitimate state goals enunciated above. "[T]hose challenging the legislative judgment must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the government decisionmaker." *Vance v. Bradley*, 440 U.S. 93, 111, 59 L.Ed. 2d 171, 184 (1979). *Accord Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 469, 66 L.Ed. 2d 659, 672. Defendants have failed to meet this burden.[5] Because there is a rational basis upon which the legislature could have classified defendants as it did in N.C.G.S. 24-5, we hold that this statute does not violate the equal protection clause of the fourteenth amendment to the United States Constitution or article I, section 19 of the Constitution of North Carolina.

Appellees in their brief attempt to raise the issue that the statute is unconstitutional as violating substantive due process rights under the fourteenth amendment to the Constitution of the

4. We note that Travelers, which apparently was responsible for payment of postjudgment interest, paid the $100,432 award of damages and costs only two days after judgment was entered.

5. *Cf.* Keeton, *Liability Insurance and Responsibility for Settlement*, 67 Harv. L. Rev. 1136, 1152 (1954) (most insurance policies unambiguously give the insurer the right to control defense of claims under the policy).

United States and article I, section 19 of the Constitution of North Carolina. They also argue that the statute is unconstitutional because it impermissibly impairs the obligation of the contract of insurance.

[2] Neither of these issues was presented to or passed upon by the trial court. The trial court's order was based solely upon the finding that the statute is unconstitutional because it violates the requirements of equal protection of the law. It is a well settled rule of this Court that we will not pass upon a constitutional question unless it affirmatively appears that such question was raised and passed upon in the court below. *State v. Woods*, 307 N.C. 213, 297 S.E. 2d 574 (1982); *City of Durham v. Manson*, 285 N.C. 741, 208 S.E. 2d 662 (1974); *State v. Cumber*, 280 N.C. 127, 185 S.E. 2d 141 (1971); *Wilcox v. Highway Comm.*, 279 N.C. 185, 181 S.E. 2d 435 (1971). This is in accord with the decisions of the United States Supreme Court. *Irvine v. California*, 347 U.S. 128, 98 L.Ed. 561 (1954); *Edelman v. California*, 344 U.S. 357, 97 L.Ed. 387 (1953). While it is true that the question of the constitutionality of the statute based upon equal protection grounds was determined by the trial court, the two additional constitutional issues were not before the trial court. Nor did the defendants make cross-assignments of error. N.C.R. App. P. 10(d). Defendants raise these issues for the first time on appeal. Because they failed to ask the trial court to pass upon the issues, we must decline to do so now. *State v. Woods*, 307 N.C. 213, 297 S.E. 2d 574.

The order of the trial court is reversed and the case is remanded to Superior Court, Mecklenburg County, for proceedings not inconsistent with this opinion.

Reversed and remanded.

Justice MEYER dissenting.

I respectfully dissent from both the reasoning and the result reached in the majority opinion. In my view the majority has effectively abrogated its responsibility to ensure that our legislature refrains from enacting laws which arbitrarily and unfairly discriminate against classes of persons in violation of their constitutional rights to equal protection. While the majority's analysis may possess the attribute of simplicity, it is that very

simplicity which forms the foundation of its inherent weakness. Its reasoning can be easily summarized:

1. The statute at issue, N.C.G.S. § 24-5, involves regulation in the area of economics and social welfare; therefore a court's review is limited to whether "the classification's relation to the objectives sought by the General Assembly attains a minimum level of rationality."

2. There is a "fundamental" difference between liability insurance companies and self insurers: liability insurance companies are in the "business" of insurance; self insurers "only incidentally settle claims."

3. There is a legitimate State purpose in promoting settlement of cases.

4. Insurance companies "have an incentive to delay litigation involving claims they insure," because they are "required by statute to establish loss reserves, which are invested for profit until specific claims are paid off."

5. Therefore there is a rational relation between the classification, liability insurance companies, and the objective sought, to promote settlement.

A careful analysis of the above "reasoning" leads inexorably to the conclusion that the majority has discovered an *excuse* rather than a *rational basis* for this legislation.

It is true that our courts have traditionally deferred to legislative judgment in reviewing equal protection challenges involving statutes of an economic nature. *See, e.g., Glusman v. Trustees and Lamb v. Board of Trustees*, 281 N.C. 629, 190 S.E. 2d 213 (cited by the majority). The authority of the legislature to enact such statutes is not, however, unlimited and it is the duty of the reviewing court to determine whether the limits have been transgressed. The equal protection clauses of the United States Constitution and the North Carolina Constitution require that in making classifications such as the legislature has made in this case, no arbitrary distinction be drawn between similarly situated persons. *See, e.g., Cheek v. City of Charlotte*, 273 N.C. 293, 160 S.E. 2d 18 (1968). The test under the equal protection clauses, is whether the difference in treatment made by the law has a rea-

sonable basis in relation to the purpose and subject matter of the legislation. *Indemnity Co. v. Ingram, Comr. of Insurance*, 290 N.C. 457, 226 S.E. 2d 498 (1976); *Guthrie v. Taylor*, 279 N.C. 703, 185 S.E. 2d 193 (1971), *cert. denied*, 406 U.S. 920, 32 L.Ed. 2d 119 (1972). Thus, rationality and fairness may be said to provide the keystones to a constitutionally valid economic regulation. I find neither to be present in the statute under discussion. In my opinion, N.C.G.S. § 24-5 arbitrarily discriminates between similarly situated plaintiffs and similarly situated defendants, if not under the federal constitution, then certainly under the North Carolina Constitution. *Compare McGowan v. Maryland*, 366 U.S. 420, 6 L.Ed. 2d 393 (1961) with *Cheek v. City of Charlotte*, 273 N.C. 293, 160 S.E. 2d 18.

I find neither significant nor helpful the "fundamental" difference between liability insurance companies and self insurers observed by the majority. The question, of course, is whether this difference has a reasonable basis in relation to the goal of the legislature. In the present case, the fact that liability insurance companies are in the business of settling claims bears no relation whatsoever to the State's goal of promoting settlements.[1] Rather, it is the majority's position that the goal of promoting settlement might be somewhat enhanced because these insurance companies are *required by law* to establish loss reserves which could result in an incentive to delay litigation.[2]

In support of this tenuous conclusion, the majority explains that loss reserves are invested for profit. What the majority fails

1. Though not addressed by the majority opinion I would question whether insurance companies as a class (and not just auto insurance companies) are any better able to expedite claims and avoid litigation delays than many self insureds. It is not unusual for insurance companies to depend on private claims adjusting firms for the investigation and settlement of claims against their insureds. In many instances the very same adjusting firms are employed by self insurers. In such instances are the insurance companies any better equipped to expedite the claims than the self insureds? Likewise, is a small insurance company (or a large one with little business in the liability field) with a small claims department any better able to handle claims than the large claims and legal departments of the giant corporation which is self insured?

2. Are insurance companies really different because they are required *by law* to establish reserves whereas giant corporations which are self insureds establish reserves because it is good business practice? Is this not a distinction without a difference?

to recognize is that as a practical matter in order to comply with N.C.G.S. § 58-35.2, insurance companies must transfer loss reserves from long-term accounts yielding high returns to short-term accounts yielding substantially lower returns. (The same with self insureds.) The more expedited the litigation, the sooner these funds can be returned to long-term accounts, in the event defendant prevails. (The same with self insureds.) It is therefore at best pure speculation that liability insurance companies will be motivated to delay litigation on this basis.

On the other hand, as the majority recognizes, self insurers and other defendants can and do delay litigation. I would point out that plaintiffs, too, delay litigation. In fact, it is frequently the plaintiff's decision to "hold out" for amounts in excess of insurance coverage, *amounts upon which prejudgment interest is presumably not due*,[3] that results in failure to settle and protracted litigation. I find it patently unfair that our laws penalize a discrete minority of insurers who, with no demonstrable certainty, are charged with purposefully delaying litigation for financial gain when others similarly situated can be, and frequently are, equally dilatory. That the law is arbitrary and unreasonable with respect to liability insurance companies is demonstrated by the fact that these companies are subject to the additional assessment of prejudgment interest while others similarly situated, for no apparent reason, are not.

Furthermore, the law unreasonably discriminates against defendants covered by liability insurance who will undoubtedly bear the burden of higher insurance rates to compensate for the additional cost of prejudgment interest.

The statute also clearly discriminates amongst similarly situated *plaintiffs*. The law excludes:

3. Under the statute prejudgment interest applies "only to *claims* covered by liability insurance." (Emphasis added.) I presume the majority would say that the "claim" refers to all damages sought and recovered and not just to that portion of the compensatory damages covered by insurance. Must the liability insurer pay prejudgment interest on the uninsured portion of the "claim," that is, the portion in excess of the policy limits? Must the individual defendant pay it? Or does prejudgment interest apply at all to the uninsured portion? These questions are left unanswered by the statute as are a number of others. For instance—does the term "claim covered by liability insurance" *include* claims under uninsured motorists coverage or suits defended by the carrier under a reservation of rights in a non-waiver agreement?

(a) Self insurers (even though their claims may be handled by the adjusting departments of commercial insurers);

(b) Persons or corporations obtaining bonds executed by surety companies or bonds executed by two individual sureties each owning real estate within the state (N.C.G.S. § 20-279.24);

(c) Persons or corporations meeting the requirements of the Motor Vehicles Safety and Financial Responsibility Act of 1953, by depositing $60,000.00 in cash or securities (N.C.G.S. § 20-279.25);

(d) Persons or corporations in whose name more than 25 motor vehicles are registered, who qualify as self insurers under the provisions of N.C.G.S. § 20-279.33;

(e) Governmental bodies.

As a result of these exclusions, the law arbitrarily discriminates against the class of plaintiffs who are injured by the acts of a defendant who falls into one of the above categories. The converse, of course, is that the law favors those plaintiffs who are fortunate enough to be injured by the acts of a defendant who is covered by liability insurance.[4]

In my opinion, this aspect of the statutory classification results in the grant of "exclusive or separate emoluments or privileges" to certain plaintiffs in violation of our constitution. *See Lowe v. Tarble*, 312 N.C. 467, 323 S.E. 2d 19 (1984) (Meyer, J., dissenting) (holding to the contrary). In this regard, I would simply point out that this Court would not be so eager to dismiss the equal protection challenge had the pertinent part of N.C.G.S. § 24-5 been couched in the following language:

The portion of all money judgments designated by the fact-finder as compensatory damages in actions other than contract shall bear interest from the time of the verdict until the

4. Indeed, if prejudgment interest is not recoverable on the uninsured portion of the compensatory damages award, does the statute not create three classes of plaintiffs—the unlucky ones who sue uninsured defendants, those luckier ones who sue defendants with minimum or low coverage and those even luckier ones who sue heavily insured defendants?

judgment is paid and satisfied EXCEPT AS TO ANY PLAINTIFF whose claim is covered by liability insurance in which event that plaintiff is entitled to interest from the time the action is instituted until the judgment is paid.

Under this language the result would be no different than it stands now under the majority's holding, and in my view would be unsupportable as granting to one class of plaintiffs exclusive privilege.

In conclusion, N.C.G.S. § 24-5 is unconstitutionally discriminatory: its classification arbitrarily discriminates against liability insurance companies, their insureds and a large class of plaintiffs whose claims are brought against defendants who are not so insured. Moreover, it does not constitute a reasonable means by which to promote the expeditious disposition of non-contract claims. Accordingly, the statute violates the fundamental principles of equal protection. Though I believe the statute as it now stands is unconstitutional, I would find no objection if it applied to all non-contract claims without regard to insurance coverage.

I vote to affirm the order of the trial court denying plaintiff's motion for prejudgment interest.

Justices COPELAND and MITCHELL join in this dissenting opinion.

STATE OF NORTH CAROLINA v. CYNTHIA WALLACE SHUPING

No. 501PA84

(Filed 4 December 1984)

Automobiles and Other Vehicles § 126.3— driving while impaired—breathalyzer results—deviation allowance

There was sufficient evidence to submit the offense of driving with a blood alcohol content of .10 to the jury when defendant's test results were .10 and the breathalyzer registered .09 in simulator tests with a known solution of .10 alcohol because a deviation above .10 is not permitted. Thus, the .01 deviation allowance only allows error in favor of defendant. G.S. 20-138.1; 20-16.2; 20-4.01; 20-139.1.

BEFORE *Freeman, J.*, presiding at the 12 March 1984 Criminal Session, MOORE County Superior Court, defendant was found guilty of the offense of driving while impaired. From judgment entered on the jury verdict, defendant in open court gave notice of appeal to the Court of Appeals. This Court, pursuant to G.S. 7A-31(a) and Rule 15(e)(2) of the Rules of Appellate Procedure, allowed *ex mero motu* discretionary review prior to a determination by the Court of Appeals.

Rufus L. Edmisten, Attorney General, by Isaac T. Avery, III, Special Deputy Attorney General; W. Dale Talbert, and David Roy Blackwell, Assistant Attorneys General, for the State-appellee.

Pollock, Fullenwider, Cunningham & Patterson, P.A., by Bruce T. Cunningham, Jr., for defendant-appellant.

FRYE, Justice.

Defendant raises a question of first impression in this State relating to the offense of driving while impaired (DWI) pursuant to G.S. 20-138.1 (1983). Essentially, defendant contends that there was insufficient evidence to submit the 0.10 *per se* offense to the jury because the breathalyzer test results are inaccurate since they are subject to a 0.01 percent margin of error. This Court does not agree with defendant and affirms the judgment of the trial court.

On 6 October 1983, Officer R. T. Williams of the Southern Pines Police Department first saw defendant, Cynthia Wallace Shuping, at 10:45 p.m. at the Southern Pines Police Department where she was obtaining a warrant for the arrest of her ex-boyfriend. At that time, Officer Williams observed that defendant's speech was slurred; she appeared confused; she was staggering; and she had a moderate odor of alcohol on her breath. After defendant left the police department, Officer Williams observed her as she was driving along Pennsylvania Avenue. Defendant's vehicle crossed the center line and brushed the curb on the bridge on West Pennsylvania Avenue. Thereafter, the officer signaled with his siren and blue light and stopped the defendant. The defendant was unable to successfully perform some field dexterity-sobriety tests, and she was placed under arrest for driving while impaired. She was taken to the police department

where she was advised of her rights, before being given a breathalyzer test.

Officer Kenneth Thornton of the Southern Pines Police Department administered a test of the defendant's breath using the Smith and Wesson Model 900A breathalyzer machine. The defendant's test revealed a 0.10 percent blood-alcohol concentration. During this time defendant stated to Officer Williams that she had begun drinking one glass of Creme de Menthe at approximately 8:00 p.m., stopping at approximately 10:00 p.m. She also stated that earlier during the evening she had taken prescription drugs consisting of Nardil, Navane and Xanax, all anti-depressants to calm her nerves.

During a jury trial in superior court, Officer Thornton, the breathalyzer operator, testified extensively about the proper procedure for administering the breathalyzer test given to the defendant. He testified that he had received training in the operation of the Model 900A and held the appropriate permit issued by the Department of Human Resources. He also testified that he followed the approved checklist when he performed the breathalyzer test on the defendant. During cross-examination, Officer Thornton testified in detail about the results of the simulator test conducted on the Model 900A prior to defendant's test, the simulator solution, and the practice of recording simulator results in a simulator master log. Officer Thornton further testified that the readings from simulator tests normally vary from 0.09 to 0.10 percent and that there is a permissible margin of tolerance of 0.01 percent below 0.10 percent. He also stated during re-direct examination that the rules require that a breathalyzer machine cannot be utilized to perform a test on an individual if the simulator test reading is greater than 0.10.

Defendant testified that she did not feel intoxicated and that she took the prescription drugs Navane and Nardil before going to the Southern Pines Police Department on the evening of 6 October 1983. She also testified that she was ignorant of any effects of taking prescription drugs and alcohol together.

I.

THE NEW STATUTE: IMPAIRED DRIVING

The offense of driving while impaired is defined as follows:

Impaired driving.

(a) Offense.—A person commits the offense of impaired driving if he drives any vehicle upon any highway, any street, or any public vehicular area within this State:

(1) While under the influence of an impairing substance; or

(2) After having consumed sufficient alcohol that he has, at any relevant time after the driving, an alcohol concentration of 0.10 or more.

N.C. Gen. Stat. § 20-138.1 (1983).

Prior to the enactment of G.S. 20-138.1, North Carolina law provided:

Persons under the influence of alcoholic beverages.

(a) It is unlawful and punishable as provided in G.S. 20-179 for any person who is under the influence of alcoholic beverages to drive or operate any vehicle upon any highway or any public vehicular area within this State.

(b) It is unlawful for any person to operate any vehicle upon any highway or any public vehicular area within this State when the amount of alcohol in such person's blood is 0.10 percent or more by weight . . . . An offense under this subsection shall be treated as a lesser included offense of the offense of driving under the influence.

N.C. Gen. Stat. § 20-138 (Cum. Supp. 1981).

Essentially, this statute made driving with a blood-alcohol concentration (BAC) of 0.10 percent or more a lesser included offense or separate method of proving the offense of driving while under the influence of intoxicants. Additionally, under former G.S. 20-139.1 the result of a chemical test yielding a 0.10 or greater created a presumption that the person was under the influence of intoxicating liquor. *State v. Basinger*, 30 N.C. App. 45, 226 S.E. 2d 216 (1976).

However, the 1983 Act created one substantive offense (DWI) but provided two methods of proving the offense: (1) that the State prove actual driver impairment; or (2) that the State prove only that the defendant operated a vehicle on a public highway or

public vehicular area with an alcohol concentration of 0.10 or more at any relevant time after the driving. The present statutory scheme does not depend upon a presumption. "The statute does not presume, it defines." *State v. Franco*, 96 Wash. 2d 816, 823, 639 P. 2d 1320, 1323 (1982); N.C. Gen. Stat. § 20-138.1 (1983).

The new DWI law represents an implied consent offense pursuant to G.S. 20-16.2 which states:

> Implied consent to chemical analysis; mandatory revocation of license in event of refusal; right of driver to request analysis.
>
> (a) Basis for Charging Officer to Require Chemical Analysis; Notification of Rights.—Any person who drives a vehicle on a highway or public vehicular area thereby gives consent to a chemical analysis if he is charged with an implied-consent offense . . . .
>
> (a1) Meaning of Terms.—Under this section, an "implied-consent offense" is an offense involving impaired driving or an alcohol-related offense made subject to the procedures of this section.

The new act significantly amended the prior chemical testing statutes and enacted definitions governing chemical testing. The General Assembly plainly keyed the 0.10 theory of DWI to the results of a chemical analysis, which is defined in G.S. 20-4.01 as follows:

> (3a) Chemical Analysis.—A chemical[1] test of the breath or blood of a person to determine his alcohol concentration, performed in accordance with G.S. 20-139.1. The term "chemical analysis" includes duplicate or sequential analyses when necessary or desirable to insure the integrity of test results.

The procedures governing the admissibility and performance of a chemical analysis are contained in G.S. 20-139.1. For our purposes, the relevant portions of this statute provide:

1. Amended by Ch. 1101, 1983 S.L., 1984, to delete the word "chemical" between the words "A" and "test."

(a) Chemical Analysis Admissible.—In any implied-consent offense under G.S. 20-16.2, a person's alcohol concentration as shown by a chemical analysis is admissible in evidence. This section does not limit the introduction of other competent evidence as to a defendant's alcohol concentration, including other chemical tests.

(b) Approval of Valid Test Methods; Licensing Chemical Analysts.—A chemical analysis, to be valid, must be performed in accordance with the provisions of this section. The chemical analysis must be performed according to methods approved by the Commission for Health Services by an individual possessing a current permit issued by the Department of Human Resources for that type of chemical analysis. The Commission for Health Services is authorized to adopt regulations approving satisfactory methods or techniques for performing chemical analyses, and the Department of Human Resources is authorized to ascertain the qualifications and competence of individuals to conduct particular chemical analyses. The Department may issue permits to conduct chemical analyses to individuals it finds qualified subject to periodic renewal, termination, and revocation of the permit in the Department's discretion.

The new statute, therefore, creates alternate methods of proving the crime of DWI. As defined by G.S. 20-138.1(a)(2), driving with a 0.10 percent BAC comprises one method of committing this crime. Additionally, the statute enables the State to introduce the results of a chemical analysis into evidence to prove the crime if the analysis comports with G.S. 20-139.1(b).

II.

BREATHALYZER RESULTS: DEFENDANT'S CHALLENGE

The defendant contends that there was insufficient evidence to submit the 0.10 aspect of G.S. 20-138.1 to the jury when the defendant's test results were 0.10 and the machine varies between 0.09 and 0.10 percent when the breathalyzer operator conducts the simulator tests. The defendant specifically excepted to the following charges given by the judge to the jury:

I would charge you that for you to find the defendant guilty of driving a vehicle on the highways of this State while

impaired the State of North Carolina must prove three things beyond a reasonable doubt. First, that the defendant was driving a 1973 Lincoln. Second, that she was driving that 1973 Lincoln upon a highway within this State, and I would say to you that East Pennsylvania Avenue in Southern Pines is a highway within this State. And third, that at the time the defendant was driving that '73 Lincoln she was either one, under the influence of an impairing substance; or, two, she was driving after having consumed sufficient quantity of alcohol that she had at any relevant time after driving an alcohol concentration of .10 or more.

. . . .

Now, the State also satisfies this third element of this offense if it proves beyond a reasonable doubt that the defendant was driving a vehicle on the highways of this State after having consumed sufficient alcohol that she had at any relevant time after driving an alcohol concentration of .10 or more.

The crux of defendant's argument originates with the testimony of Officer Thornton, the breathalyzer operator. Officer Thornton testified that he had been certified by the State to perform chemical analyses of the breath. He further testified that while conducting the breathalyzer tests on the defendant he complied with the Department of Human Resources' Regulations.[2] As part of these operational procedures, the operator is required to analyze a simulated breath sample prior to taking and analyzing the defendant's actual breath sample. The purpose of this procedure is to verify the accuracy of the machine. It is in the nature of a control test. To perform the simulator testing, the operator connects to the breathalyzer a jar containing a known solution of 0.10 percent alcohol.[3] The operator then blows into the mouth-

2. N.C. Admin. Code tit. 10, § 7B.0336 (1983).

3. N.C. Admin. Code, tit. 10, § 7B.0102 (defines simulator solution):

"Simulator Solution" shall mean a water-alcohol solution made by preparing a stock solution of 60.5 grams of alcohol per liter of water (77.0 ml. of absolute alcohol diluted to one liter of distilled water, or equivalent ratio) and then preparing for simulator use as a control sample by using 10 ml. of stock solution and further diluting to 500 ml. with distilled water, which then corresponds to the equivalent alcohol concentration of 0.10.

piece, introducing a sample of air from the simulator solution into the machine.[4]

If the machine yields the expected result of 0.10 percent then it is operating properly, since the control sample of air is being measured consistently with a prepared solution equal to 0.10 BAC. The regulations do allow for an instrumental deviation of 0.01 percent below the 0.10 expected reading. However, a deviation above the 0.10 percent expected reading is not permitted. *See* note 4, *supra.*

Officer Thornton testified that during the simulator test he obtained the result of 0.09, a reading on the low side. During cross examination, the defendant's attorney questioned the operator as follows:

> Q. It's true, is it not, Mr. Thornton, the machine varies when you run the simulator test?
>
> A. Yes, sir.
>
> Q. What does it vary between?
>
> . . . .
>
> A. There is a tolerance.
>
> Q. What is the tolerance?
>
> A. Point 01.
>
> Q. To what?
>
> A. When I perform the test and I get results between .09 and .10 the instrument is working accurate.

4. N.C. Admin. Code tit. 10, § 7B.0102(22) defines this verification of instrumental calibration as follows:

> Verification of Instrumental Calibration shall mean verification of instrumental accuracy by employment of a control sample from an alcoholic breath simulator using solution as specified in Paragraph (19) of this Rule and obtaining the expected results/level on the instrument. The expected results/level shall be an instrumental reading of 0.10 alcohol concentration, with an allowable instrumental deviation not to exceed 10 percent under the expected reading. Deviations on the high side are not permitted. When the procedures set forth for instruments in Section .0300 of these Rules are followed and the expected results/level is obtained, the instrument shall be deemed properly calibrated.

Q. So there is a ten per cent margin of error.

A. Point 01.

Q. Point 01 out of what?

A. Between .09 and .10.

Q. So if the machine registers anywhere between .09 and .10 for the simulator solution then you go ahead and run the test.

A. Yes, sir.

And during re-direct examination, Officer Thornton testified:

Q. Officer Thornton, you testified that—Mr. Cunningham asked you and you testified that the machine can be between .09 and .10 on the simulator and it's operating according to the guidelines, and you can run the Breathalyzer on certain subjects, is that correct?

A. Yes, sir.

Q. What happens if it's over .10?

A. You cannot use the instrument.

Q. Why is that?

A. It's not an accurate or valid test. The instrument is not working properly.

Q. And when you ran the simulator on Miss Shuping what were the test results?

A. The simulator test results?

Q. Yes.

A. .09.

Q. Is that within the tolerance, the guidelines set by the North Carolina Department of Human Resources, Division of Health Services?

A. Yes, Sir.

Defendant contends, based on this testimony, that there is a 0.01 "margin of error" in the breathalyzer instrument. Therefore,

it is contended defendant's BAC could have been 0.09, since her breathalyzer reading was 0.10 and the breathalyzer "varies up and down by 0.01." Basically, defendant argues that the 0.01 instrumental margin of tolerance allowed during simulator testing equates to a 0.01 "margin of error" during actual testing of the defendant's breath. This is simply not the case. The 0.01 deviation allowance below the expected reading of 0.10 during simulation procedures is a safeguard to insure that when the actual test is subsequently run, any possible error during actual testing is in favor of defendant. Stated differently, when the machine yields a 0.10 during simulation testing, the machine is operating accurately. A subsequent reading of the defendant's breath will then render a reading that is reliable.

Furthermore, when the machine yields a 0.09 during simulation testing, within the allowable margin of tolerance, that means it is testing on the low side. Thus, when a subsequent test is actually conducted on defendant, the reading from the machine is lower than the actual BAC. Thus, when defendant in this case blew a 0.10 after the machine had yielded a 0.09 during the simulation test, her actual BAC could have been a 0.11 rather than a 0.10. Consequently, any "error," if error there be, was fully in favor of defendant.

Defense counsel cites cases from sister states as persuasive authority to support his argument that readings from a breath-testing machine, in order to be competent evidence, must yield results outside of the 0.01 "margin of error" inherent in the testing process. Defendant contends that these cases recognize an "inherent deviation in the machine." Essentially, defendant maintains that the breathalyzer results must be 0.11 in order to prove a BAC of 0.10. Defendant's argument is rejected.

An analysis of the cases cited by defendant reveals that they are inapposite to the case *sub judice*. Two of these cases, *State v. Bjornsen*, 201 Neb. 709, 271 N.W. 2d 839 (1978) and *People v. Campos*, 138 Cal. App. 3d Supp. 1, 188 Cal. Rptr. 366 (Super. Ct. 1982), deal with the results of blood tests, not breath tests.[5] So instead, what these cases address is the error inherent in the blood-

5. It has been recognized that breathalyzer readings are usually lower than results from blood tests. *Heddan v. Dirkswager*, 336 N.W. 2d 54, 62 (Minn. 1983);

testing process, not the breath-testing machine involved in this case. Accordingly, we are not persuaded by this authority.

Defendant also cites *State v. Boehmer*, 613 P. 2d 916 (Hawaii Ct. App. 1980) (per curiam). It is true that in *Boehmer* the court concluded that the breathalyzer machine was subject to a margin of error. The court held that the results of the breathalyzer test must reflect a percent that is outside of any error inherent in the testing process. However, we are not persuaded by the court's rationale in *Boehmer*, primarily because the court relied exclusively upon *Bjornsen*, which dealt with blood, not breath, tests. Additionally, the *Boehmer* opinion does not make reference to any facts that indicate whether the breathalyzer operator was required to, or did indeed, verify the accuracy of the machine by conducting a simulator test prior to taking a sample of the defendant's breath.

Courts in several states have reviewed the accuracy and reliability of breath-testing devices, including the Breathalyzer Models 900 and 900A, and have determined them to be reliable scientific instruments. *Romano v. Kimmelman*, 96 N.J. 66, 474 A. 2d 1 (1984); *Heddan v. Dirkswager*, 336 N.W. 2d 54 (Minn. 1983); *People v. Tilley*, 120 Misc. 2d 1040, 466 N.Y.S. 2d 983 (Co. Ct. 1983); *State v. Keller*, 36 Wash. App. 110, 672 P. 2d 412 (1983); *State v. Rucker*, 297 A. 2d 400 (Del. Super. Ct. 1972).

In conclusion, we hold that the trial court correctly determined that the breathalyzer operator complied with the Department of Human Resources Regulations and the statutory provisions before admitting the chemical analysis of the defendant's breath into evidence pursuant to 20-139.1(a) and (b). *State v. Eubanks*, 283 N.C. 556, 196 S.E. 2d 706, *reh'g denied*, 285 N.C. 597 (1973). Once it is determined that the chemical analysis of the defendant's breath was valid, then a reading of 0.10 constitutes reliable evidence and is sufficient to satisfy the State's burden of proof as to this element of the offense of DWI. Therefore, the trial judge correctly instructed the jury regarding the 0.10 *per se* offense of DWI.

No error.

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see generally, Watts, *Some Observations on Police-Administered Tests for Intoxication*, 45 N.C. L. Rev. 35, 51 (1966) (for a thorough treatment of the traditional chemical tests for intoxication).

STATE OF NORTH CAROLINA v. MAXIE THOMAS COKER, JR.

No. 486PA84

(Filed 4 December 1984)

1. **Automobiles and Other Vehicles § 125— driving while impaired—sufficiency of citation**

A citation which charged that defendant did "unlawfully and willfully operate a motor vehicle on a street or highway while subject to an impairing substance. G.S. 20-138.1" met the statutory requirements of G.S. 20-138.1(c).

2. **Indictment and Warrant § 7.1— form of citation—legislative power**

The legislature has the power, within constitutional parameters, to prescribe the manner in which a criminal charge can be stated in a pleading.

3. **Automobiles and Other Vehicles § 125— driving while impaired—citation not ambiguous**

A citation charging the operation of a motor vehicle "while subject to an impairing substance" satisfied statutory and constitutional standards of certainty because "subject to an impairing substance" is so clear and distinct that a person of common understanding would know what was intended. G.S. 15-153; G.S. 20-4.01(14a).

4. **Automobiles and Other Vehicles § 125— driving while impaired—citation—driving synonymous with operating**

A citation charging defendant with *operating* rather than *driving* a motor vehicle need not be quashed because the legislature intended "driver" and "operator" to be synonymous, and because the use of "operate" is not so great a refinement on the statutory short form pleading as to render the charge unintelligible. G.S. 20-138.1; G.S. 20-4.01(7), (25).

5. **Automobiles and Other Vehicles § 125— driving while impaired—citation sufficiently specific**

A citation which charged driving while subject to an impairing substance was sufficient without specifying the evidence the State would present regarding the impairing substance or stating whether the State intended to proceed under a theory of driving while under the influence or driving with a blood alcohol content of .10 where the General Assembly clearly intended to combine the formerly separate offenses, the State is not required to plead evidentiary matters, and the citation was sufficient to inform the defendant of the charge so that he could prepare a defense, to inform the court of the judgment to pronounce in the event of conviction, and to protect defendant from subsequent prosecution for the same offense. G.S. 20-138.1(c); G.S. 20-4.01(14a); G.S. 15-144.

ON certiorari pursuant to Rule 21(a)(1) of the North Carolina Rules of Appellate Procedure (1983) of an order entered 29 March 1984 by *Judge Brewer*, Superior Court, WAKE County, reversing

a judgment entered by *Judge Greene*, District Court, WAKE County.

On 12 November 1983 defendant was arrested and charged in a uniform citation alleging that he did "unlawfully and wilfully operate a motor vehicle on a street or highway while subject to an impairing substance. G.S. 20-138.1." Prior to trial defendant moved in writing to dismiss the charge.

Upon call of the case for trial in Wake County District Court on 12 November 1984 Judge Greene, the presiding judge, gave the assistant district attorney representing the State an opportunity to file a statement of charges or to amend the citation. The assistant district attorney informed the court that she would not move to amend the citation nor would she proceed with a statement of charges. Judge Greene thereafter dismissed the charges against defendant after finding that the citation did not satisfy constitutional and statutory requirements of a criminal pleading. The State appealed to Wake County Superior Court and on 6 April 1984, Judge Brewer entered an order reversing the decision of Judge Greene and remanded the case to Wake County District Court for trial on the merits.

Defendant filed a notice of appeal in the North Carolina Court of Appeals. Defendant had no right to appeal in the present posture of this case. N.C. Gen. Stat. 15A-1444(a1) (1983). However, we elect to treat his purported appeal as a petition for certiorari and allow the petition.

Rufus L. Edmisten, Attorney General, by Isaac T. Avery, III, Special Deputy Attorney General, David Roy Blackwell, Assistant Attorney General, and W. Dale Talbert, Assistant Attorney General, for the State.

Merriman, Nicholls, Crampton, Dombalis & Aldridge, P.A., by Nicholas J. Dombalis, II for defendant-appellant.

BRANCH, Chief Justice.

[1] Defendant's sole assignment of error is that Judge Brewer erred by reversing the district court's dismissal of the charge against him. He argues that the citation upon which he was charged failed to satisfy statutory and constitutional requirements because it did not adequately inform him of the

charge against him. Defendant complains that the citation (1) is vague and ambiguous; (2) fails to specify an impairing substance; and (3) fails to specify under which theory of driving while impaired defendant is charged.

North Carolina General Statute § 20-138.1 provides:

> (a) Offense.—A person commits the offense of impaired driving if he drives any vehicle upon any highway, any street, or any public vehicular area within this State:
>
> (1) While under the influence of an impairing substance; or
>
> (2) After having consumed sufficient alcohol that he has, at any relevant time after the driving, an alcohol concentration of 0.10 or more.
>
> (b) Defense Precluded.—The fact that a person charged with violating this section is or has been legally entitled to use alcohol or a drug is not a defense to a charge under this section.
>
> (c) Pleading.—In any prosecution for impaired driving, the pleading is sufficient if it states the time and place of the alleged offense in the usual form and charges that the defendant drove a vehicle on a highway or public vehicular area while subject to an impairing substance.

We are of the opinion that the citation meets the statutory requirements of N.C.G.S. 20-138.1(c). However, defendant contends that the language of the statute is ambiguous in that the phrase "subject to an impairing substance" does not have precise legal import. We find defendant's citation, modeled after N.C.G.S. § 20-138.1(c), complies with statutory and constitutional requirements.

[2, 3] The legislature has, within constitutionally mandated parameters, the power to prescribe the manner in which a criminal charge can be stated in a pleading to relieve the State of the common law requirement that every element of the offense be charged. *State v. Lowe*, 295 N.C. 596, 247 S.E. 2d 878 (1978). An indictment or criminal charge is constitutionally sufficient if it apprises the defendant of the charge against him with enough certainty to enable him to prepare his defense and to protect him from subsequent prosecution for the same offense. The indictment

must also enable the court to know what judgment to pronounce in the event of conviction. *State v. Squire*, 292 N.C. 494, 234 S.E. 2d 563, *cert. denied*, 434 U.S. 998 (1977); *State v. Russell*, 282 N.C. 240, 192 S.E. 2d 294 (1972).

An indictment is sufficient in form for all intents and purposes if it expresses the charge in a plain, intelligible and explicit manner. N.C. Gen. Stat. 15-153 (1983). It will not be quashed "by reason of any informality or refinement, if in the bill or proceeding, sufficient matter appears to enable the court to proceed to judgment." *Id.* It is generally held that the language in a statutorily prescribed form of criminal pleading is sufficient if the act or omission is clearly set forth so that a person of common understanding may know what is intended. 41 Am. Jur. 2d, *Indictments and Informations* § 68 (1968).

In determining the sufficiency of indictments, courts must look to long-established and well-known rules of law. *Id.* at § 70. Words having technical meanings must be construed according to such meanings. *Id.* Where words in a statute have not acquired a technical meaning, they must be construed in accordance with their common and ordinary meaning. *Lafayette Transportation Service, Inc. v. County of Robeson*, 283 N.C. 494, 196 S.E. 2d 770 (1973).

The words "subject to" appear in the challenged citation and in the form prescribed by statute. Although not defined in Chapter 20 of the General Statutes, "subject to" is defined in Black's Law Dictionary as "liable, subordinate, subservient, . . . obedient to; *governed or affected by.*" *Black's Law Dictionary* 1594 (rev. 4th ed. 1968) (emphasis added). The word "subject" is defined as "likely to be conditioned, affected, or modified in some indicated way." Webster's Third New International Dictionary (Unabridged 1976).

"Impairing substance" is defined by statute as "[a]lcohol, controlled substance under Chapter 90 of the General Statutes, any other drug or psychoanalytic substance capable of impairing a person's physical or mental faculties or any combination of these substances." N.C. Gen. Stat. 20-4.01(14a) (1983).

We are satisfied that the meaning of driving while "subject to an impairing substance" is so clear and distinct that a person

of common understanding would know what is intended. *See* 41 Am. Jur. 2d *Indictments and Informations* § 68 (1968). We therefore reject defendant's argument to the contrary.

[4] Although defendant has not raised this argument, the State points out that the only difference between the approved short form pleading set forth in the statute and defendant's citation is that defendant was charged with *operating* a motor vehicle. Subsection c of N.C.G.S. 20-138.1 provides that the pleading is sufficient if it charges that defendant *drove* a vehicle.

Although Chapter 20 of the General Statutes contains no definition of "drive" or "operate," "driver" and "operator" are defined. In N.C.G.S. 20-4.01(7), "driver" is defined as "the operator of a vehicle." "Operator" is defined as "a person in actual physical control of a vehicle which is in motion or which has the engine running." N.C. Gen. Stat. 20-4.01(25).

We recognize that distinctions may have been made between driving and operating in prior case law and prior statutes regulating motor vehicles. *See e.g. State v. Carter*, 15 N.C. App. 391, 190 S.E. 2d 241 (1972) (interpreting "driving" under a former statute to require motion); Act of March 5, 1935, Chapter 52, § 1, 19 Public Laws 34, (formerly codified at N.C. Gen. Stat. 20-6 (1935)) (repealed 1973) (defining "operator" as a person who is in the driver's seat while the engine is running or who steers while the vehicle is being towed or pushed by another vehicle).

We do not believe, however, that such a distinction is supportable under N.C.G.S. 20-138.1. Since "driver" is defined simply as an "operator" of a vehicle, we are satisfied that the legislature intended the two words to be synonymous. In any event "operate" as used in defendant's citation is not so great a refinement on the statutory short-form pleading as to render the charge unintelligible or to prevent the court from proceeding to judgment. The use, therefore, of the word "operate" rather than "drive" will not require that the indictment be quashed. *See* N.C. Gen. Stat. § 15-153.

[5] Defendant next contends that the citation, based on the approved criminal pleading set forth in N.C.G.S. 20-138.1(c), is constitutionally infirm because it lacks the specificity necessary to enable him to prepare his defense and to bar subsequent prosecu-

tion for the same offense. He argues specifically that he should be informed in the charge of "what evidence the State will present regarding the impairing substance or substances which caused the condition of the defendant resulting in his arrest." In a similar argument he contends the State should make explicit in the citation whether it intends to proceed on a theory of driving while under the influence as set forth in subsection (a)(1) or driving with a blood alcohol content of .10 as described in subsection (a)(2) of the statute. We find no merit in these contentions.

Although it is true that the purpose of an indictment or criminal summons is to inform a party so that he may learn with reasonable certainty the nature of the crime of which he is accused, this Court has long held that the State is required only to allege ultimate facts. Evidentiary matters need not be alleged. *State v. Palmer*, 293 N.C. 633, 239 S.E. 2d 406 (1977). A defendant who feels that he may be taken by surprise may ask for a bill of particulars to obtain information in addition to that contained in the indictment. *State v. O'Keefe*, 263 N.C. 53, 138 S.E. 2d 767 (1964) *cert. denied*, 380 U.S. 985 (1965). As Chief Justice Merrimon stated in *State v. Moore*, 104 N.C. 743, 10 S.E. 183 (1889):

> The mere form of the indictment—any particular form—is not thus made essential. The purpose is to require that the party charged with crime by indictment shall be so charged by a grand jury as that he can learn with reasonable certainty the nature of the crime of which he is accused and make defense. As we have said, it is not necessary in doing so to charge the particular incidents of it—the particular means employed in perpetrating and the particular manner of it—and thus compel the State to prove that it was done with such particular means and in such way, and in no other. Such particularity might defeat or delay justice in many cases, as, indeed, it has sometimes done.

Id. at 750, 10 S.E. at 185-86.

To determine whether the citation sufficiently enables defendant to prepare his defense against the charge of driving while impaired, we look first to the nature of the offense itself.

In 1983 the General Assembly, based on recommendations by the Governor's Task Force, passed the Safe Roads Act which sub-

stantially modified existing statutes relating to driving while under the influence of alcohol or drugs. Act of June 3, 1983, Ch. 435, 1983 Advance Legislative Service 52. After examining the Act and its predecessor statute, we believe it is clear that the legislature intended to combine prior offenses relating to driving while under the influence of drugs or alcohol into one consolidated offense.

Under the former statutory scheme, drug-related driving offenses and alcohol-related driving offenses were contained in separate statutes. *Compare* Act of March 31, 1939, Ch. 292, § 1, 1939 Session Laws 577, (formerly codified at N.C. Gen. Stat. 20-139 (repealed 1983)) (Driving while under the influence of a drug and operation of a vehicle by a habitual user of narcotic drugs); Act of March 23, 1937, Ch. 407, § 101, 1937 Session Laws 833, (codified at N.C. Gen. Stat. 20-138 (repealed 1983)) (Driving while under the influence of alcohol); Act of March 23, 1937, Ch. 407, § 102, 1937 Session Laws 833, (codified as amended at N.C. Gen. Stat. 20-140(c)) (repealed 1983) (Reckless driving after drinking).

Under the Safe Roads Act, the General Assembly provided that a person commits the offense of driving while impaired if he drives "while under the influence of an impairing substance" or if at any relevant time after driving, he has an alcohol concentration of .10 or more. N.C. Gen. Stat. 20-138.1. As noted previously, "impairing substance" is defined as "[a]*lcohol*, controlled substance under Chapter 90 of the General Statutes, *any other drug or psychoactive substance* capable of impairing a person's physical or mental faculties, or any combination of these substances." N.C. Gen. Stat. 20-4.01(14a). (Emphasis added.)

It is clear that under the Safe Roads Act, impairment by any substance enumerated in N.C.G.S. 20-4.01(14a) is sufficient to fall within the parameters of the statutory prohibition of N.C.G.S. 20-138.1. Proof that defendant was impaired by one particular substance or another is a matter of evidence. Since evidentiary matters need not be alleged in a criminal pleading, we reject defendant's argument that the State is required to specify which substance impaired defendant.

Knowledge of what evidence the State intends to offer to prove that defendant was under the influence of an impairing substance would no doubt make easier defendant's task of prepar-

ing his defense. Nonetheless, the State is not constitutionally required to allege that evidence in defendant's criminal summons. *See e.g. State v. Morgan*, 268 N.C. 214, 150 S.E. 2d 377 (1966) (State need not allege what "implements of housebreaking" were used in indicting defendant under N.C.G.S. 14-55).

In the same vein, the State's decision whether to prosecute defendant with evidence that he drove while under the influence of an impairing substance under subsection (a)(1) or evidence that his blood alcohol concentration was .10 under subsection (a)(2) is a decision as to the theory of the trial rather than a decision as to what *offense* to proceed upon.

After examining a predecessor to the driving while impaired statute, the now repealed N.C.G.S. 20-138, it is clear that the General Assembly intended in the recently enacted provision to combine formerly separate offenses of driving under the influence of intoxicating beverage and driving with a .10 percent of blood alcohol into one offense. The former statute provided:

> § 20-138. Persons under the influence of intoxicating liquor.—(a) It is unlawful and punishable as provided in G.S. 20-179 for any person who is under the influence of intoxicating liquor to drive or operate any vehicle upon any highway or any public vehicular area within this State.
>
> (b) It is unlawful for any person to operate any vehicle upon any highway or any public vehicular area within this State when the amount of alcohol in such person's blood is 0.10 percent or more by weight. . . . An offense under this subsection shall be treated as a lesser included offense of the offense of driving under the influence.

It is clear that under the former statute two possible offenses were described. The statute explicitly stated that driving with a .10 percent alcohol level was a lesser included offense of driving under the influence of an intoxicating liquor. Such language is absent in the recently enacted N.C.G.S. 20-138.1.

In further contrast to the current version of the statute, the former statute stated that "It is unlawful . . . for any person who is under the influence of intoxicating liquor to drive. . . ." N.C. Gen. Stat. 20-138(a) (repealed 1983). In prohibiting driving with .10 percent blood alcohol, the legislature in a different subsection

again included the words "it is unlawful." The repetition of such language suggests that the legislature intended to outlaw separately both driving while under the influence of intoxicating liquor and driving with a blood alcohol level of .10 percent. In the recently enacted N.C.G.S. 20-138.1(a), the legislature described both prohibited acts by the single offense, "driving while impaired." The words "offense" and "the offense" in the singular form in the statute are amplified further by subsections 1 and 2, which describe how the offense may be committed. This arrangement supports our conclusion that the acts of driving while under the influence of an impairing substance and driving with an alcohol concentration of .10 are two separate, independent and distinct ways by which one can commit the single *offense* of driving while impaired. Since we must presume that the legislature did not act in vain but instead acted with care, deliberation and the full knowledge of prior and existing law, we interpret N.C.G.S. 20-138.1 as creating one offense which may be proved by either or both theories detailed in N.C.G.S. 20-138.1(a)(1) & (2).

Since N.C.G.S. 20-138.1 describes one offense, the State need not allege under what theory it will proceed or what evidence it intends to produce to prove the offense. *State v. Palmer*, 293 N.C. 633, 239 S.E. 2d 406 (1977). This Court has long upheld indictments for first-degree murder modeled after a short-form indictment set forth in N.C.G.S. 15-144. *State v. Duncan*, 282 N.C. 412, 193 S.E. 2d 65 (1972); *State v. Kirksey*, 227 N.C. 445, 42 S.E. 2d 613 (1947). Under that short-form indictment, the State is required to allege that the killing was committed feloniously, wilfully and with malice aforethought. Under the indictment a defendant can be convicted either on a theory of felony murder or on a theory of premeditation and deliberation or both. *State v. Norwood*, 303 N.C. 473, 279 S.E. 2d 550 (1981). The State need not declare before trial upon which theory it intends to rely. *State v. Silhan*, 302 N.C. 223, 275 S.E. 2d 450 (1981). We will not impose upon the State trying a defendant for the misdemeanor of driving while impaired a greater burden of informing a defendant of the theories upon which it intends to proceed than it must bear in trying a defendant for first-degree murder. As we held in *State v. Boyd*, 287 N.C. 131, 214 S.E. 2d 14 (1975), where the factual basis is sufficiently pleaded defendant must be prepared to defend against any and all legal theories which those facts support.

In the instant case, in compliance with N.C.G.S. 20-138.1(c), defendant was charged with operating a motor vehicle on a public highway or street subject to an impairing substance. The citation names defendant and lists his address; it establishes in what county, on what date and at what time the offense occurred. The citation is dated and signed by an arresting officer. We believe it is sufficient to inform the defendant of the charge so that he is able to prepare his defense, to enable the court to know what judgment to pronounce in the event of conviction and to protect defendant from subsequent prosecution for the same offense.

In his brief defendant poses a hypothetical situation in which he contends a defense of double jeopardy might arise. Since the facts of this case do not support such a defense, we need not consider defendant's contention in this regard.

We hold that defendant's citation is both constitutionally and statutorily sufficient. The Superior Court's reversal of the citation's dismissal is

Affirmed.

STATE OF NORTH CAROLINA v. ANTHONY WAYNE ROSE

No. 485PA84

(Filed 4 December 1984)

Automobiles and Other Vehicles § 120— driving while impaired—alcohol level of 0.10 or more—constitutionality of statute

The statute providing that a person commits the offense of driving while impaired if he drives upon a highway, street or public vehicular area after having consumed sufficient alcohol that he has an alcohol concentration of 0.10 or more "at any relevant time after the driving," G.S. 20-138.1(a)(2), is not unconstitutionally vague in violation of the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution and Art. I, § 19 of the N.C. Constitution because a drinking driver does not know precisely when his body alcohol level has risen above the 0.10 statutory maximum. Nor is the statute so arbitrary, capricious or unrelated to a valid legislative purpose as to violate due process.

ON this Court's *sua sponte* order to review prior to determination by the Court of Appeals defendant's appeal from a judg-

ment of *Judge Coy E. Brewer, Jr.*, entered at the 6 April 1984 Session of WAKE County Superior Court, reversing an order of *Judge Narley L. Cashwell*, entered on 2 March 1984 in WAKE County District Court.[1] *Judge Cashwell* declared N.C.G.S. § 20-138.1(a)(2) to be unconstitutional.

Rufus L. Edmisten, Attorney General, by Isaac T. Avery, III, Special Deputy Attorney General; David Roy Blackwell and W. Dale Talbert, Assistant Attorneys General, for the state.

Lucas, Brown and Lock, P.A., by Thomas H. Lock for defendant appellant.

EXUM, Justice.

The sole issue in this case is whether N.C.G.S. § 20-138.1(a)(2), a section of the Safe Roads Act of 1983, contravenes constitutional due process because it is too vague and because it bears no reasonable relationship to any legitimate legislative purpose. We conclude it does not and affirm.

I.

N.C.G.S. § 20-138.1 provides:

> (a) Offense.—A person commits the offense of impaired driving if he drives any vehicle upon any highway, any street, or any public vehicular area within this State:
>
> (1) While under the influence of an impairing substance; or
>
> (2) After having consumed sufficient alcohol that he has, at any relevant time after the driving, an alcohol concentration of 0.10 or more.

On 9 October 1983 defendant was issued a traffic citation for operating a motor vehicle on U.S. 70 East near Garner "while subject to an impairing substance [in violation of] G.S. 20-138.1." Before trial in district court, defendant moved to dismiss the charge on the ground that subsection (a)(2) of the statute is unconstitutional. The district court, after considering the parties'

1. This Court's order was entered pursuant to N.C.G.S. § 7A-31(a), App. R. 15(e)(2).

briefs on the motion, declared subsection (a)(2) to be unconstitutional and ordered the case to proceed to trial under subsection (a)(1). Pursuant to N.C.G.S. § 15A-1432 the state appealed to the superior court, which, after a hearing, reversed the district court, declared subsection (a)(2) constitutional and remanded the case to district court for trial. Defendant appealed to the Court of Appeals. This Court brought the case here for review prior to determination by the Court of Appeals.

II.

The state may convict a defendant of driving while impaired by proving a violation of either subsection (a)(1) or (a)(2) of section 20-138.1. Defendant concedes the constitutionality of subsection (a)(1). He contends, however, that subsection (a)(2) "fails to give adequate notice of the conduct it proscribes" and is therefore unconstitutionally vague in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution and Article I, section 19 of the North Carolina Constitution.

In determining whether a statute so poorly defines the conduct it intends to proscribe that it becomes unconstitutionally vague, we turn to the following constitutional guidelines:

> That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law; and a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.

Connally v. General Construction Company, 269 U.S. 385, 391 (1926).

> '[T]he terms of a criminal statute must be sufficiently explicit to inform those subject to it what acts it is their duty to avoid or what conduct on their part will render them liable to its penalties, and no one may be required, at the peril of life, liberty, or property to guess at, or speculate as to, the meaning of a penal statute.'

Surplus Store, Inc. v. Hunter, 257 N.C. 206, 211, 125 S.E. 2d 764, 768 (1962); *see also, State v. Sparrow*, 276 N.C. 499, 509, 173 S.E. 2d 897, 904 (1970); *In re Burrus*, 275 N.C. 517, 531, 169 S.E. 2d 879, 888 (1969).

Defendant argues that subsection (a)(2) fails to meet these constitutional standards. He says "men of common intelligence" cannot know "what conduct on their part will render them liable to its penalties." *Surplus Store, Inc. v. Hunter*, 257 N.C. at 211, 125 S.E. 2d at 768.

Persons are guilty of an offense under subsection (a)(2) if they drive upon a public highway or public vehicular area after having consumed sufficient alcohol to raise their blood-alcohol concentration to the level of 0.10 or greater "at any relevant time after driving." This phrase is defined by N.C.G.S. § 20-4.01(33a) as "any time after the driving in which the driver still has in his body alcohol consumed before or during the driving." Since the precise concentration of alcohol in the body at any given time cannot be known without the aid of measuring devices, drivers cannot know precisely when their body alcohol level has risen above the 0.10 statutory maximum. Therefore, says defendant, the statute must fail for vagueness.

This argument has a superficial appeal and in other contexts might prevail. As applied to subsection (a)(2), however, it must fail.

The requirement of definiteness in a criminal statute is designed to insure that the statutory language conveys "sufficient definite warning as to the proscribed conduct when measured by common understanding and practices." *Miller v. California*, 413 U.S. 15 (1973); *United States v. Petrillo*, 332 U.S. 1 (1946); *In re Burrus*, 275 N.C. 517, 169 S.E. 2d 879. A statute is not unconstitutionally vague when its terms can be understood and complied with by an average person exercising ordinary common sense. *U.S. Civil Service Commission v. National Ass'n of Letter Carriers*, 413 U.S. 548 (1973); *Broadrick v. Oklahoma*, 413 U.S. 601 (1973); *State v. Lowry and State v. Mallory*, 263 N.C. 536, 139 S.E. 2d 870 (1965); *State v. Hales*, 256 N.C. 27, 122 S.E. 2d 768 (1961).

Subsection (a)(2) sets out in such terms what conduct is proscribed. That conduct is driving after or while consuming a quan-

tity of alcohol which, at any time after the driving, is sufficient to result in a blood-alcohol concentration of 0.10 or greater. Although drivers may not know precisely when they cross the forbidden line, they do know the line exists; and they do know that drinking enough alcohol before or during driving may cause them to cross it. Persons who drink before or while driving take the risk they will cross over the line into the territory of proscribed conduct. This kind of forewarning is all the constitution requires. It is not a violation of constitutional protections "to require that one who goes perilously close to an area of proscribed conduct shall take the risk that he may cross the line." *Boyce Motor Lines v. United States*, 342 U.S. 337 (1952).

There are other criminal statutes which clearly prohibit certain conduct although not in terms which permit persons to know precisely when conduct in which they are engaging actually crosses the line into criminal behavior. In these cases the law simply places persons who engage in certain conduct at risk that their conduct will at some point exceed acceptable behavior. To accept defendant's arguments in the instant case would cast doubt upon the constitutionality of these kinds of criminal statutes which satisfy constitutional definiteness by clearly setting forth what conduct is proscribed.

Under N.C.G.S. § 14-27.2(a), for example, one over a prescribed age who engages in consensual vaginal intercourse with a child who in fact is "under the age of thirteen years" is guilty of first degree rape. Consent is a complete defense if the child was over the prescribed age. *State v. Henderson*, 285 N.C. 1, 203 S.E. 2d 10 (1974); *State v. Primes*, 275 N.C. 61, 165 S.E. 2d 225 (1969). Consent is no defense if in fact the child was not, even if defendant, by reason of the child's appearance or representations, believed in good faith that the consenting child was over the prescribed age. *State v. Wade*, 224 N.C. 760, 32 S.E. 2d 314 (1944). *See also State v. Cox*, 280 N.C. 689, 187 S.E. 2d 1 (1972); *State v. Crawford*, 260 N.C. 548, 133 S.E. 2d 232 (1963). Under this statute a person engaging in consensual vaginal intercourse with a child takes the risk that the child is below the prescribed age. If the child is, criminal responsibility follows even in the absence of defendant's knowledge that his conduct crossed the line into the area of proscribed conduct.

Similarly, a driver whose conduct behind the wheel reaches a certain level of egregiousness may be guilty of reckless driving under N.C.G.S. § 20-140. That statute makes it an offense punishable by fine or imprisonment for any person to drive "carelessly and heedlessly in wilful or wanton disregard of the rights or safety of others." The statute does not, however, say precisely at what point conduct by a driver will constitute reckless driving. Like defendant in this case, drivers charged under that section could also claim that they did not know at exactly what point their conduct became reckless within the meaning of the statute. Despite the accuracy of that claim, such drivers are nonetheless criminally liable at the point where their conduct crosses the forbidden line.

Finally, we note that courts in other jurisdictions which have considered identical challenges to similar driving while impaired statutes have agreed that a 0.10 blood-alcohol concentration is not an unconstitutionally vague standard simply because a drinking driver does not know precisely when he has reached that level. *Fuenning v. Superior Court*, 139 Ariz. 590, 680 P. 2d 121 (1984); *Burg v. Municipal Court*, 35 Cal. 3d 257, 198 Cal. Rptr. 145, 673 P. 2d 732 (1984). *See, Roberts v. State*, 329 So. 2d 296 (Fla. 1976); *Greaves v. Utah*, 528 P. 2d 805 (Utah 1974). These courts have adopted the position that all persons are presumed to know the law and a defendant who drinks and then drives takes the risk that his blood-alcohol content will exceed the legal maximum. We agree with this rationale.

III.

Defendant asserts, correctly, that blood-alcohol concentration is a function of many factors including the amount of alcohol consumed, the length of time between drinking and measurement, the amount of food in the stomach, and the body's alcohol absorption rate. *See State v. Cooke*, 270 N.C. 644, 155 S.E. 2d 165 (1967). Defendant argues that blood-alcohol measurement made some time after drinking may relate to a driver's physical condition so dissimilar from his condition while driving that it bears no reasonable relationship to the state's legitimate goal of penalizing *impaired* drivers. Defendant cites no authority for this argument. Apparently he relies on the principle that the conduct of citizens in a free society cannot be regulated, or made criminal, under the

state's police power by a statute which is unreasonable, arbitrary or capricious, or which is not reasonably related to some valid legislative purpose. *See State v. Joyner*, 286 N.C. 366, 211 S.E. 2d 320 (1975).

We disagree with defendant's contention that subsection (a)(2) is such a statute. Defendant recognizes that by defining the offense in terms of blood-alcohol content after driving, the statute succeeds in depriving "an impaired driving defendant of the defense that his blood-alcohol concentration was below 0.10 at the time of driving, but rose to 0.10 or more by the time of analysis." Defendant's Brief p. 12. Defendant concedes that "there is no constitutional right to drink and drive. Indeed, a statute prohibiting driving after the consumption of *any* amount of alcohol would pass constitutional muster." Defendant's Brief, p. 13. (Emphasis defendant's.) With this concession we have no quarrel. In it lies the answer to this prong of defendant's argument. If the legislature can constitutionally proscribe driving after the consumption of any alcohol, it follows that this aspect of defendant's attack on subsection (a)(2) must be rejected. A person whose blood-alcohol concentration, as a result of alcohol consumed before or during driving, was at some time after driving 0.10 or greater must have had some amount of alcohol in his system at the time he drove. The legislature has decreed that this amount, whatever it might have been, is enough to constitute an offense. This it may constitutionally do.

Defendant calls our attention to several hypothetical situations designed to illustrate the point that because of the various factors influencing blood-alcohol concentration at any given time, some persons whose concentrations were greater (and who were presumably more impaired) while driving than when measured may escape prosecution or at least conviction under subsection (a)(2). Other persons whose concentrations were less (and who were presumably less impaired) while driving than when measured will be ensnared under the subsection. Let it suffice to say that subsection (a)(2) is only one of two avenues by which persons may be prosecuted under the Safe Roads Act. Persons who escape it because their blood-alcohol concentrations were less when tested than when driving will likely be subject to prosecution and conviction under subsection (a)(1). In determining whether subsection (a)(2) is evenhanded enough to pass constitu-

tional muster, we must view it not in isolation but as part of a larger statutory scheme. *State v. Lucas*, 302 N.C. 342, 275 S.E. 2d 433 (1981); *In re Brownlee*, 301 N.C. 532, 272 S.E. 2d 861 (1981); *Williams v. Williams*, 299 N.C. 174, 261 S.E. 2d 849 (1980). So viewed we are satisfied that it should be sustained.

The decision of the superior court is, therefore,

Affirmed.

STATE OF NORTH CAROLINA v. LESTER FLACK AND RICHARD FLACK

No. 384A83

(Filed 4 December 1984)

1. **Appeal and Error § 67— retroactive application of controlling decision**

Because a case had not been decided on direct appeal at the time *State v. Peoples*, 311 N.C. 515, was certified, the holding in *Peoples* was applied retroactively where the admission of hypnotically induced testimony constituted reversible error.

2. **Criminal Law § 87; Witnesses § 7— hypnotically refreshed testimony—inadmissible**

Under the rule enunciated in *State v. Peoples*, 311 N.C. 515, the admission of hypnotically induced testimony constituted prejudicial error since a reasonable possibility exists that a different result would have been reached had the testimony not been admitted. N.C.G.S. 15A-1443(a).

DEFENDANTS appeal as a matter of right pursuant to G.S. 7A-27(a) from a judgment entered by *Ferrell, J.*, during the 28 February 1983 Session of Superior Court, RUTHERFORD County, sentencing defendants to consecutive life sentences for first degree rape, first degree murder, and first degree burglary.

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

Wayne C. Alexander for defendant-appellant, Lester Flack; Ralph C. Gingles for defendant-appellant, Richard Flack.

Ephraim Margolin and Nicholas C. Arguimbau for Amicus Curiae, National Association of Criminal Defense Lawyers and California Attorneys for Criminal Justice.

James R. Parish for Amicus Curiae, North Carolina Academy of Trial Lawyers.

FRYE, Justice.

The primary issue for consideration by this Court is whether the trial court was correct in admitting the hypnotically induced testimony of the prosecution's chief witness. Because of our recent decision in *State v. Peoples*, 311 N.C. 515, 319 S.E. 2d 177 (1984), which resolved this identical issue, we find that the trial court erroneously allowed such hypnotically induced testimony. Furthermore, since this evidence constituted the heart of the State's case, such error constitutes prejudicial error. N.C. Gen. Stat. § 15A-1443(a).

I.

Miss Nannie Newsome was eighty-eight years old, a retired school teacher, and a respected member of the community of Union Mills, located in rural Rutherford County. On 8 January 1982, her body was discovered near her home. She was clad in bloody pajamas and was lying face down on top of a rake. An autopsy revealed that Miss Newsome had scrapes on her neck, bruises over many parts of her body, severely scraped knees, lacerations in her genital area, and four broken ribs. The cause of death was determined to be a heart attack, resulting from assault in the form of manual strangulation, beating, and sexual assault. Miss Newsome's death caused a wave of anger and revulsion within the Union Mills Community.

The county sheriff, highway patrol, SBI, and other law enforcement agencies secured the crime scene and made a thorough search of the entire area for evidence. The investigation revealed that Miss Newsome's house had been broken into but did not appear to have been ransacked. There were clear imprints of what appeared to be a single set of men's size ten and a half tennis shoes. Bare footprints, later identified as those of Miss Newsome, were also found.

The house was dusted and sprayed for fingerprints. Blood, hair, and fiber samples were taken throughout the house and the field where the body was discovered. Analysis of this physical evidence and comparison fingerprints and hair samples from Lester and Richard Flack failed to show any connection of the items with Lester or Richard Flack. In fact, both parties concede that no physical evidence whatsoever placed either of the defendants at the crime scene.

During the early afternoon of the day the body was discovered, bloodhounds were brought out to track the tennis shoe prints found at the crime scene. Some distance away from the Newsome residence, the dog happened to pass Lester Flack and another man, Herman King, as they jogged down the street. Different versions of the event were presented in court. In the State's version, the dogs lunged toward the men and tried to follow Flack. The State contends that the dog had to be restrained by the dog handler. However, the defendant Lester Flack and Herman King testified that the dog did nothing as it passed within three or four feet of Lester.

Officers of the Rutherford County Sheriff's Department went house to house seeking information from area residents about the crime. Within a day or so after the murder, Otis Forney was taken in for questioning. He lived with his brothers, Bernard, Gilbert, and Maurice, about two-tenths of a mile down a dirt road directly in front of the Newsome residence. While Otis was in custody and still a suspect, the police investigation began to focus on his younger brother, Maurice Forney.

On 21 January 1982, Maurice Forney was taken into custody on the orders of Rutherford County Sheriff Damon Huskey. Originally, he was kept in custody for public intoxication. Police officers questioned Forney, who maintained that he knew nothing about the events concerning Miss Newsome's death, except what he had read in the newspapers and heard through gossip. In fact, for a period of approximately two or three weeks after Miss Newsome's body was found, Maurice Forney stated that he knew nothing of the details of her death. He did state that he was in his car at approximately 12:30 a.m. on 8 January 1982 in front of Miss Newsome's house and "saw a light pop on and someone in her bedroom."

Lester Flack was taken into custody for questioning on the evening of 21 January 1982. He denied any involvement in the events that occurred at Miss Newsome's residence. On 22 January 1982, Lester Flack and Maurice Forney were given voice stress tests, which they were told they had failed. Although Maurice Forney maintained that he knew nothing about the details surrounding Miss Newsome's death, there was testimony that the officers told Forney he was not telling the truth and that he did know about the murder. Warrants charging Maurice Forney and Lester Flack with murder were formally drawn on 23 January 1982. Four days after these two men were charged, Maurice Forney was hypnotized in Charlotte on two separate occasions by Dr. Stann Reiziss, a psychologist and trained hypnotist.

Defendants' transcripts of the video-taped hypnotic sessions revealed that Maurice Forney, while under hypnosis, "zoomed in" on Miss Newsome's house on 8 January where he saw either Lester or Richard Flack through the bedroom window. This was the first time Richard Flack's name was mentioned in connection with the murder. While in a hypnotic trance, Maurice Forney stated that Lester Flack had come to his house, placed Maurice Forney on his shoulders, and jogged to the Newsome residence. Forney also said that Lester Flack had Christoper Hunt across his shoulders during this time. Forney then described how they broke into Miss Newsome's house, carried Miss Newsome out of the house, raped, and murdered her. Subsequently, Forney created different versions of this same story. During trial, there was also abundant evidence presented relating to Maurice Forney's low I.Q. of 74 and history of mental problems.

Thereafter, on 28 January 1982, Richard Flack was arrested without a warrant and served with magistrate's orders charging him with murder, rape, and burglary. A probable cause hearing was conducted on 13 April 1982, and the judge found that probable cause existed as to the charges against each defendant. In May 1982, Christoper Hunt was tried in Rutherfordton, and Maurice Forney testified against Hunt pursuant to a plea bargain with the State. The Flack brothers continued to be held without bond during this time. On 26 July 1982, all charges against each defendant were dismissed without prejudice. Maurice Forney later repudiated his plea bargain and was tried during October

1982 for first degree murder, first degree burglary, and second degree sexual offense.

On 20 October 1982, bench warrants were issued for the defendants, charging them with rape, murder, and burglary. Richard Flack was arrested for the second time on 20 October 1982; Lester Flack was again arrested on 21 October 1982. Defendants' pretrial motions to suppress the testimony of Maurice Forney as being hypnotically induced were denied. During trial Maurice Forney's brother, Nosha, testified that he told Maurice that several days before the break-in Lester Flack had made a statement about robbing or "making a hit" on Miss Newsome. Forney testified that Lester Flack said, "If I don't get a job soon, I'm going to go robbing people." Forney also said Lester Flack threatened him with violence if Forney told anybody what he had said. Lester Flack and others with him during the time these statements were made testified that they considered them to be in jest. Forney's testimony about the events of 8 January 1982 generally paralleled the original version given during the first hypnotic session. However, Forney maintained he knew nothing of the events until he was hypnotized. At the close of the evidence, both defendants renewed their motions to suppress Maurice Forney's testimony and moved that the cases against them be dismissed. The motions were denied.

After a jury trial, the defendants were found guilty in March 1983 of first degree murder, first degree rape, and first degree burglary. They were sentenced to serve consecutive life sentences for each of the three crimes.

Christoper Hunt's convictions were reversed on 20 September 1983. *State v. Hunt*, 64 N.C. App. 81, 306 S.E. 2d 846, *cert. denied*, 309 N.C. 824, 310 S.E. 2d 354 (1983). Maurice Forney's convictions were reversed by this Court in January 1984. *State v. Forney*, 310 N.C. 126, 310 S.E. 2d 20 (1984).

II.

The determinative issue presented by this case is whether hypnotically induced testimony is admissible. This precise question was recently decided by this Court in *State v. Peoples*, 311 N.C. 515, 319 S.E. 2d 177 (1984). In that case we held that hypnotically refreshed testimony is inadmissible in judicial pro-

ceedings. Our decision in *Peoples* explicitly overruled *State v. McQueen*, 295 N.C. 96, 244 S.E. 2d 414 (1978), which had permitted the trial court to admit such hypnotically induced testimony.

[1] Because the present case had not been decided on direct appeal at the time the *Peoples* decision was certified, the holding in *Peoples* will be applied retroactively herein. In applying the new rule retroactively, this Court in *Peoples* adopted a harmless error analysis to "allow us to correct errors in which the truth-seeking process was tainted by hypnotically refreshed testimony while imposing minimal adverse impact on the administration of justice." *Peoples*, 311 N.C. at 535, 319 S.E. 2d at 189. Essentially, this analysis involves a case-by-case determination of whether the trial court, by erroneously admitting hypnotically induced testimony, committed reversible error. If there is a reasonable possibility that the jury would have reached a contrary result had the evidence not been erroneously admitted, then the decision of the trial court must be reversed.

[2] In the present case, the hypnotically induced testimony of Maurice Forney, the State's chief prosecution witness, was admitted in derogation of the rule of inadmissibility enunciated in *Peoples*. There can be no doubt that the erroneous admission of Maurice Forney's testimony constitutes prejudicial error, since a reasonable possibility certainly exists that a different result would have been reached had the testimony not been admitted during defendants' trial. N.C. Gen. Stat. § 15A-1443(a). Defendants raise several additional assignments of error allegedly committed by the trial court. However, we find it unnecessary to address such errors since our ultimate decision rests squarely upon the inadmissibility of the hypnotically induced testimony.

For the foregoing reasons, the judgment of the trial court is hereby vacated and the cause is remanded to the Superior Court, Rutherford County, for a

New trial.

STATE OF NORTH CAROLINA v. JOHN BERNARD HOWREN, JR.

No. 484PA84

(Filed 4 December 1984)

1. **Automobiles and Other Vehicles § 126.3; Constitutional Law § 43— breathalyzer test—statute allowing 30 minutes to obtain counsel—constitutionality**

The administration of a chemical analysis to determine if a driver is acting under the influence of an impairing substance is not a critical stage of the prosecution entitling defendant to the presence of counsel; therefore, the statute allowing a defendant only 30 minutes to obtain counsel before undergoing a chemical analysis, G.S. 20-16.2(a), does not violate defendant's right to counsel guaranteed by the Sixth and Fourteenth Amendments to the U. S. Constitution and Art. I, § 23 of the N. C. Constitution.

2. **Automobiles and Other Vehicles § 126.4— breathalyzer test—no right to constitutional warnings**

Defendant was not entitled to be informed of his constitutional rights before undergoing a breathalyzer test since the results of the test are not evidence of a testimonial or communicative nature.

3. **Automobiles and Other Vehicles § 126.2— driving while impaired—requirement of two breathalyzer tests after 1 January 1985—equal protection**

A defendant charged with driving while impaired prior to 1 January 1985 was not denied equal protection of the laws because only one chemical breath analysis was required whereas a person charged with driving while impaired after 1 January 1985 must be given two chemical breath tests, since G.S. 20-139.1(b3) merely treats the same group of people in different ways at different times. Fourteenth Amendment to the U. S. Constitution; Art. I, § 19 of the N. C. Constitution.

4. **Automobiles and Other Vehicles § 120— driving while impaired—alcohol concentration of 0.10 or more—validity of statute**

The statute making it a crime for persons to have an alcohol concentration of 0.10 or more at any relevant time after driving on the highways or public vehicular areas of this State, G.S. 20-138.1(a)(2), merely sets forth the elements of the offense and does not impermissibly declare individuals with an alcohol concentration of 0.10 or more to be presumptively guilty of a crime.

5. **Automobiles and Other Vehicles § 120— driving while impaired—statute not void for vagueness**

G.S. 20-138.1(a)(2) is not void for vagueness because a potential violator has no means of measuring the level of alcohol in his system and does not have a fair warning of when he has crossed the 0.10 level of alcohol concentration.

6. **Automobiles and Other Vehicles § 126.3— breathalyzer test—improper maintenance of machine—burden of proof on defendant—constitutionality**

The statute putting the burden on defendant to object and show that a breathalyzer machine had not been maintained in accordance with regulations

of the Commission for Health Services, G.S. 20-139.1(b2), does not violate the rule of *Mullaney v. Wilbur*, 421 U.S. 684, since the absence of proper maintenance is not an essential element of the offense of driving while impaired but is an affirmative defense, and the State may permissibly put the burden of establishing affirmative defenses on defendant.

ON discretionary review by the Court's own motion, pursuant to N.C.G.S. § 7A-31(a), of an order entered by *Friday, J.*, at the 21 November 1983 Criminal Session of GASTON County Superior Court. Heard in the Supreme Court 9 November 1984.

Defendant was arrested on 21 October 1983 and charged with driving while impaired after being stopped by a Gastonia City Patrolman. He was taken to the Gaston County Jail and given a breathalyzer test which indicated that he had an alcohol concentration of 0.11. Defendant's license was then revoked for ten days pursuant to N.C.G.S. § 20-16.5(b)(4). At trial in the District Court the charges against defendant were dismissed on the grounds that various sections of the Safe Roads Act were unconstitutional. The Superior Court, upon appeal by the State pursuant to N.C. G.S. § 15A-1432, ruled that the challenged sections of the Safe Roads Act were constitutional and reinstated the charges. Defendant appealed.

Rufus L. Edmisten, Attorney General, by W. Dale Talbert, Assistant Attorney General, for the State.

Harris, Bumgardner and Carpenter by James R. Carpenter and R. Dennis Lorance, for the defendant.

COPELAND, Justice.

I.

[1] By driving a vehicle on a highway or public vehicular area a person consents to administration of a chemical analysis if he is charged with driving while impaired. N.C.G.S. § 20-16.2(a). A person required to submit to chemical analysis has the right to contact an attorney and select a witness to view the procedures, but the testing may not be delayed for these purposes more than thirty minutes. *Id.* A chemical analysis that reveals a blood alcohol level of 0.10 or more is sufficient under N.C.G.S. § 20-138.1(a)(2) to support a conviction of the criminal offense of driving while impaired. Because a person required to undergo chemical analysis

must decide whether to take the test and risk conviction on the basis of the result or refuse and have his license revoked for twelve months pursuant to N.C.G.S. § 20-16.2(a)(2), defendant argues that the chemical analysis is a critical stage of the prosecution requiring the police to advise him of his constitutional rights and entitling him to counsel. Based on his argument that a critical stage is involved, defendant contends that allowing him only thirty minutes to obtain counsel is unreasonable and violates his right to counsel guaranteed by the sixth and fourteenth amendments to the United States Constitution and article I § 23 of the North Carolina Constitution. We disagree.

The administration of a chemical analysis to determine if a driver is acting under the influence of an impairing substance is not a critical stage of the prosecution. The cases of *State v. Hill*, 277 N.C. 547, 178 S.E. 2d 462 (1971) and *City of Tacoma v. Heater*, 67 Wash. 2d 733, 409 P. 2d 867 (1966) cited by defendant stand only for the proposition that a critical stage of the prosecution has been reached only after a test for sobriety has been administered and the defendant has been charged with an offense. In *Sedars v. Powell*, 298 N.C. 453, 461-63, 259 S.E. 2d 544, 550-51 (1979) this Court reviewed N.C.G.S. § 20-16.2(a) and concluded that there is no constitutional right to have counsel present prior to deciding whether or not to take a breathalyzer test. While the *Sedars* decision concerned a civil proceeding for the revocation of a driver's license for willful failure to submit to a breathalyzer test, the basic rationale of *Sedars* is applicable to a criminal charge of driving while impaired. *See State v. Martin*, 46 N.C. App. 514, 519, 265 S.E. 2d 456, 459, *cert. den.*, 301 N.C. 102 (1980), and *State v. Sanchez*, 110 Ariz. 214, 216-17, 516 P. 2d 1226, 1228-29 (1973). Defendant has no constitutional right to refuse to submit to chemical analysis, *Schmerber v. California*, 384 U.S. 757, 761 (1966) (driver arrested for drunk driving has no constitutional right to refuse a compulsory blood test on advice of counsel), and anyone who accepts the privileges of driving on the highways of this State has consented to the use of chemical analysis. *Sedars*, 298 N.C. at 462, 259 S.E. 2d at 550. The fact that as a matter of grace the legislature has given defendant the right to refuse to submit to chemical analysis, and suffer the consequences for refusing, does not convert this step in the investigation into a critical stage in the prosecution entitling defendant to

more than the 30 minutes provided in the statute to secure a lawyer. Otherwise, defendant would be able to delay the analysis until its results would be of doubtful value. For these reasons we reaffirm the holding of *Sedars* that there is no constitutional right to have an attorney present prior to submitting to chemical analysis.

[2] We note that defendant has suggested that he was entitled under the rule of *Miranda* to be informed of his constitutional rights before undergoing a breathalyzer test. Based on the rule of *Schmerber* we have already held that admission of a breathalyzer test is not dependent on whether *Miranda* warnings have been given because the results of the test are not evidence of a testimonial or communicative nature. *Sedars*, 298 N.C. at 463, 259 S.E. 2d at 551. *State v. Sykes*, 285 N.C. 202, 207, 203 S.E. 2d 849, 852 (1974). Defendant had no constitutional right to counsel at this stage, and his assignment of error on this point is without merit.

II.

[3] We next consider defendant's claim that he was denied the equal protection of the laws in violation of the fourteenth amendment to the United States Constitution and article I § 19 of the North Carolina Constitution. Defendant bases his argument on the fact that after 1 January 1985 an individual charged with driving while impaired must be given two chemical breath analyses. N.C.G.S. § 20-139.1(b3). At present only one analysis is required, and defendant was only given one breathalyzer test. Defendant contends that this results in an arbitrary and capricious classification between similarly situated individuals because the classification between persons charged prior to 1 January 1985 and those charged afterward has no basis in fact. We do not believe that N.C.G.S. § 20-139.1(b3) creates an impermissible classification and hold that the Safe Roads Act does not deny defendant the equal protection of the laws.

A statute is not subject to the equal protection clause of the fourteenth amendment of the United States Constitution or article I § 19 of the North Carolina Constitution unless it creates a classification between different groups of people. In this case no classification between different groups has been created. All individuals charged with driving while impaired before 1 January 1985 will be treated in exactly the same way as will all in-

dividuals charged after 1 January 1985. The statute merely treats the same group of people in different ways at different times. It is applied uniformly to all members of the public and does not discriminate against any group. If defendant's argument were accepted the State would never be able to create new safeguards against error in criminal prosecutions without invalidating prosecutions conducted under prior less protective laws. Article I § 19 and the equal protection clause do not require such an absurd result. This assignment of error is overruled.

III.

[4] Defendant contends that N.C.G.S. § 20-138.1(a)(2) offends due process by creating a conclusive presumption that a person found to have an alcohol concentration of 0.10 or more at any relevant time after driving has committed the offense of impaired driving. More specifically, defendant argues that the legislature has impermissibly declared individuals with an alcohol concentration of 0.10 or more to be presumptively guilty of crime and that N.C.G.S. § 20-138.1(a)(2) is unconstitutionally vague.

It is well established law that a legislature may not declare an individual guilty or presumptively guilty of crime. *McFarland v. American Sugar Refining Company*, 241 U.S. 79, 86 (1916). Contrary to defendant's belief N.C.G.S. § 20-138.1(a)(2) does not run afoul of that prohibition. By stating that anyone who drives a vehicle upon a highway, street, or public vehicular area after having consumed such an amount of alcohol that he has a blood-alcohol concentration of 0.10 or more at any relevant time after the driving has committed the offense of driving while impaired, the legislature has merely stated the elements of the offense, proof of which constitutes guilt. Defendant's complaint amounts to nothing more than that the statute requires him to be adjudged guilty if it is found that he has committed the act that the statute forbids. The legislature may constitutionally make it a crime for persons to have an alcohol concentration of 0.10 or more at any relevant time after driving on the highways and public vehicular areas of this State and that is all N.C.G.S. § 20-138.1(a)(2) does. *See State v. Rose*, 312 N.C. 441, 323 S.E. 2d 339 (12/4/84). Defendant's reliance on *McFarland* is misplaced. In that case the Supreme Court overturned a Louisiana statute that created a presumption that a company was a party to a monopoly or a con-

spiracy in restraint of trade on proof of facts that bore no rational relation to those offenses. 241 U.S. at 86. This is clearly a different situation from the case at bar. N.C.G.S. § 20-138.1(a)(2) does not create a presumption but defines an offense. If this statute is unconstitutional then so is any statute that makes the doing of a particular act illegal. Defendant's characterization of N.C.G.S. § 20-138.1(a)(2) is unfounded, and we hold that it does not deprive him of due process of law.

[5] Defendant also argues that N.C.G.S. § 20-138.1(a)(2) is void for vagueness and thus deprives him of due process of law because a potential violator has no means of measuring the level of alcohol in his system and therefore, does not have fair warning when he has crossed the threshold of 0.10 alcohol concentration. This issue has already been decided against defendant, and we need not consider it further. *State v. Rose*, 312 N.C. 441, 323 S.E. 2d 339 (12/4/84).

IV.

[6] N.C.G.S. § 20-139.1(b2) provides that the results of a breath analysis are inadmissible if the defendant objects to their introduction into evidence and demonstrates that the instrument used to conduct the analysis had not been maintained according to the regulations of the Commission for Health Services. The analysis will also be excluded if the defendant shows that it was not performed within the time limits prescribed by those regulations. *Id.* Because driving with a blood alcohol concentration of 0.10 constitutes the offense defendant argues that requiring him to demonstrate that the breathalyzer was not properly maintained places on him the burden of proof as to an essential element of the offense. *Mullaney v. Wilbur*, 421 U.S. 684 (1975). After a careful review of the law we find defendant's argument to be without merit.

The State may permissibly put the burden of establishing affirmative defenses on the defendant. *Patterson v. New York*, 432 U.S. 197, 209-10 (1977). The possibility that the breathalyzer may not have been properly maintained is an affirmative defense to be established by defendant. The maintenance record of the breathalyzer goes only to the weight to be given an essential element of the offense, the blood alcohol concentration as shown by chemical analysis, and is not itself an element of the offense. The State is

not required by the statute to prove that preventive maintenance was performed on the breathalyzer, and it is under no duty to do so. *Martin*, 46 N.C. App. at 520, 265 S.E. 2d at 459-60. Putting the burden on defendant to object and show that preventive maintenance was not performed on the breathalyzer does not violate the rule of *Mullaney v. Wilbur*. Defendant's assignment of error on this point is overruled.

After a careful consideration of the law we find the challenged portions of the Safe Roads Act to be constitutional and affirm the order of the Superior Court reinstating the charges against defendant.

Affirmed.

FRANK J. CLIFFORD, AND DOLORESE R. CLIFFORD v. RIVER BEND PLANTATION, INC.

No. 199A84

(Filed 4 December 1984)

1. **Appeal and Error § 2— appeal to Supreme Court—dissent in Court of Appeals—issues limited to dissent**

When an appeal is taken pursuant to G.S. § 7A-30(2), the only issues properly before the Court are those on which the dissenting judge in the Court of Appeals based his dissent.

2. **Appeal and Error § 2— appeal to Supreme Court—dissent in Court of Appeals—issue not raised at trial or preserved for appeal—heard in interest of justice**

Where a dissent in the Court of Appeals, on which plaintiffs appealed to the Supreme Court, was based on an issue not properly raised at trial or preserved for appeal, the plaintiffs were not entitled to argue the issue in the Supreme Court. However, the issue was heard by the Supreme Court in the interest of justice.

3. **Evidence § 32.1; Contracts § 5— contract to purchase house—merger clause—statements before contract signed—inadmissible**

Where a written contract to purchase a house made no mention of any warranty against flooding and contained a merger clause declaring that the entire agreement of the parties was contained in the writing, statements made before the signing of the contract were inadmissible and could not be used to prove the existence of a warranty.

4. **Sales § 6.4; Contracts § 18.1— purchase of home—flooding—seller attempts to remedy defect—no warranty**

There was no parol modification of a purchase contract where plaintiffs complained to defendant's president after a flood at the house which they had just purchased from defendant, and defendant's president said that the house was warranted, that he would take care of the matter, and sent plaintiffs a letter saying that warranties for workmanship, material, and subcontractors were for one year but proposing steps to correct the flooding. The fact that a seller attempts to remedy defects in a house that he has sold does not prove that such efforts were made pursuant to a warranty, and the bare statement that a warranty existed is insufficient to create a warranty.

5. **Sales § 6.4; Frauds, Statute of § 6— subsequent modification of contract to purchase house—statute of frauds—no warranty**

Where plaintiffs purchased a house from defendants pursuant to a written contract and subsequently encountered problems with flooding, subsequent modifications must be within the statute of frauds, and a letter that does not set out the essential terms of a warranty against flooding is not enforceable as a warranty.

6. **Sales § 6.4; Contracts § 18.1— contract to purchase house—subsequent warranty—no consideration or intentionally induced reliance**

Any warranty created when defendant sent plaintiffs a letter proposing repairs after plaintiffs complained of flooding in their newly purchased house was not enforceable because there was no evidence that defendant intentionally induced detrimental reliance or that any consideration passed to defendant.

APPEAL of right by plaintiffs from the decision of the Court of Appeals (*Judges Webb* and *Phillips* concurring, *Judge Eagles* dissenting) reported at 67 N.C. App. 438, 313 S.E. 2d 607 (1984), *disc. rev. denied*, 311 N.C. 304, 317 S.E. 2d 679 (1984), reversing the judgment entered by *Smith, J.*, on 10 July 1982 in Superior Court, CRAVEN County. Heard in the Supreme Court 11 October 1984.

This is a contract action arising from the sale of a house and lot in New Bern. Plaintiffs, Frank and Dolorese Clifford, purchased the house from defendant pursuant to a written contract entered into on 19 March 1976. Prior to that date plaintiffs had talked with defendant's employee, Phil Nelson, about the type of house they wished to purchase. Mr. Clifford returned to River Bend Plantation on 18 March 1976 to visit various houses in the company of Mr. Nelson. While Mr. Clifford was looking over the home that plaintiffs later purchased, he noticed that the earth under the house was damp. Mr. Clifford testified that he asked

whether the property flooded and Mr. Nelson responded that it did not.

The next day, 19 March 1976, Mr. Clifford went to the offices of defendant and offered to buy the home at 220 Rockledge Road for $40,000.00. Mr. Efird, defendant's president, accepted the offer. At some point in their negotiations, Mr. Clifford asked about the damp earth under the house and whether or not the property was subject to flooding. Mr. Efird then stated that the property was not subject to flooding and that the earth under the house was damp because the plumbing system had been drained. However, on cross examination Mr. Efird testified that he said the earth was damp because rainwater ran into the crawl hole door of the house. The record is unclear as to whether Mr. Efird made this statement before or after the written sales agreement was executed. The agreement contains a merger clause with the following language: "Buyer hereby acknowledges that he has inspected the above described property, that no representations or inducements have been made, other than those expressed herein, and that this contract contains the entire agreement between all parties hereto." The deal was closed sometime later.

Shortly after plaintiffs moved into their house on 30 May 1976, a flood occurred. Mr. Clifford contacted Mr. Efird who examined the property and told Mr. Clifford that the house was warranted, that he intended on staying there twenty-five years, and he would take care of the whole matter. Shortly after this conversation, plaintiffs received a letter from defendant confirming Mr. Efird's conversation with Mr. Clifford and stating that warranties on homes for workmanship, material and subcontractors are for one year. In the letter Mr. Efird proposed certain remedial steps to correct the flooding condition. His efforts to correct the flooding problem were unsuccessful and plaintiffs filed suit.

At the close of the trial, the trial judge submitted an issue to the jury as to the existence and breach of an express warranty against flooding. The judge did not submit an issue to the jury concerning any subsequent parol modification of the sales agreement. The jury found that an express warranty against flooding had been made and breached by the defendant and returned a verdict in favor of plaintiffs. Defendant's motions for directed ver-

dict, for judgment notwithstanding the verdict, and for a new trial were denied. The Court of Appeals reversed on the ground that the parol evidence rule was applicable and plaintiffs appealed.

David P. Voerman, for the plaintiffs.

Allen, Hooten and Hodges, P.A., by John M. Martin, for the defendant.

COPELAND, Justice.

[1, 2] We note at the outset that plaintiffs have based their appeal, in this Court and the Court of Appeals, primarily on the theory that Mr. Efird made a parol warranty of no flooding after the written contract had been signed so that the parol evidence rule does not apply to this case. Judge Eagles based his dissent entirely on the theory that the conversation Mr. Efird had with Mr. Clifford after the first incidence of flooding amounted to a subsequent parol modification of the written contract. Plaintiffs did not object to nor assign as error the trial judge's failure to submit the issue of subsequent parol modification to the jury and thus are precluded from arguing that issue on appeal. "Under Rule 10 of the North Carolina Rules of Appellate Procedure, review is foreclosed except insofar as exceptions are made the bases of assignments of error and those assignments are brought forward." *State v. Jones*, 300 N.C. 363, 365, 266 S.E. 2d 586, 587 (1980). When an appeal is taken pursuant to N.C. Gen. Stat. § 7A-30(2), the only issues properly before the Court are those on which the dissenting judge in the Court of Appeals based his dissent. *In re Grad v. Kaasa*, 312 N.C. 310, --- S.E. 2d --- (11/6/84). Since Judge Eagles based his dissent on subsequent parol modification of the contract, that is the only issue on which plaintiffs can appeal. Because plaintiffs did not properly raise that issue at trial or preserve it for appeal, they may not argue it in this Court. However, in the interest of justice we will consider this issue and the other issues raised by plaintiffs' brief and argument.

[3] The written contract before the Court in this case makes no mention of any warranty against flooding and contains a merger clause declaring that the entire agreement of the parties is contained in the writing.

> "(W)here the parties have deliberately put their engagements in writing in such terms as imports a legal obligation free of uncertainty, it is presumed the writing was intended by the parties to represent all their engagements as to the elements dealt with in the writing. Accordingly, all prior and contemporaneous negotiations in respect to those elements are deemed merged in the written agreement. . . . [I]n the absence of fraud or mistake or allegation thereof, parol testimony of prior or contemporaneous negotiations or conversations inconsistent with the writing, or which tend to substitute a new and different contract from the one evidenced by the writing, is incompetent."

Neal v. Marrone, 239 N.C. 73, 77, 79 S.E. 2d 239, 242 (1953). In the absence of fraud in the inducement which renders the contract void, warranties cannot be asserted by parol. *American Laundry Machinery Co. v. Skinner*, 225 N.C. 285, 288, 34 S.E. 2d 190, 192 (1945). In this case the jury concluded that the statements made by defendant's agents did not amount to fraud. The merger clause in the written contract clearly excludes from the agreement everything not included in the writing, and parol evidence of express warranties made prior to the execution of the contract are incompetent and inadmissible. *Griffin v. Wheeler-Leonard and Co.*, 290 N.C. 185, 202, 225 S.E. 2d 557, 568 (1976). Therefore, the statements made by Mr. Nelson on 18 March 1976 and any statements made by Mr. Efird before the signing of the contract on 19 March 1976 are inadmissible and cannot be used to prove the existence of a warranty.

[4] Plaintiffs' primary argument is that Mr. Efird's conversation with Mr. Clifford in early June and his letter confirming the conversation amounted to a subsequent parol modification of the contract. Plaintiffs argue that Mr. Efird's statement that the house was warranted and that he would take care of the whole matter constituted an express warranty. We disagree.

The fact that a seller attempts to remedy defects in a house that he has sold does not prove that such efforts were made pursuant to a warranty. The only thing said by Mr. Efird, subsequent to the signing of the contract, that could be construed as a warranty is his statement that the house was warranted. Aside from the fact that Mr. Efird testified at trial that he was under the

false impression that the house was warranted when he made that statement, the statement is too vague to create a warranty because it does not indicate what is included in the warranty. In his letter of 17 June 1976 confirming his conversation with plaintiffs, the only warranty Mr. Efird referred to was the standard one year warranty for workmanship, materials, and subcontractors. Nothing was said about a warranty against flooding. Other than Mr. Efird's statement that the house was warranted, there is no evidence that anyone made a warranty to plaintiffs on behalf of defendant after the written contract was signed. The bare statement that a warranty existed is insufficient to create a warranty when no one representing defendant ever made a warranty against flooding to plaintiffs subsequent to the signing of the contract.

[5] Because the contract in this case is a contract for the sale of land, it must be in writing to comply with the Statute of Frauds. When the original agreement comes within the Statute of Frauds, subsequent oral modifications of the agreement are ineffectual. 72 Am. Jur. 2d Statute of Frauds § 274 (1974). *See General Tire and Rubber Co. v. Distributors, Inc.*, 253 N.C. 459, 117 S.E. 2d 479, 485 (1960) (a written contract not within the Statute of Frauds may be modified by subsequent parol agreement); *Jefferson Standard Ins. Co. v. Morehead*, 209 N.C. 174, 176, 183 S.E. 606, 608 (1936) (subsequent parol modifications are permissible provided the law does not require a writing). Even if the statement made by Mr. Efird in early June amounts to a warranty, it will be ineffectual unless there is some memorandum of it signed by Mr. Efird and setting out the essential terms of the warranty. 72 Am. Jur. Statute of Frauds § 339 (1974); *Kidd v. Early*, 289 N.C. 343, 353, 222 S.E. 2d 392, 400 (1976); *McCraw v. Llewellyn*, 256 N.C. 213, 217, 123 S.E. 2d 575, 578 (1962). An examination of the letter of 17 June 1976 reveals that it does not set out the essential terms of a warranty against flooding. The only mention made of a warranty is the statement that the normal warranties on homes for workmanship, material, and subcontractors last one year. In detailing proposed repairs to the house and property, Mr. Efird stated that those were items he *personally* felt needed to be corrected. At no point in the letter did Mr. Efird indicate that the repairs would be performed pursuant to any warranty. Since the house was more than one year old and had previously been occupied by Larry and Pa-

tricia Swendel, Mr. Efird's reference to the normal one year warranties appears to mean that he would perform the enumerated repairs even though he was not obligated to do so. The letter does not indicate that defendant made a warranty of any kind, much less a warranty against flooding, and so lacks an essential term of any oral warranty that might have been made. Therefore, if it is assumed that Mr. Efird's conversation with plaintiffs in early June 1976 created an oral warranty, it is unenforceable because it violates the Statute of Frauds.

[6] Even if it were shown that an oral warranty was made subsequent to the execution of the written contract and Mr. Efird's letter of 17 June 1976 amounted to a memorandum of the oral warranty sufficient to satisfy the requirements of the Statute of Frauds, the warranty would still be unenforceable. It is established law that an agreement to modify the terms of a contract must be based on new consideration or on "evidence that one party intentionally induced the other party's detrimental reliance. . . ." *Wheeler v. Wheeler*, 299 N.C. 633, 636, 263 S.E. 2d 763, 765 (1980). There is no evidence in this case that defendant or its agent, Mr. Efird, acquired any benefit or right from the purported warranty or that plaintiffs assumed any additional obligations or renounced any rights they had under the contract. Just as clearly, plaintiffs did not rely to their detriment on Mr. Efird's statement that the house was warranted. Defendant's obligation to buy back the property remained in force and plaintiffs' inability to enforce this obligation was due to their failure to comply with the terms of the buy back agreement. In the absence of evidence of consideration passing to defendant or that Mr. Efird intentionally induced detrimental reliance on the part of the plaintiffs, any warranty given by Mr. Efird subsequent to the signing of the contract is a simple promise not enforceable by the courts.

Based on our review of the record, we hold that defendant did not make any enforceable warranty of no flooding to plaintiffs. The decision of the Court of Appeals that parol evidence of warranties was improperly admitted at trial and that no subsequent parol modification of the contract was made is affirmed. Because the jury based its verdict on improperly admitted evidence defendant is entitled to a new trial. The Court of Appeals did not specify what relief defendant was entitled to, and its decision is modified to grant defendant a new trial.

Modified and affirmed.

BOBBY VESTAL LOWE AND BETTY F. LOWE v. SAMUEL INGHAM TARBLE AND ARA SERVICES, INC.

No. 28PA84

(Filed 4 December 1984)

1. **Interest § 2; Judgments § 55; Insurance § 110.1— prejudgment interest—constitutional**

The statute which allows prejudgment interest on claims covered by liability insurance, G.S. 24-5, does not offend the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution nor Art. I, § 19 of the North Carolina Constitution.

2. **Interest § 2; Judgments § 55; Insurance § 110.1— prejudgment interest—statute not unconstitutionally vague**

G.S. 24-5, which allows prejudgment interest when a claim is covered by liability insurance, is not unconstitutionally vague or uncertain merely because it must be interpreted and applied in light of particular facts in a given case. There is nothing in the language of the statute which would preclude courts from interpreting and administering the statute uniformly.

3. **Constitutional Law § 19; Judgments § 2; Insurance § 110.1— prejudgment interest—not a special emolument**

Although G.S. 24-5 does favor certain classes of litigants by distinguishing between defendants who carry liability insurance and those who do not, it is not a special emolument or privilege within the meaning of Art. I, § 32 of the North Carolina Constitution. The legislature could have reasonably concluded that the distinction was a valid one and that the public welfare would be best served by such a classification.

Justice MEYER dissenting.

Justices COPELAND and MITCHELL join in the dissent.

ON discretionary review prior to determination by the Court of Appeals of the order entered by *Mills, J.*, on 20 September 1983 in RANDOLPH County Superior Court awarding plaintiffs prejudgment interest pursuant to N.C. Gen. Stat. § 24-5.

Henson, Henson & Bayliss by Paul D. Coates, Perry C. Henson and Perry C. Henson, Jr., for defendant appellants.

Bailey, Sitton, Patterson & Bailey, P.A., by William L. Sitton, Jr., for plaintiff appellees.

EXUM, Justice.

The question presented by this appeal is whether our prejudgment interest statute, N.C. Gen. Stat. § 24-5, violates Article I, section 19 of the North Carolina Constitution, the Equal Protection and Due Process Clauses of the Fourteenth Amendment to the Constitution of the United States, and the exclusive emoluments clause contained in Article I, section 32 of the North Carolina Constitution. We conclude the statute does not violate these constitutional provisions.

I.

The plaintiff, Bobby Vestal Lowe, was injured in an automobile accident on 4 May 1981 involving the defendant, Samuel Ingham Tarble. On 20 August 1982 plaintiff filed suit against Tarble. Plaintiff later amended his complaint to include an additional plaintiff, his wife, her claim for loss of consortium, and an additional defendant, ARA Services, Inc. On 2 September 1983, a jury returned a verdict awarding Bobby Vestal Lowe $85,500.00 for personal injuries and his wife Betty Lowe $1,000.00 for loss of consortium. Plaintiffs moved for prejudgment interest from the date of the filing of the complaint in accord with N.C. Gen. Stat. § 24-5. Defendants objected on the ground that the statute was unconstitutional and requested a hearing. Following a hearing on 19 September 1983 the court allowed plaintiffs' motion for prejudgment interest and entered judgment accordingly the following day.

N.C. Gen. Stat. § 24-5 provides in pertinent part as follows:

> The portion of all money judgments designated by the fact-finder as compensatory damages in actions other than contract shall bear interest from the time the action is instituted until the judgment is paid and satisfied, and the judgment and decree of the court shall be rendered accordingly. The preceding sentence shall apply only to claims covered by liability insurance. The portion of all money judgments designated by the fact-finder as compensatory damages in actions other than contract which are not covered by liability insurance shall bear interest from the time of the verdict until the judgment is paid and satisfied, and the judgment and decree of the court shall be rendered accordingly.

II.

[1] Defendants first contend the statute violates the Law of the Land and Equal Protection Clauses of Article I, section 19 of the North Carolina Constitution and the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States. Defendants' contentions regarding these federal and state constitutional provisions are answered by our decision in *Powe v. Odell*, 312 N.C. 410, 322 S.E. 2d 762 (1984), in which we hold that section 24-5 offends neither the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution nor Article I, section 19 of the North Carolina Constitution.

III.

[2] Defendants next argue that section 24-5 is unconstitutionally vague, uncertain and indefinite. Legislation must be definite and explicit enough reasonably to inform those who are the subject of the legislation what conduct on their part will render them liable under the statute. *Surplus Store, Inc. v. Hunter*, 257 N.C. 206, 125 S.E. 2d 764 (1962). Defendants contend that section 24-5 fails to meet that standard because it is not clear whether the phrase "claims covered by liability insurance" in the statute includes claims under uninsured motorist coverage, claims for which, despite policy violations by insureds, the insurance company must pay pursuant to the Financial Responsibility Act, N.C. Gen. Stat. § 20-309, *et seq.*, and claims which an insurance company defends under a reservation of rights. A statute, however, is not constitutionally suspect merely because it must be interpreted and applied in light of particular facts in a given case.

> [I]mpossible standards of statutory clarity are not required by the constitution. When the language of a statute . . . prescribes boundaries sufficiently distinct for judges and juries to interpret and administer it uniformly, constitutional requirements are fully met. *United States v. Petrillo*, 332 U.S. 1 [1947].

In re Burrus, 275 N.C. 517, 531, 169 S.E. 2d 879, 888 (1969).

N.C. Gen. Stat. § 24-5 clearly states that where a claim "in actions other than contract" is covered by liability insurance, the portion of any money judgment designated as compensatory

damages shall bear interest from the time the action is instituted until the judgment is paid and satisfied. We see nothing in this language which would preclude courts from interpreting and administering this statute uniformly. We therefore find no merit in defendants' claim that section 24-5 is unconstitutionally vague or indefinite.

IV.

[3] Finally, defendants object that section 24-5 grants "exclusive or separate emoluments or privileges" in violation of Article I, section 32 of the North Carolina Constitution which provides:

> Exclusive Emoluments. No person or set of persons is entitled to exclusive or separate emoluments or privileges from the community but in consideration of public services.

Defendants argue, in essence, that by assessing prejudgment interest only against those defendants covered by liability insurance, section 24-5 creates a special privilege or right in favor of plaintiffs who sue defendants covered by such insurance, and in favor of defendants who are not covered by liability insurance.

By distinguishing between defendants who carry liability insurance and those who do not, and assessing prejudgment interest only against the former, section 24-5 does favor certain classes of litigants.

Our case law, however, teaches that not every classification which favors a particular group of persons is an "exclusive or separate emolument or privilege" within the meaning of the constitutional prohibition. In *State v. Knight*, 269 N.C. 100, 152 S.E. 2d 179 (1967), this Court held that a statute exempting certain individuals from jury duty did not violate the constitutional prohibition against separate emoluments or privileges. There the Court said, *id.* at 107-08, 152 S.E. 2d at 183-84:

> Obviously, this provision does not forbid all classifications of persons with reference to the imposition of legal duties and obligations.
>
> . . . .
>
> Therefore, the limitation . . . does not apply to an exemption from a duty imposed upon citizens generally if the

purpose of the exemption is the promotion of the general welfare, as distinguished from the benefit of the individual, and if there is a reasonable basis for the Legislature to conclude that the granting of the exemption would be in the public interest. Here, as in questions arising under the exercise of the police power pursuant to the requirement of due process of law, the principle to be applied is that declared by Moore, J., for the Court, in *State v. Warren*, 252 N.C. 690, 114 S.E. 2d 660 [1960], where it is said:

> 'The presumption is that an act passed by the Legislature is constitutional, and it must be so held by the courts unless it appears to be in conflict with some constitutional provision. [Citations omitted.] The legislative department is the judge, within reasonable limits, of what the public welfare requires, and the wisdom of its enactments is not the concern of the courts. As to whether an act is good or bad law, wise or unwise, is a question for the Legislature and not for the courts—it is a political question. The mere expediency of legislation is a matter for the Legislature, when it is acting entirely within constitutional limitations, but whether it is so acting is a matter for the courts. [Citations omitted.]'

In *Lamb v. Wedgewood South Corp.*, 308 N.C. 419, 439, 302 S.E. 2d 868, 879 (1983), we held that even if N.C. Gen. Stat. § 1-50 (5) (Replacement 1969) was interpreted to protect certain groups in the building industry (architects, engineers and contractors) from suit after six years from performance of their services while not affording such protection to other groups (materialmen, suppliers or manufacturers), the statute would not grant an unconstitutional exclusive emolument or privilege to the protected groups. We said:

> As we have already demonstrated, the classifications in G.S. 1-50(5) are based on what the legislature could reasonably determine were valid distinctions between the groups protected by the statute and those not protected. The legislature could reasonably adjudge that the public welfare would be best served by the classification it chose to make. Therefore, the classification does not create a special emolument or privilege within the meaning of the constitutional prohibition.

Id.

As we concluded in dealing with the appellants' equal protection arguments in *Powe v. Odell, supra*, the legislature could reasonably have concluded that the classification scheme established by section 24-5 would best serve to further important and legitimate public purposes, including compensation of a plaintiff for the loss-of-use value of a damage award, the prevention of unjust enrichment to liability insurers who are required by law to maintain claim reserves on which interest is earned, and the promotion of settlement by these insurers, who unlike self-insurers, have as their primary business the insuring, investigation, defense and settlement of claims. The legislature could have reasonably concluded that the distinction between defendants with liability insurance and those without was a valid one, and that the public welfare would be best served by such a classification. Therefore, N.C. Gen. Stat. § 24-5 does not create a special emolument or privilege within the meaning of Article I, section 32 of the North Carolina Constitution.

The judgment of the superior court is

Affirmed.

Justice MEYER dissenting.

I respectfully dissent for the reasons expressed in my dissent in *Powe v. Odell*, 312 N.C. 410, 322 S.E. 2d 762 (1984).

Justices COPELAND and MITCHELL join in this dissent.

ERNEST EARL OWENSBY v. ELIZABETH UPTON OWENSBY

No. 320A84

(Filed 4 December 1984)

Divorce and Alimony § 20.3— award of counsel fees—insufficient findings

In an action involving divorce, alimony, and child custody and support in which defendant wife's attorneys submitted an affidavit showing the value of their services to be in excess of $55,000, the trial court's findings of fact in its order awarding attorney fees of $6,750 to defendant wife were insufficient to provide a basis for determining the reasonableness of the fees awarded, and the case must be remanded for further findings, where the court stated that it had considered the time and labor required to represent the defendant but failed to find how many hours of labor were actually expended on defendant's behalf by her attorneys; one of the listed considerations of the trial court was the customary charge for similar services, but the court never stated what it found the customary charge to be or whether the charge by defendant's attorneys was in line with the customary fee; and although the court recited as one of its considerations "the novelty and difficulty of the questions of law, and the skill requisite to the proper representation of the defendant," the court did not state how it adjudged the difficulty of the legal questions or the adequacy of the representation.

APPEAL of right from a decision by a divided panel of the Court of Appeals, 68 N.C. App. 436, 315 S.E. 2d 86 (1984), remanding for a new hearing an order awarding attorneys' fees which was entered by *Judge Hamrick* on 18 January 1984 in District Court, CLEVELAND County.

Plaintiff-appellant, Ernest Earl Owensby, filed an action for divorce from bed and board, custody of minor children and absolute divorce on 30 September 1981. Defendant-appellee, Elizabeth Upton Owensby, answered and counterclaimed for alimony *pendente lite*, permanent alimony, child custody and support, divorce from bed and board and attorneys' fees. Hearings on defendant's claims for temporary alimony, child custody and support, possession of the marital home and attorneys' fees were conducted in May and June of 1982. On 22 June 1982 Dennis L. Guthrie, one of defendant's attorneys, filed an affidavit in support of defendant's motion for attorneys' fees. The affidavit provided that fees billed to defendant for services rendered up to 20 June 1982 were $24,331, with other expenses of $403.61.

On 28 June 1982 Judge James T. Bowen awarded defendant custody, child support, temporary alimony and attorneys' fees.

Judge Bowen found that defendant was a homemaker with no individually-owned property and that she was not financially able to pay for her attorneys' services. The court further found that plaintiff was the sole owner of a corporation with a reported 1981 income in excess of $90,000. Thereupon, the court ordered plaintiff to pay defendant's attorneys $2,500 as a partial payment for counsel fees.

In a motion filed 7 July 1982 defendant requested the court to amend its order. Attorney Guthrie filed a second affidavit in support of an amended award of attorneys' fees. On 2 July 1982 the court awarded an additional $1,500 in partial payment of the attorneys' fees to be paid by the plaintiff.

In September and October of 1982 various motions were filed and three hearings were held involving defendant's failure to leave the marital home and plaintiff's failure to deliver household furniture for the benefit of defendant and the minor children. Acting upon a motion filed 26 October 1982 by defendant's counsel for an award of attorneys' fees, the court ordered plaintiff to pay defendant's counsel an additional $250. Prior to the jury trial for divorce from bed and board and permanent alimony, additional pleadings were filed, depositions were taken, and hearings were held. A four day jury trial was conducted in Cleveland County in January 1983 with Judge Hamrick presiding. At the conclusion of that trial, plaintiff was granted a divorce from bed and board and the court found that defendant was not entitled to alimony because she had committed adultery. Attorneys for defendant, members of a Charlotte law firm, filed an affidavit in support of defendant's claim for attorneys' fees. The attorneys additionally filed an itemized statement of time spent on defendant's case. Attorney hours were billed at $75 per hour and paralegal hours were billed at $35 per hour. The affidavit stated that the reasonable value of services from 18 September 1981 until 14 January 1983 was $55,152.64, after deducting $4,000 already paid by plaintiff.

The trial court entered an order on 21 January 1983 awarding additional attorneys' fees. The court found that defendant was unemployed, had no income and no substantial assets. It also found that plaintiff was "of sufficient financial means to defray counsel fees." The court concluded as a matter of law that defend-

ant was entitled to have reasonable attorneys' fees paid by the plaintiff. After reciting several factors it considered in determining the amount of that fee, the trial judge awarded additional attorneys' fees of $2,500. The order stated that the additional award brought the total amount of attorneys' fees awarded to $6,500.

Defendant appealed from the order awarding attorneys' fees. The Court of Appeals held that the award was so unreasonable as to constitute an abuse of discretion. Judge Vaughn dissented. The plaintiff appeals as a matter of right pursuant to N.C. Gen. Stat. § 7A-30(2).

Hamrick, Mauney, Flowers, Martin & Deaton, by Fred A. Flowers for plaintiff-appellant.

Murchison, Guthrie & Davis, by Dennis L. Guthrie and K. Neal Davis for defendant-appellee.

BRANCH, Chief Justice.

The sole question presented for our review in this appeal is whether the trial court abused its discretion in its award of a total of $6,750 in attorneys' fees to defendant's attorneys for legal services rendered on her behalf. Without ruling upon the reasonableness of the award, we remand the case to the trial court for further findings of fact.

The purpose of allowing counsel fees for a dependent spouse in a divorce and alimony action is to enable the spouse, as litigant, to meet the supporting spouse, as litigant, on substantially even terms, making it possible for the dependent spouse to employ adequate and suitable legal representation. *Hudson v. Hudson*, 299 N.C. 465, 263 S.E. 2d 719 (1980). Before granting an award of attorneys' fees, the trial court must determine, as a matter of law, that the spouse seeking the award is dependent, and that the spouse is without sufficient means to subsist during the prosecution of the suit and to defray the necessary expenses. *Id.* Where attorneys' fees are properly awarded, the amount of the award rests within the discretion of the trial court and is reviewable on appeal only for an abuse of discretion. *Clark v. Clark*, 301 N.C. 123, 271 S.E. 2d 58 (1980).

In determining the proper amount of counsel fees to be awarded, the trial court should not end its inquiry with a deter-

mination of each party's estate and how much is available to defray costs of litigation. *Id.; Stanback v. Stanback*, 270 N.C. 497, 155 S.E. 2d 221 (1967). As we stated in *Stadiem v. Stadiem*, 230 N.C. 318, 52 S.E. 2d 899 (1949):

> There are so many elements to be considered in an allowance of this kind;—the nature and worth of the services; the magnitude of the task imposed; reasonable consideration for the defendant's condition and financial circumstances;—these and many other considerations are involved. On this appeal the question before us is not whether the award may not have been larger than that anticipated or even usual in cases of that kind; but whether in consideration of the circumstances under which it was made it was so unreasonable as to constitute an abuse of discretion.

Id. at 321, 52 S.E. 2d at 901. Furthermore, the court must make findings of fact as to the nature and scope of legal services rendered, the skill and the time required upon which a determination of reasonableness of the fees can be based. *See Brown v. Brown*, 47 N.C. App. 323, 267 S.E. 2d 345 (1980); *Blair v. Blair*, 44 N.C. App. 605, 261 S.E. 2d 301 (1980); *Rickenbaker v. Rickenbaker*, 21 N.C. App. 276, 204 S.E. 2d 198 (1974).

In the case at hand, after concluding that the defendant was entitled to have reasonable counsel fees paid by the plaintiff, the court stated that it considered the following factors in setting the award:

> 1. The time and labor required in the investigation and prosecution of the action; the novelty and difficulty of the questions of law, and the skill requisite to the proper representation of the defendant.
>
> 2. The Court considers the employment by the defendant may preclude appearances in other matters which the counsel of record for the defendant could be engaged with, and the Court considers whether employment by the defendant would preclude employment by other clients.
>
> 3. The Court further considers the customary charge for similar services rendered.
>
> 4. The Court considers the amount involved in the controversy.

5. The Court considers the contingency or certainty of the compensation.

6. The Court considers the character of the employment, whether casual or for an established and constant client.

7. The Court considers the variation in overhead in practicing of law in Mecklenburg County and Cleveland County, and the Court considers that the defendant's counsel must maintain offices, a library and employees in his office.

8. The Court considers that the sum of $2,500 has been paid previously and $1,500 has been paid on a subsequent prior occasion, amounting to a total of $4,000 prior to this hearing.

Having reviewed the trial court's findings, we find them to be insufficient to form a basis for determining a reasonable award of attorneys' fees. For example, although the trial court perfunctorily stated that it had considered among other factors, the time and labor required to represent the defendant, the court nowhere found how many hours of labor were actually expended on defendant's behalf by her attorneys. Although one of the listed "considerations" of the trial court was the customary charge for similar services, the court never stated what it found the customary charge to be, or whether the charge by defendant's counsel was in line with the customary fee. Although the trial court recited as one of its considerations "the novelty and difficulty of the questions of law, and the skill requisite to the proper representation of the defendant," the court did not state how it adjudged the difficulty of the legal questions or the adequacy of the representations. The court's findings in no way shed light upon the nearly $48,000 disparity between the amount submitted by defendant's attorneys as the value of their services and the amount awarded by the court. In sum, nothing in the court's findings provided a basis for determining the reasonableness of the counsel fees awarded. Absent such findings, we are unable to determine whether the trial court abused its discretion in setting the amount of the award. We therefore remand the case to the Court of Appeals, for a further remand to the trial court for additional findings in accord with this opinion.

Modified and affirmed.

STATE OF NORTH CAROLINA v. JAMES ALBERT McCROWRE

No. 345A84

(Filed 4 December 1984)

1. **Constitutional Law § 49— right to counsel—discharge of appointed counsel—no waiver of right**

The court erred by permitting defendant to go to trial without the assistance of counsel where defendant had indicated that he was dissatisfied with his appointed counsel and wished to hire a private attorney, defendant obtained a continuance so that he could work out a payment plan with an attorney, and defendant appeared for trial without an attorney and requested that the court appoint counsel. Defendant had stated that he wanted to discharge his assigned counsel, but there is no evidence that he ever intended to proceed without the assistance of counsel.

2. **Constitutional Law § 45— right to appear pro se—required inquiry**

Where a defendant clearly indicates that he wishes to proceed *pro se*, the court is required to make inquiry to determine whether defendant has been clearly advised of his right to the assistance of counsel, including his right to the assignment of counsel when he is so entitled; understands and appreciates the consequences of his decision; and comprehends the nature of the charges and proceedings and the range of permissible punishments. G.S. 15A-1242.

ON appeal by defendant from judgment entered by *Bailey, J.*, at the 23 January 1984 session of Superior Court, CUMBERLAND County. Heard in the Supreme Court 12 November 1984.

Defendant was charged in an indictment proper in form with breaking and entering a dwelling with intent to commit larceny, robbery with a dangerous weapon, larceny, and rape. At a trial during which defendant appeared pro se, the jury found defendant guilty of felonious breaking or entering, felonious larceny, armed robbery, and rape in the first degree.

Evidence presented by the state tended to show the following: On 15 August 1983, Kelly Jo Bloomingdale was sunbathing in her front yard. When she heard doors closing, Ms. Bloomingdale went into her house to investigate. Inside she was confronted by the defendant, who brandished a screwdriver. Defendant put a towel over Ms. Bloomingdale's head and led her around the house, telling her that he wanted money. He took twelve dollars from Ms. Bloomingdale and then took her to the bathroom of the house. While in the bathroom, defendant removed Ms. Bloomingdale's pants and proceeded to rape her. As this was happening, Deputy

Kenneth Williams of the Cumberland County Sheriff's Department, who had been called to the house by a neighbor who saw a man break into the Bloomingdale house, came to the bathroom door, identified himself, and demanded entry. Defendant dived out of the bathroom window and ran from the house. Defendant was apprehended nearby.

Defendant testified on his own behalf and denied breaking into Ms. Bloomingdale's house and raping her.

Rufus L. Edmisten, Attorney General, by Michael Rivers Morgan, Assistant Attorney General, for the state.

John G. Britt, Jr., Assistant Public Defender, Twelfth Judicial District, for defendant.

MARTIN, Justice.

[1] Defendant's first assignment of error is that the trial court erred by denying him assistance of counsel. The record shows that defendant was arrested on 15 August 1983. On 17 August 1983, the District Court of Cumberland County determined that defendant was indigent and the Public Defender was appointed to represent him. Defendant appeared for arraignment on 3 January 1984, but his appointed counsel was not present. After the call of the calendar, defendant told the court that he was not satisfied with his appointed counsel and that he wished to hire his own private attorney. The court asked defendant whether he had the money to do that, and defendant replied, "Yes, I think I can arrange that." Mr. Ed Brady, an attorney, then stepped forward and stated that defendant had talked with him that morning although he was not prepared to make a general appearance for defendant during arraignment. After further questioning of defendant, the court permitted defendant to sign a form captioned: "WAIVER OF RIGHT TO ASSIGNED COUNSEL." Defendant was then arraigned and pleaded not guilty to all charges brought against him.

On 16 January 1984, defendant's case was called for trial. Defendant appeared without an attorney and requested that his case be continued. Defendant stated that he had been unable to retain counsel because he had not been released from jail until 23 December 1983 and had just gotten a job "last week." Defendant

also stated that he intended to talk with Mr. Brady that day to work out a payment plan for Mr. Brady's representation of him. The court continued defendant's case until 23 January 1984.

On 23 January 1984 defendant appeared for trial without an attorney. Before the jury was brought in, defendant stated to the trial judge:

> MR. MCCROWRE: I want the Court to know that I am ready for trial. Due to the fact that I know I am not going to be able to handle some of my matters and things that an attorney would know, I do not know that part but I'm ready for trial and I would ask the Court to please get someone to assist me in this case?
>
> COURT: Speak a little louder please?
>
> MR. MCCROWRE: I would like for the court to get someone to assist me in my case.

The court then stated that defendant had waived his right to have appointed counsel and therefore the court would not appoint counsel in his case. Later, during the trial, the issue was raised again. At that time the trial judge stated, "You know as well as I do that you waived your right to counsel." Defendant was tried without the assistance of counsel. This was error.

The record clearly indicates that when defendant signed the waiver of his right to assigned counsel he did so with the expectation of being able to privately retain counsel. Before Judge Battle, the defendant stated that he wanted to discharge Mr. Britt, his assigned counsel, and employ his own lawyer. There is no evidence that defendant ever intended to proceed to trial without the assistance of some counsel.

> Statements of a desire not to be represented by court-appointed counsel do not amount to expressions of an intention to represent oneself. . . . At most, defendant's statements amounted to an expression of the desire that his court-appointed lawyers be replaced. Given the fundamental nature of the right to counsel, we ought not to indulge in the presumption that it has been waived by anything less than an express indication of such an intention.

State v. Hutchins, 303 N.C. 321, 339, 279 S.E. 2d 788, 800 (1981) (citations omitted).

> [T]he waiver of counsel, like the waiver of all constitutional rights, must be knowing and voluntary, and the record must show that the defendant was literate and competent, that he understood the consequences of his waiver, and that, in waiving his right, he was voluntarily exercising his own free will. *Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed. 2d 562.

State v. Thacker, 301 N.C. 348, 354, 271 S.E. 2d 252, 256 (1980). The trial judge mistakenly believed that defendant had waived his right to *all* counsel at arraignment.

[2] Had defendant clearly indicated that he wished to proceed pro se, the trial court was required to make inquiry to determine whether defendant:

(1) Has been clearly advised of his right to the assistance of counsel, including his right to the assignment of counsel when he is so entitled;

(2) Understands and appreciates the consequences of this decision; and

(3) Comprehends the nature of the charges and proceedings and the range of permissible punishments.

N.C. Gen. Stat. § 15A-1242 (1983); *State v. Gerald*, 304 N.C. 511, 284 S.E. 2d 312 (1981). Such was not done in the present case and it was therefore error to permit defendant to go to trial without the assistance of counsel. U.S. Const. amend. VI; *Gideon v. Wainwright*, 372 U.S. 335, 9 L.Ed. 2d 799 (1963). For this reason, defendant is entitled to a new trial. As the other assignments of error are not likely to reoccur, we do not deem it necessary to discuss them.

New trial.

In re Redwine

IN THE MATTER OF JUDGE PHILIP O. REDWINE, DISTRICT COURT JUDGE TENTH JUDICIAL DISTRICT

No. 137PA84

(Filed 4 December 1984)

Mandamus § 3.1; Prohibition, Writ of § 1— writ to district court judge—no jurisdiction in superior court

A judge of the superior court has no authority or jurisdiction to issue a writ of mandamus or prohibition to a district court judge since those remedies are reserved to the Supreme Court by Art. IV, § 12(1) of the N. C. Constitution.

ON discretionary review, prior to determination by the Court of Appeals, of the writ of mandamus entered by *Lee, J.*, on 1 March 1984 in Superior Court, WAKE County. Heard in the Supreme Court 9 October 1984.

Eugene Perry Watkins, Jr. was arrested in Wake County at 1:35 a.m. on 22 November 1983 for driving while impaired, in violation of N.C.G.S. 20-138.1. Mr. Watkins was subsequently formally charged with driving while impaired, and as part of his routine processing, Mr. Watkins was asked to submit to a breath test on an intoxilizer machine at the Wake County Courthouse. The test was administered by Harold Belk, a chemical analyst, at approximately 2:08 a.m. on 22 November 1983. Pursuant to N.C.G.S. 20-139.1(e1), Mr. Belk completed an affidavit which showed, inter alia, that the test showed an alcohol concentration of 0.23.

On 5 January 1984 Mr. Watkins appeared before the Honorable Philip O. Redwine, presiding in the District Court of Wake County, on the charge of driving while impaired. Through counsel Mr. Watkins filed a motion in limine to prevent the state from using the affidavit completed on 22 November 1983 by Harold Belk as evidence at trial. On 6 January 1984 Judge Redwine filed an order stating, inter alia:

> And, the Court having heard the arguments of counsel for the defendant and for the State and having reviewed the sources and authorities cited;
>
> And, it further appearing to the Court that if the State were allowed to prove the alcohol concentration of the defendant pursuant to the provisions of G.S. 20-139.1(e1) that

the defendant's constitutional rights would be violated, particularly including his right to due process and to a fair trial as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution, his right to be confronted with the witnesses against him and to have effective assistance of counsel for his defense as guaranteed by the Sixth Amendment to the United States Constitution, his right to the equal protection of the laws as guaranteed by the Fourteenth Amendment to the United States Constitution, his right not to be deprived of his liberty but by the law of the land as guaranteed by Section 19 of Article I of the North Carolina Constitution, and his right of confrontation as guaranteed by Section 23 of Article I of the North Carolina Constitution;

And, it therefore appearing to the Court that the defendant's MOTION IN LIMINE should be allowed with respect to the provisions of G.S. 20-139.1(e1);

NOW, THEREFORE, IT IS HEREBY ORDERED that the defendant's MOTION IN LIMINE is granted insofar as it prohibits the State from attempting to prove his alcohol concentration pursuant to the provisions of G.S. 20-139.1(e1) in that such provisions are unconstitutional under the authorities cited heretofore. This Order in no way precludes the State from trial of this case using proper evidence as to the defendant's alcohol concentration.

On 13 January 1984 the state petitioned the Superior Court of Wake County for a writ of mandamus or, in the alternative, a writ of prohibition to require Judge Redwine to admit Mr. Belk's affidavit into evidence during Mr. Watkins's trial. On 1 March 1984 the superior court issued a writ of mandamus in which it concluded as a matter of law that N.C.G.S. 20-139.1(e1) is constitutional under the provisions of the fifth, sixth, and fourteenth amendments to the United States Constitution and article I, sections 19 and 23 of the Constitution of North Carolina. The court then ordered Judge Redwine to admit Mr. Belk's affidavit into evidence. From this writ, Judge Redwine appeals.

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

Van Camp, Gill & Crumpler, P.A., by William B. Crumpler, for the respondent.

MARTIN, Justice.

Appellant Redwine argues that N.C.G.S. 20-139.1(e1) is unconstitutional and therefore the superior court erred by issuing a writ of mandamus compelling him to admit the chemical analyst's affidavit into evidence. We need not reach this issue, however, since we hold, for another reason, that the superior court erred in issuing the writ of mandamus in the present case. As the constitutional issue sought to be reviewed in this appeal is presently before this Court in another case, we find it unnecessary to treat the appeal in this case as a petition for writ of mandamus. *See State v. Surles; State v. Barnes; State v. Williams and State v. Sutton*, 55 N.C. App. 179, 284 S.E. 2d 738 (1981).

The superior court judge misconstrued his authority to issue the writ of mandamus to a judge of the General Court of Justice. A judge of the superior court has no authority or jurisdiction to issue a writ of mandamus or prohibition to a district court judge. Those remedies are reserved by the Constitution of North Carolina, article IV, section 12(1), to the Supreme Court.

As the superior court judge had no authority to issue the writ of mandamus to the judge of the district court, the writ was void. This opinion does not affect the authority or jurisdiction of judges of the superior court to issue writs of mandamus and prohibition to parties other than justices and judges of the General Court of Justice.

The writ of mandamus is vacated and the cause is remanded to the Superior Court, Wake County, for further proceedings.

Vacated and remanded.

THE PRESBYTERIAN HOSPITAL v. CORNELIUS EUGENE McCARTHA AND SALLY W. McCARTHA

No. 83PA84

(Filed 4 December 1984)

ON discretionary review of the decision of the Court of Appeals, 66 N.C. App. 177, 310 S.E. 2d 409 (1984), remanding the cause to the Superior Court, MECKLENBURG County, for entry of an order reversing the judgment against the defendant Sally W. McCartha entered by *Kirby, J.*, 2 December 1982, and dismissing plaintiff's claim against Sally W. McCartha. Heard in the Supreme Court 12 November 1984.

Miller, Johnston, Taylor & Allison, by Robert J. Greene, Jr. and Paul A. Kohut, for plaintiff.

Warren C. Stack for defendant Sally W. McCartha.

PER CURIAM.

Discretionary review improvidently allowed.

IN THE MATTER OF THE ESTATE OF EDWARD GORDON STERN, DECEASED, H. T. MULLEN, JR., ADMINISTRATOR OF THE ESTATE OF EDWARD GORDON STERN v. CEILA STERN, ROBERT WEISS, MELVENA W. TRAVALIA, AUGUST WEISS, EMMA W. JOHNSON, AGNES WEISS TEULON, WILLIAM WEISS, ADELE S. STEIN, A. EDWIN STERN, JR., JENNIE W. MILLSTEIN, HARRY S. WENDER, FLORENCE MARGARET W. LEHN, SHIRLEY JOAN W. UKRAINETZ, GEORGINA L. GEPPERT, EVELYN L. BAERWALDT, HELEN L. MCGOVERN, GORDON LISSEL, JEAN L. GESCHWANDTNER, THERESA L. SEIDENS, JAMES LISSEL AND ALL UNKNOWN HEIRS OF EDWARD GORDON STERN

No. 156A84

(Filed 4 December 1984)

APPEAL by respondent-paternal heirs from a decision of the Court of Appeals, 66 N.C. App. 507, 311 S.E. 2d 909 (1984), one judge dissenting, which affirmed the order entered in favor of respondent-maternal heirs by *Allsbrook, J.*, at the 23 August 1982 Session of Superior Court, PASQUOTANK County.

Jennette, Morrison, Austin & Halstead, by C. Glenn Austin and John S. Morrison, for respondent paternal heirs.

Griffin & Ruff, by Joseph M. Griffin, for respondent maternal heirs.

PER CURIAM.

Affirmed.

JAMES A. DEAN, EMPLOYEE v. CONE MILLS CORPORATION, EMPLOYER, AND LIBERTY MUTUAL INSURANCE COMPANY, CARRIER

No. 203A84

(Filed 4 December 1984)

APPEAL pursuant to N.C.G.S. 7A-30(2) by plaintiff from the Court of Appeals' decision, 67 N.C. App. 237, 313 S.E. 2d 11 (1984), affirming the Industrial Commission's denial of workers' compensation benefits, one judge dissenting.

Hassell, Hudson and Lore, by Charles R. Hassell, Jr., for plaintiff appellant.

Maupin, Taylor and Ellis, P.A., by David V. Brooks, for defendant appellees.

PER CURIAM.

The decisions of the Court of Appeals and the Industrial Commission are vacated and the case is remanded to the Court of Appeals for further remand to the Industrial Commission for reconsideration by the Commission in light of this Court's opinion in *Rutledge v. Tultex Corporation*, 308 N.C. 85, 301 S.E. 2d 359 (1983).

Vacated and remanded.

Thorpe v. DeMent

JUNIOUS THORPE, ADMINISTRATOR OF ESTATE OF SHIRLEY ANN THORPE, DECEASED, JUNIOUS THORPE, INDIVIDUALLY, AND MARY BUNCH THORPE v. RUSSELL W. DEMENT, JR., PHILIP O. REDWINE, SHERMAN A. YEARGAN, JR. AND GARLAND L. ASKEW, DOING BUSINESS AS DEMENT, REDWINE, YEARGAN AND ASKEW, ATTORNEYS AT LAW

No. 454A84

(Filed 4 December 1984)

APPEAL by plaintiffs from a decision of a divided panel of the Court of Appeals (*Judges Johnson* and *Arnold* concurring, *Judge Phillips* dissenting) reported in 69 N.C. App. 355, 317 S.E. 2d 692 (1984) affirming the judgment entered by *Brewer, J.*, at the 20 December 1982 Civil Session of Superior Court, WAKE County. Heard in the Supreme Court 15 November 1984.

Boyce, Mitchell, Burns and Smith, P.A., by Greg L. Hinshaw and Susan K. Burkhart, for plaintiffs-appellant.

Van Camp, Gill and Crumpler, P.A., by Douglas R. Gill, for defendants-appellee.

PER CURIAM.

Affirmed.

State v. Edwards

STATE OF NORTH CAROLINA	)	
	)	
v.	)	ORDER
	)	
MATTHEW EDWARDS, JR.	)	

No. 544PA84

(Filed 6 November 1984)

UPON consideration of the defendant'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 petition for discretionary review of the decision of the North Carolina Court of Appeals reported at 70 N.C. App. 317, filed pursuant to G.S. 7A-31, the following order was entered and is hereby certified to the North Carolina Court of Appeals:

1. The Attorney General's Motion to Dismiss Appeal for Lack of Substantial Constitutional Question is ALLOWED.

2. Defendant's Petition for Discretionary Review is ALLOWED, with review limited to assignments of error relating to:

A. a witness' reading the contents of a search warrant affidavit to the jury, and

B. the application of G.S. 7A-49.3 to the calendaring of defendant's case for trial.

State v. Joines

STATE OF NORTH CAROLINA	)	
	)	
v.	)	ORDER
	)	
WILLIAM HENRY JOINES	)	

No. 108P84

(Filed 6 November 1984)

DEFENDANT'S Petition for Discretionary Review of the decision of the Court of Appeals, 70 N.C. App. 146, is allowed for the sole purpose of entering the following order:

> The cause is remanded to the Court of Appeals for a consideration of the merits of defendant's assignments of error concerning his motion to suppress evidence obtained during a search of a mobile home and defendant's assignments of error concerning his motion to suppress evidence of the results of his polygraph examination.

TOWN OF NAGS HEAD	)	
	)	
v.	)	ORDER
	)	
ROBERT C. TILLETT; ZENOVA P. TILLETT; BRADFORD NEIL LOY; PETER L. MARSHALL AND WIFE, FLORA COSTIN MARSHALL; DOROTHY HAND WAGONER AND HUSBAND, JAMES L. WAGONER, SR.; RICHARD L. RUSSAKOFF AND WIFE, RISE GURY RUSSAKOFF; JAMES T. RYCE AND WIFE, SUSAN RYCE; AND E. CROUSE GRAY, JR., TRUSTEE	)	

No. 436P84

(Filed 6 November 1984)

THIS matter is before the Court for consideration of plaintiff's Petition for Discretionary Review under G.S. 7A-31 of the decision reported at 68 N.C. App. 554, defendants' (Ryce) Notice of Appeal, and defendants' (Ryce) Petition for Discretionary Review under G.S. 7A-31.

1. Plaintiff's Petition for Discretionary Review is DENIED.

2. Defendants' (Ryce) Notice of Appeal is DISMISSED.

3. Defendants' (Ryce) Petition for Discretionary Review is ALLOWED and it is ORDERED:

A. The Order of the Court of Appeals entered 12 July 1984 denying defendants' (Ryce) Petition for Rehearing is REVERSED, and

B. The Court of Appeals is directed to rehear the case for the sole purpose of determining the merits of the defendants' (Ryce) cross-assignment of error regarding their cross-claim against Defendant Loy.

By order of the Court in Conference, this 6th day of November, 1984.

FRYE, J.
For the Court

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

CAMPBELL v. CITY OF GREENSBORO

No. 522P84.

Case below: 70 N.C. App. 252.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 6 November 1984. Motion by defendant to dismiss appeal for lack of substantial constitutional question allowed 6 November 1984.

CAULDER v. WAVERLY MILLS

No. 258PA84.

Case below: 67 N.C. App. 739.

Petition by defendants for discretionary review under G.S. 7A-31 allowed 6 November 1984.

CITY OF STATESVILLE v. GILBERT ENGINEERING CO.

No. 377P84.

Case below: 68 N.C. App. 676.

Petition by defendant for discretionary review under G.S. 7A-31 denied 6 November 1984.

DOUD v. K & G JANITORIAL SERVICES

No. 413P84.

Case below: 69 N.C. App. 205.

Petition by several defendants for discretionary review under G.S. 7A-31 denied 6 November 1984.

FRAVER v. N. C. FARM BUREAU INS. CO.

No. 517P84.

Case below: 69 N.C. App. 733.

Petition by plaintiffs for discretionary review under G.S. 7A-31 denied 6 November 1984.

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

GILLESPIE v. GILLESPIE

No. 590P84.

Case below: 66 N.C. App. 377.

Petition by defendants for writ of supersedeas and temporary stay dismissed 6 November 1984.

HARCO LEASING v. BOWMAN

No. 427P84.

Case below: 69 N.C. App. 177.

Petition by defendant for discretionary review under G.S. 7A-31 denied 6 November 1984.

HOWARD v. SHARPE

No. 464P84.

Case below: 69 N.C. App. 555.

Petition by several defendants for discretionary review under G.S. 7A-31 denied 6 November 1984.

IN RE DURHAM ANNEXATION ORDINANCE

No. 412P84.

Case below: 69 N.C. App. 77.

Petition by petitioners for discretionary review under G.S. 7A-31 denied 6 November 1984. Motion by respondent to dismiss appeal for lack of substantial constitutional question allowed 6 November 1984.

INTERNATIONAL HARVESTER CREDIT CORP. v. BOWMAN

No. 426P84.

Case below: 69 N.C. App. 217.

Petition by defendants for discretionary review under G.S. 7A-31 denied 6 November 1984.

JERNIGAN v. JERNIGAN

No. 456P84.

Case below: 69 N.C. App. 339.

Petition by defendant for discretionary review under G.S. 7A-31 denied 6 November 1984.

JORDAN v. JONES

No. 391PA84.

Case below: 69 N.C. App. 339.

Petition by defendants/third-party plaintiffs for discretionary review under G.S. 7A-31 allowed 6 November 1984.

LATTIMORE v. FISHER'S FOOD SHOPPE

No. 429PA84.

Case below: 69 N.C. App. 227.

Petition by plaintiff for discretionary review under G.S. 7A-31 allowed 6 November 1984.

MILLER v. RUTH'S OF N. C., INC.

No. 369P84.

Case below: 69 N.C. App. 153.

Petitions by plaintiff and several defendants for discretionary review under G.S. 7A-31 denied 6 November 1984.

MILLER v. RUTH'S OF N. C., INC.

No. 474P84.

Case below: 69 N.C. App. 672.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 6 November 1984.

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

MINOR v. MINOR

No. 537P84.

Case below: 70 N.C. App. 76.

Petition by defendant for discretionary review under G.S. 7A-31 denied 6 November 1984.

MURPHREY v. WINSLOW

No. 533A84.

Case below: 70 N.C. App. 10.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied as to additional issues 6 November 1984.

ROBINS & WEILL v. MASON

No. 588P84.

Case below: 70 N.C. App. 537.

Petition by defendant for temporary stay of preliminary injunction and petition for writ of supersedeas to stay preliminary injunction denied 6 November 1984. Petition by defendant for discretionary review under G.S. 7A-31 denied 6 November 1984.

RORRER v. COOKE

No. 468P84.

Case below: 69 N.C. App. 305.

Petition by defendant for discretionary review under G.S. 7A-31 allowed 6 November 1984.

SCOTT v. THORNE

No. 339P84.

Case below: 68 N.C. App. 788.

Notice of appeal under G.S. 7A-30 by defendant dismissed 6 November 1984. Petition by defendant for discretionary review under G.S. 7A-31 denied 6 November 1984.

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

SOUTHERN WATCH SUPPLY v.
REGAL CHRYSLER-PLYMOUTH

No. 420P84.

Case below: 69 N.C. App. 164.

Petition by defendant (Regal) for discretionary review under G.S. 7A-31 denied 6 November 1984.

S.R.M. REALTY v. WEBSTER

No. 535P84.

Case below: 70 N.C. App. 146.

Petition by defendant for discretionary review under G.S. 7A-31 denied 6 November 1984.

STATE v. BEAM

No. 527P84.

Case below: 70 N.C. App. 181.

Petition by defendant for discretionary review under G.S. 7A-31 denied 6 November 1984.

STATE v. BORDEAUX

No. 546P84.

Case below: 70 N.C. App. 344.

Petition by defendant for discretionary review under G.S. 7A-31 denied 6 November 1984.

STATE v. CAUTHEN

No. 593P84.

Case below: 70 N.C. App. 495.

Petition by defendant for discretionary review under G.S. 7A-31 denied 6 November 1984.

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

STATE v. HOBSON

No. 611P84.

Case below: 70 N.C. App. 619.

Petition by Attorney General for writ of supersedeas and temporary stay denied 6 November 1984.

STATE v. HOWELL & STANLEY

No. 574P84.

Case below: 67 N.C. App. 197.

Petition by defendant (Stanley) for writ of certiorari to North Carolina Court of Appeals denied 6 November 1984.

STATE v. POINDEXTER

No. 525P84.

Case below: 69 N.C. App. 691.

Petition by defendant for writ of certiorari to North Carolina Court of Appeals denied 6 November 1984.

STATE v. STAFFORD

No. 481P84.

Case below: 69 N.C. App. 769.

Petition by defendant for discretionary review under G.S. 7A-31 denied 6 November 1984.

STATE v. TRIPLETT

No. 543P84.

Case below: 70 N.C. App. 341.

Petition by defendant for discretionary review under G.S. 7A-31 denied 6 November 1984.

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

STATE v. WATERS

No. 551P84.

Case below: 68 N.C. App. 789.

Petition by defendant for writ of certiorari to North Carolina Court of Appeals denied 6 November 1984.

WELLS v. FRENCH BROAD ELEC. MEM. CORP.

No. 311P84.

Case below: 68 N.C. App. 410.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 6 November 1984.

WILFONG v. WILKINS, COM'R OF MOTOR VEHICLES

No. 531P84.

Case below: 70 N.C. App. 127.

Petition by defendant for discretionary review under G.S. 7A-31 denied 6 November 1984.

WINSTON REALTY CO. v. G.H.G., INC.

No. 580A84.

Case below: 70 N.C. App. 374.

Petition by defendant for discretionary review under G.S. 7A-31 allowed as to additional issues 6 November 1984.

WYATT v. WYATT

No. 495P84.

Case below: 69 N.C. App. 747.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 6 November 1984.

STATE OF NORTH CAROLINA v. JAMES VEREEN, A/K/A ONION

No. 633A83

(Filed 8 January 1985)

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

The exclusion of jurors who were unequivocally opposed to the death penalty did not violate a murder defendant's right to a fair trial and his right to due process of law.

2. **Criminal Law § 91.6— pretrial publicity and prejudicial bias—additional time to gather information—denial of continuance**

A murder defendant's rights to the effective assistance of counsel and due process of law were not violated by the trial court's denial of a continuance to give defendant's expert additional time to gather information pertaining to pretrial publicity and community prejudice in support of his motion for a change of venue where defendant's trial had been delayed for four years because of defendant's actions in removing himself from the jurisdiction; on 16 September 1983 the trial judge allowed defense counsel funds to hire an expert to survey the extent and effect of pretrial publicity and prejudicial bias in the community, scheduled a hearing on defendant's motion for a change of venue for 7 November, and scheduled the trial for 28 November; defendant moved on 3 November to continue the hearing and the trial for the convenience of defendant's expert; and the trial court concluded that the six weeks allowed by the court's prior order for defendant to prepare for the hearing on the motion for a change of venue was reasonable. G.S. 15A-701(b)(7).

3. **Criminal Law § 15.1— community bias and publicity—denial of change of venue**

A murder defendant failed to show that under the "totality of the circumstances" he was deprived of a fair and impartial jury by the denial of his motions for a change of venue on grounds of bias in the community and pretrial and trial publicity where the county of trial had a population of 34,000, and the entire county thus did not qualify as a "neighborhood"; there was no evidence that the victim was well-known throughout the county; six of the jurors ultimately selected stated that they did not know defendant and knew nothing about the case, and the remaining six jurors indicated that they had only vague recollections about the case, had formed no opinion of defendant's guilt or innocence, presumed defendant innocent until proven guilty, and could render a fair and impartial verdict; the publicity consisted of factual, noninflammatory news stories; and the jury was repeatedly admonished throughout the trial to avoid all media accounts of the trial and to refrain from discussing the case.

4. **Criminal Law § 60— palm prints—nontestimonial identification order—defendant in custody**

Although G.S. 15A-271 did not apply to a defendant in custody and a nontestimonial identification order was not required for the State to acquire

an additional palm print from defendant during the trial, the fact that the State chose to comply with the more restrictive procedures of G.S. 15A-271 in obtaining a nontestimonial identification order worked to defendant's advantage, and the trial court did not abuse its discretion in issuing the order where defendant failed to show that he was prejudiced by the taking of his palm print during trial.

5. Criminal Law §§ 42.5, 96— withdrawal of evidence—absence of prejudice

In a prosecution for first-degree murder, the trial court did not err in the denial of defendant's motion for a mistrial when the court admitted and subsequently withdrew from evidence the victim's pocketbook and items therein which were discovered in an abandoned house located on the street where defendant lived since (1) the evidence was properly excluded because the pocketbook was discovered three weeks after the murder and there was no evidence to connect it to defendant, and (2) the probable influence of the evidence upon the minds of the jury in reaching a verdict was slight when the remoteness of the evidence is considered with the trial judge's instruction to disregard it.

6. Homicide § 21.5— first-degree murder—sufficient evidence of premeditation and deliberation

There was sufficient evidence of premeditation and deliberation to support submission of an issue as to defendant's guilt of first-degree murder where the evidence tended to show that the viciousness and brutality of the attack upon the seventy-two-year-old victim was unprecedented in the experience of the physician conducting the autopsy, and where the numerous wounds, including defensive incisional wounds to the victim's hands and arms, her broken ribs, evidence of strangulation and evidence of sexual assault indicated that the victim underwent extreme physical pain and unspeakable psychological anguish prior to her death.

7. Criminal Law § 135.8— two aggravating factors—submission on same evidence —absence of prejudice

In a prosecution for first-degree murder, defendant was not prejudiced by the trial court's error in submitting two aggravating factors—that the murder was committed while defendant was engaged in the commission of the crime of first-degree burglary or an attempt to commit first-degree rape and that the murder was part of a course of conduct involving other crimes of violence—based on the same evidence of an attempt to rape the victim's daughter, where there was ample evidence of first-degree burglary and assault on the victim's daughter to support these two aggravating factors without the necessity of relying on the crime of attempted rape; evidence of the attempted rape was the weakest of the crimes submitted to support the aggravating factors; and in light of the vicious brutality of the crimes and the absence of any significant factors in mitigation, there could be no reasonable possibility that consideration of the crime of attempted rape under one, the other, or both aggravating factors might have contributed to the imposition of the death penalty in this case.

8. Criminal Law § 135.10— proportionality of death sentence

A sentence of death imposed on defendant was not disproportionate considering both the crime and the defendant where the evidence showed that the seventy-two-year-old victim was strangled, stabbed and sexually assaulted in her home; defendant sexually assaulted the victim's mentally retarded daughter, stabbed her numerous times, and inflicted a nearly fatal cut to her throat; the knife wounds were inflicted with such force that the murder weapons, a serrated steak knife and a pocketknife, were both broken when discovered at the scene of the crime; and defendant offered little in mitigation of the offense.

9. Criminal Law § 135.10— death penalty—proportionality review

Although the U. S. Constitution does not require a comparative proportionality review of a death sentence, that requirement is mandated by G.S. 15A-2000(b)(2).

10. Criminal Law § 135.10— death sentence—proportionality review

Although the cases in the pool of cases for proportionality review offer guidance in determining whether a sentence of death in a particular case is excessive or disproportionate, ultimately each case must rest on its own unique facts.

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

BEFORE *Herring, J.*, at the 17 October 1983 Criminal Session of Superior Court, VANCE County, defendant was convicted of first-degree murder. From the imposition of a sentence of death, defendant appeals as a matter of right. N.C.G.S. § 7A-27(a). Heard in the Supreme Court on 13 November 1984.

Defendant was convicted of the first-degree murder of seventy-two year old Geraldine Abbott whose body was discovered in her home in Henderson, North Carolina, during the early morning hours of 30 September 1979. On appeal to this Court, defendant challenges the constitutionality of the jury selection process; the trial judge's rulings on a motion for continuance and motions for a change of venue; certain evidentiary rulings; the sufficiency of the evidence on the question of premeditation and deliberation; and, with respect to the sentencing phase of his trial, the submission of two aggravating factors which he contends were based on the same evidence. We find no error in the guilt phase of defendant's trial. Although the trial judge erroneously instructed the jury concerning what evidence it might consider in determining the existence of two aggravating factors, we hold that the defend-

ant was not prejudiced thereby, and we therefore affirm the sentence of death.

Rufus L. Edmisten, Attorney General, by Donald W. Stephens, Special Deputy Attorney General, and Ellen B. Scouten, Associate Attorney, for the State.

J. Henry Banks and Willie S. Darby, Attorneys for defendant-appellant.

MEYER, Justice.

The record discloses the following facts pertinent to this appeal: The victim, Geraldine Abbott, lived with her thirty-year old mentally retarded daughter, Susie Abbott. In response to a telephone call from Susie, the victim's son arrived at his mother's home shortly after 2:30 a.m. on 30 September 1979, where he found his mother lying on the floor. Her underpants were pulled down to her knees. Her nightgown was soaked with blood. She appeared to be dead. His sister Susie was sitting naked on the floor with her throat cut and numerous incisional wounds on her body. Apparently Susie, who testified only at defendant's sentencing hearing, informed law enforcement officers that the assailant was a black man wearing a blue "uniform."

A search of the crime scene disclosed a shoe print traced in blood, ostensibly made by the sole of a tennis shoe, and two one dollar bills lying on the floor, one of which harbored a latent palm print in blood.

On the following day, 1 October 1979, SBI Agent Walker and two Henderson police officers, while investigating an unrelated incident, noticed a two-piece blue jogging suit hanging from a clothesline on the front porch of a house located less than a mile from the Abbott home. Upon returning to the house a short time later, Agent Walker asked for, and was given permission by the occupant of the house, James Vereen, to take the jogging suit. The defendant admitted ownership of the suit, explaining that he had recently purchased it, that it had gotten dirty, and that he had washed it that morning. The suit was still damp. When asked if he owned a pair of tennis shoes, defendant answered affirmatively and agreed to let Officer Walker take the shoes. In spite of its being washed, chemical analysis revealed positive indica-

tions of the presence of blood on the suit. The shoe print taken from the crime scene was consistent in shape, size, and design with the tennis shoes.

As a result of the investigation, the defendant was indicted for the murder of Geraldine Abbott on 8 October 1979. Efforts to arrest the defendant were thwarted, however, until 1983 when defendant, who had fled the State, was finally apprehended in New York.

While law enforcement officers described the discovery of the blue jogging suit leading to defendant's arrest as "providential," it is evident from the record that the prosecution was nevertheless forced to rely solely on circumstantial evidence at the guilt phase of the trial. During a hearing on pretrial motions, defense counsel challenged the competency of the eyewitness, Susie Abbott, to testify. In light of Susie Abbott's very limited mental ability, the prosecution judiciously chose to exclude the testimony of this witness during the guilt phase.

At trial, the prosecution's case in support of a first-degree murder conviction consisted of the following: In addition to testimony that there were positive indications of blood on defendant's jogging suit, and that the shape, size and design of the shoe print found at the crime scene were consistent with defendant's tennis shoes, the most incriminating evidence pointing to defendant as the perpetrator of the crime was testimony from Special Agent Ludas that the left palm print impressed in blood on the dollar bill found in the victim's home matched the palm print of the defendant taken during the course of the trial. The prosecution also introduced evidence through the testimony of SBI Agent Worsham that caucasian head hairs removed from the defendant's jogging suit were microscopically consistent with the head hair of the victim, Geraldine Abbott.

To support its theory that the murder was committed with premeditation and deliberation, the prosecution relied on the testimony of the medical examiner, Dr. Tate. In addition to two stab wounds, one of which was the fatal wound which penetrated the right and left ventricles of the heart, Dr. Tate noted ten other wounds, six incisional wounds to other parts of the body and four wounds to the index and middle fingers of the victim and to her wrist and left hand which he characterized as "defensive"

wounds. Severe bruising to the muscles of the victim's throat and a fracture of the hyoid bone indicated that the victim had been strangled. Dr. Tate also found numerous rib fractures and bruising on the lower left wall and a tear in the rear of the vagina. Of the close to 100 autopsies he had performed, Dr. Tate testified that he had never before seen this constellation of injuries to one person.

Defendant did not offer evidence at the guilt phase of the trial.

At the sentencing phase of the trial, the prosecution submitted three aggravating factors. In support of the first aggravating factor, that defendant had previously been convicted of a felony involving the use or threat of violence to the person, the prosecution offered evidence of defendant's 1969 conviction of common law robbery. The second aggravating factor submitted was that the murder was committed while the defendant was engaged in the commission of first-degree burglary or an attempt to commit the crime of first-degree rape. In support of this factor, the prosecution offered the testimony of Susie Abbott. She testified that she lived in the same house as her mother and that on the night of the murder she and her mother put on their nightgowns. As her mother was saying her prayers, a black man entered the bedroom, grabbed her mother around the neck, and carried her to Susie's bedroom. He stabbed her mother with a knife and said "You must die." The man then held Susie's head back and cut her throat. He also cut her genital area. He put her on the bed, forced her to disrobe, and, with his clothes off, attempted to have intercourse with her. He then proceeded to cut her about her hips. Susie Abbott also testified that the man then took their pocketbooks and left. Neither Susie nor her mother gave the man permission to come into their home or take their pocketbooks. She did not consent to having sex with the man.

In support of the third aggravating factor submitted, that the murder of Mrs. Abbott was part of a course of conduct which included the commission by the defendant of other crimes of violence against other persons, the prosecution relied on evidence that defendant committed the crime of assault with a deadly weapon with intent to kill inflicting serious injury on Susie Abbott, as well as the crime of attempted rape against Susie Abbott.

Defendant offered the testimony of his aunt in support of the following mitigating factors which he couched in the following language:

> (3) Does the affection between the defendant and his family constitute a mitigating circumstance, i.e., taking care of his grandmother who was a double amputee?
>
> (4) Did the defendant confess and accept Christ at some point in his life?
>
> (5) Was the defendant active in church, the boy scouts, and the boys' club during his youth so as to constitute a mitigating circumstance?
>
> (6) The defendant has led a law abiding life for a substantial period of time before the commission of the present crime.

In addition, defendant submitted in mitigation his age (30); that he had no significant history of prior criminal activity; and any other circumstance which the jury deemed to have mitigating value. The jury found each of the three aggravating factors and indicated, without specifying, that it found from the evidence the existence of one or more mitigating factors. Upon finding that the aggravating factors outweighed the mitigating factors and that the aggravating factors, when considered with the mitigating factors, were sufficiently substantial to warrant a penalty of death, the jury recommended that the defendant be so sentenced.

Prior to discussing defendant's assignments of error, we deem it appropriate to comment on the fully competent representation of counsel afforded this defendant at trial and on appeal, as well as the caution and sound judgment displayed by the trial judge and the professional approach taken by the prosecution. Defense counsel, by well-researched and well-reasoned arguments both at trial and on appeal focused attention on the critical issues and set out persuasive arguments. As a result of defense efforts and discretionary rulings on the part of the trial judge, defendant was appointed additional counsel, and, at the expense of the State, was allowed funds to hire experts to verify the results of physical evidence and to conduct a county survey in an effort to obtain a change of venue. Counsel's motions and objections were

timely and, under the circumstances of the case, appropriate. The record discloses a trial skillfully conducted in an adversarial but orderly manner.

[1] As his first assignment of error, defendant contends that exclusion of jurors who were unequivocally opposed to the death penalty violated his right to a fair trial and his right to due process of law. This Court has consistently rejected the argument as set forth by the defendant. *See State v. Boyd*, 311 N.C. 408, 319 S.E. 2d 189 (1984). We decline to reconsider our position.

[2] Defendant contends that he was denied his right to effective assistance of counsel and due process of law as a result of the trial court's denial of his motion for a continuance. Toward the resolution of this issue we consider the following facts: Defendant was indicted for the murder of Geraldine Abbott on 8 October 1979. Due solely to defendant's own actions in removing himself from the jurisdiction, it was not until four years later that the State was prepared to bring him to trial. At a pretrial hearing on 16 September 1983, and in connection with defendant's motion for a change of venue, the trial judge, in his discretion and pursuant to N.C.G.S. § 7A-450(b), allowed defense counsel funds to hire an expert to survey the extent and effect of pretrial publicity and prejudicial bias in the Vance County community. A hearing on defendant's motion for a change of venue was scheduled for 7 November, with trial scheduled for 28 November. On 3 November counsel appeared before the court to request a continuance of the motions hearing and the trial. Accompanying the motion was a letter dated 26 October 1983 from James Luginbuhl, described as a "juristic psychologist," who, in addition to estimating the cost of the survey to be $975.00, wrote:

> Given that I have a heavy teaching schedule the rest of the semester at N.C. State University, a realistic time estimate is about 2 weeks to develop the survey and find and train interviewers, 2 weeks for the interviewers to complete their task, and 2 weeks to analyze and interpret the data and prepare testimony. That would mean everything could be completed by the early part of December. Since classes at NCSU end on December 9, the week of December 12 would be especially convenient for me to testify.

> You also indicated an interest in my assisting you in the selection of the jury. I have done jury selection in about a dozen capital cases in North Carolina and feel that I have been beneficial in helping attorneys select an impartial jury. In a case such as this, where the attorney is court appointed, I ask that I be paid $100 per day for jury selection.

In his order denying defendant's motion for a continuance, the trial judge concluded that there had been "an adequate amount of time for the defendant and his counsel to prepare and present pretrial motions within the time limitations earlier imposed by this Court." We agree and reject defendant's arguments to the contrary.

While we have frequently addressed the issue of a defendant's right to a speedy trial, it should not be overlooked that this right is not exclusive to criminal defendants. Our Speedy Trial Act, N.C.G.S. § 15A-701, provides in pertinent part, that in granting a continuance, the judge must find that "the ends of justice served . . . outweigh *the best interest of the public* and the defendant in a speedy trial." N.C.G.S. § 15A-701(b)(7) (emphasis added). Inasmuch as defendant's trial had been delayed for four years, we would expect the trial judge to give serious consideration to additional motions on behalf of either the defense or the State which would result in further delay. Among the considerations in the present case would be the defendant's alleged need to gather information pertaining to pretrial publicity and community prejudice in preparation for his motion for a change of venue. This information, as is most often the case and ultimately was the case here, can be adequately gleaned without the assistance of an expert. *See State v. Watson*, 310 N.C. 384, 312 S.E. 2d 448 (1984); *State v. Stokes*, 308 N.C. 634, 304 S.E. 2d 184 (1983) (upholding the denial of funds to hire experts in the field of juristic psychology). *See also State v. Jerrett*, 309 N.C. 239, 307 S.E. 2d 339 (1983) (granting defendant a new trial for error in denying his motion for change of venue, without the assistance of a juristic psychologist); *State v. Richardson*, 308 N.C. 470, 302 S.E. 2d 799 (1983) (Dr. Luginbuhl presented the results of a survey in support of defendant's motion for change of venue. The motion was denied; this Court affirmed). A second consideration would be that while granting, in its discretion, defendant's motion for funds to hire a juristic psychologist, the trial court did so with an implicit

caveat: defendant was to be prepared to argue his motion for a change of venue on 7 November. In so doing, the trial judge allowed defense counsel a period of time which he considered reasonable to gather the necessary information. It was incumbent on defense counsel to meet the time limitation imposed. That the court's schedule was not convenient to Mr. Luginbuhl, defendant's proposed expert, does not render the court's schedule unreasonable.

Our review of this issue is normally limited to whether the trial court abused its discretion in denying a defendant's motion for a continuance. *State v. Mason*, 295 N.C. 584, 248 S.E. 2d 241, *cert. denied*, 440 U.S. 984 (1978). However, when a motion to continue is based on a constitutional right, the question is a reviewable question of law. *Id.; see State v. Horner*, 310 N.C. 274, 311 S.E. 2d 281 (1984). "Constitutional rights are not to be granted or withheld in the court's discretion." *State v. Farrell*, 223 N.C. 321, 327, 26 S.E. 2d 322, 325 (1943). Here it is defendant's contention that the trial court's ruling on his motion for a continuance denied him his sixth amendment right to effective assistance of counsel inasmuch as it deprived him of a fair opportunity to prepare and present his defense. Under the circumstances of this case, we cannot agree that the defendant was so deprived. Defense counsel were permitted approximately six weeks to prepare for the 7 November hearing on the motion for a change of venue. In light of the already substantial delay in bringing defendant to trial and the underlying reason for defendant's request for an additional delay, to wit: convenience of an expert afforded defendant as a discretionary matter, we find no error in the denial of the motion for a continuance.

[3] Defendant presents a forceful argument that the trial court abused its discretion in denying his motions for a change of venue. Defendant cited as support for the first motion, filed on 16 September, that Vance County is a small, largely rural county making it "particularly difficult to get a fair trial in cases such as this . . . because the jurors generally know each other and do not want to buck the community sentiment and favor conviction even though the evidence may be weak." Defense counsel also emphasized the racial nature of the case (a black man charged with murdering a white woman), and argued that in counties like Vance, "there is a long tradition . . . to convict on almost any

evidence to serve as a deterrent to blacks." Finally, defense counsel alleged that extensive pretrial publicity, including articles about the incident in the local *Henderson Daily Dispatch*, made a fair trial in Vance County impossible. The trial court denied the change of venue motion on 7 November 1983 after considering these arguments together with ten affidavits from county residents expressing the view that defendant could not receive a fair trial in Vance County.

Defendant's second motion for a change of venue was made during jury selection. This motion was based on the continuing publication of articles in the *Henderson Daily Dispatch*, one of which discussed the proposed testimony of SBI Agent Ludas that the palm print on the one dollar bill was made by the defendant. "[I]t is unreasonable to assume," stated the motion, "that the December 2, 1983 edition of the *Henderson Daily Dispatch* would not be read, despite warnings and admonitions by this Court." Defense counsel also alleged that eighty-seven of ninety-five prospective jurors had heard, read and discussed the case.

The third motion for a change of venue was filed on 1 December 1983 after the jury was selected but prior to its being impanelled. This motion included an analysis of the jury selection process and set forth the following assessment of the twelve jurors finally selected: Nine of the twelve jurors who were seated had heard, discussed and/or read about the case and the alleged incidents surrounding the crime but their prior knowledge would not prevent them from being fair and impartial. Two of the twelve jurors who were actually seated knew members of the Abbott family and one indicated that he had heard "street talk." Ten of the twelve jurors who were actually seated were at least familiar with the State's witnesses. Defense counsel reiterated that pretrial publicity and threats against the defendant's life indicated a need for a change of venue. Two additional motions were filed during trial, based primarily on publicity generated in the *Henderson Daily Dispatch*.

Defendant, in his argument to this Court, relies on our holding in *State v. Jerrett*, 309 N.C. 239, 307 S.E. 2d 339, citing numerous similarities between the facts in *Jerrett* and the facts in the present case. In *Jerrett* we granted the defendant a new trial for error in the trial court's denial of his motion for a change

of venue. Our holding was based on the totality of circumstances which included a unique combination of factors: Alleghany County, where the trial took place, had a population of under 10,000 people. It was a "small, rural and closely-knit county where the entire county was, in effect, a neighborhood." *Id.* at 256, 307 S.E. 2d at 348. The victim was a well-known and respected dairy farmer. One-third of the potential jurors acknowledged familiarity with the victim or some member of his family. Ten of the twelve jurors selected and both alternate jurors had heard about the case; four knew or were familiar with the victim's family; six knew or were familiar with the State's witnesses; and the foreman had heard a relative of the victim emotionally discussing the case. A deputy sheriff, a magistrate, the sales manager of the local radio station who traveled the county extensively and at least three attorneys (one who was subsequently appointed to serve as co-counsel for the defendant, and one who appeared with the State on behalf of the victim's family), all testified that it would be difficult to find jurors who had not already formed an opinion. The jury was examined collectively. There had been extensive pretrial publicity. We also note that defendant's trial took place less than a year after the crime was committed.

By contrast, Vance County, where this defendant was tried, had, in 1983, a population of 34,000 people. Henderson alone had a population of 13,000 people. While the county as a whole might be characterized as rural, it enjoys this characterization along with the majority of counties in North Carolina. Vance County's population, however, exceeds that which might qualify it as a "neighborhood." The victim, Geraldine Abbott, was undoubtedly known and respected in her community; however, there is no evidence that she was well-known throughout Vance County. Of the ninety-five jurors questioned, only four were excused for cause because they knew the victim or her family.[1] Furthermore, of the twelve jurors who served, six had never heard or read about the case, had never discussed it, and had formed no opinions. Of the remaining six jurors, four acknowledged some pretrial exposure at the time the crime was committed four years earlier. Two acknowledged reading something about the case just prior to trial.

1. It appears that defendant's notoriety exceeded the victim's. Nine potential jurors were excused for cause by the State because they knew the defendant or his family and could not be impartial.

Two jurors stated that they had known one of the victim's sons who had died years before.

As we pointed out in *Jerrett*, the right of county residents to try a defendant in the county where the crime is committed is not without limitation. Nevertheless "county residents have a significant interest in seeing criminals who commit local crimes being brought to justice. For this reason, only in rare cases should a trial be held in a county different from the one in which the crime was allegedly committed." *Id.* at 254, 307 S.E. 2d at 347. It is equally true, as pointed out by Justice Mitchell in his dissenting opinion in *Jerrett*, that undue emphasis on pretrial publicity or publicity during trial "inevitably creates the 'potential for needless friction between the rights of a free press guaranteed by the First Amendment to the Constitution of the United States and the defendant's right to trial by an impartial jury guaranteed by the Sixth Amendment.' " *Id.* at 273, 307 S.E. 2d at 357-58. Indeed, defendant acknowledges in his brief that "In these technological times of electronic communications, mass media, modern transportation and the like, the problem of pretrial publicity has become a prevalent factor to be considered in providing a fair trial by an impartial, indifferent jury."

It is within the framework of these two fundamental propositions that the weakness of defendant's arguments lies. Inherent in the first proposition is the recognition that every county has an *admitted interest* in the criminal justice system as it concerns the violation of a criminal law against one of its own citizens. That interest includes the apprehension of the wrongdoer and, where there is sufficient evidence to support a conviction, the punishment of the wrongdoer. Secondly, the residents have a constitutional right under the first amendment to the dissemination of information concerning the crime and matters related thereto. Thus, particularly in our many rural counties, one would expect to encounter a sense of outrage at the brutal murder of one of its residents. Nor would it be unreasonable to expect that many residents comprising the jury venire will have heard or read about the case. It is neither surprising nor unusual in the present case that many of the prospective jurors indicated familiarity with the case or the parties to the extent that they felt they could not be impartial. Furthermore, we have consistently held that where a defendant shows only that publicity consists of factual, non-

inflammatory news stories, a trial court's denial of motion for a change of venue is proper. *See State v. Richardson*, 308 N.C. 470, 302 S.E. 2d 799. The newspaper accounts in the present case were of such a non-inflammatory nature. We therefore hold that defendant has failed to show that under the "totality of circumstances," there was a probability of prejudice such as to deny defendant due process.

Although we are tangentially concerned with prejudice, bias and interest expressed by prospective jurors during the jury selection process as related to the "totality of the circumstances," the primary focus on a motion for a change of venue has been and remains on the jurors who were ultimately selected to determine defendant's guilt or innocence. As noted earlier, six of these jurors stated that they did not know the defendant and knew nothing about the case. The remaining six indicated that they had only vague recollections about the case and each indicated in some manner that he or she had formed no opinion of defendant's guilt or innocence, presumed the defendant innocent until proven guilty, and could render a fair and impartial verdict. Throughout the trial the jury was repeatedly admonished to avoid all media accounts of the trial and to refrain from discussing the case. We hold that defendant has failed to meet his burden of showing that he was deprived of a fair and impartial jury.[2] The trial judge properly denied defendant's motion for a change of venue.

[4] Defendant's next assignment of error concerns a technical argument involving a nontestimonial identification order issued by the court during the course of the trial. We find no merit in this assignment. On 1 December 1983 the State made an oral motion requesting that the defendant submit to giving an additional palm print for identification purposes in preparation for Agent Ludas' testimony concerning the palm print found on the one dollar bill discovered at the scene of the crime. The trial court granted this motion and allowed defendant a continuance to assess the results of the procedure. Defendant reasons as follows: The defendant was then in custody. The "judge's Order requiring

2. As required in order to meet his burden of showing actual prejudice, defendant exhausted his peremptory challenges. Juror Ball was seated over defendant's objection. Juror Ball had known the victim's deceased son in the 1950's. He stated unequivocally that he could be fair and impartial.

him to submit to additional fingerprinting was tantamount to an Order pursuant to G.S. 15A-274" (requiring suspect to submit to certain nontestimonial identification procedures). This Court in *State v. Irick*, 291 N.C. 480, 231 S.E. 2d 833 (1977) held that N.C.G.S. § 15A-271 did not apply to a defendant in custody. Therefore, concludes defendant, the trial court was without authority to issue the order, and the results of the procedure should have been suppressed.

In short answer to defendant's argument we point out that although N.C.G.S. § 15A-271 does not apply to an in-custody defendant, it does not follow that a trial judge is without authority to issue a nontestimonial identification order where the defendant is in custody. An order was not required. *See State v. Irick*, 291 N.C. 480, 231 S.E. 2d 833. The fact that the State chose to comply with the more restrictive procedures outlined in N.C.G.S. § 15A-271 in obtaining the order worked to defendant's advantage.

Nor do we agree with defendant's further argument that, although it might have acted within its legal authority, the trial court abused its discretion in ordering defendant to submit to an additional print. Defendant does not specify, nor can we conceive how defendant was prejudiced by the taking of his palm print during trial. Defendant knew well in advance of trial that Agent Ludas was expected to testify that the print found at the crime scene matched that of the defendant.[3] The procedure took less than five minutes. The trial court granted defense counsel's request for funds to be paid, in advance, to hire an independent fingerprint expert to analyze the results and the case was continued until the following Monday in order to permit counsel to reevaluate its case in light of the results. In short, both the trial judge and the prosecutor accommodated defense counsel well beyond that required.

[5] Defendant next contends that the trial court erred in denying his motion for a mistrial based on the admission into evidence of the victim's pocketbook, which evidence was later excluded.

3. Law enforcement authorities had access to defendant's palm prints as a result of an earlier felony conviction.

The record discloses that during direct examination of Henderson Police Officer Grissom, the witness was asked to identify numerous exhibits related to the crime. Among these exhibits was a brown floral pocketbook which was found in an abandoned house located on the same street as that on which the defendant lived. Officer Grissom also identified cards and other personal items belonging to Geraldine and Susie Abbott which were found inside the pocketbook. The State moved that the exhibits be received into evidence. The trial judge overruled defendant's objection and admitted the exhibits into evidence. However, following a fifteen minute recess during which defense counsel argued that the evidence was irrelevant, the trial judge reversed his prior ruling. The jury was instructed that the evidence was not to be considered. Defendant contends that the evidence was "so highly prejudicial that its effect cannot be erased from the minds of the jurors," and "error in its admission is not cured by its withdrawal and instruction of the Court not to consider it."

We agree that the evidence was properly excluded. No foundation was laid for its admission. The pocketbook was discovered approximately three weeks after the murder and there was no evidence to connect it to the defendant. For these same reasons, we cannot agree that defendant was prejudiced by the admission and subsequent withdrawal of the exhibits from evidence. The very remoteness which characterized this evidence, taken together with the trial judge's instruction to the jury to disregard it, leads us to the conclusion that if any, the probable influence of the evidence upon the minds of the jury in reaching a verdict was slight. *See State v. Rowland*, 263 N.C. 353, 139 S.E. 2d 661 (1964); *State v. Strickland*, 229 N.C. 201, 49 S.E. 2d 469 (1948). The assignment of error is overruled.

[6] Defendant contended at trial that there was insufficient evidence of premeditation and deliberation to support the submission of the case to the jury on a charge of first-degree murder. Although he assigns as error the denial of his motion for nonsuit, defendant makes no argument in this regard to us on appeal. Due to the serious nature of this case, we have nevertheless carefully reviewed the record and transcript and conclude that there was plenary evidence to support a conviction of first-degree murder. The viciousness and brutality of the attack upon this seventy-two year old victim was unprecedented in the experience of the physi-

cian conducting the autopsy. The numerous wounds, including defensive incisional wounds to the victim's hands and arms, her broken ribs, the evidence of strangulation and the evidence of sexual assault indicate that the victim underwent extreme physical pain and unspeakable psychological anguish prior to her death. This evidence is sufficient to support a theory that the murder was committed with premeditation and deliberation. *See State v. Fountain*, 282 N.C. 58, 191 S.E. 2d 674 (1972); *State v. Duboise*, 279 N.C. 73, 181 S.E. 2d 393 (1971). This assignment of error is overruled.

[7] Defendant raises one assignment of error concerning the sentencing phase of his trial. He argues that the trial judge erred in submitting two aggravating factors based on the same evidence, to wit: an attempt to commit rape on Susie Abbott. We agree. However, the error was committed without prejudice to the defendant. The two aggravating factors at issue, as submitted, were: (1) The murder was committed while the defendant was engaged in the commission of a crime of first-degree burglary *or an attempt to commit the crime of first-degree rape.* (2) The murder was part of a course of conduct in which the defendant engaged which included the commission by the defendant of other crimes of violence against other persons. In this regard, the trial judge instructed the jury that "[t]here is evidence from which you may find the commission of crimes of assault with a deadly weapon with intent to kill inflicting serious injury or the lesser included offense of assault with a deadly weapon inflicting serious injury, and as well, *the crime of attempted rape.*"

In addition to relying on the evidence presented at the guilt phase, the State offered the testimony of Susie Abbott during the sentencing hearing. This evidence, taken together, was sufficient to support these two aggravating factors without the necessity of relying on the crime of attempted rape. In fact, of the three crimes submitted to support these aggravating factors, *i.e.*, first-degree burglary, assault, and attempted rape, evidence of the attempted rape was unquestionably the weakest. Apart from the fact that Susie Abbott was found naked when witnesses arrived at the scene, evidence of the attempted rape depended on the testimony of Susie Abbott whose credibility was possibly reduced because of her handicap. On the other hand, there was plenary evidence to support the submission of the aggravating factor that

the murder was committed while the defendant was engaged in the commission of the crime of first-degree burglary. Without undue reliance on Susie Abbott's testimony, the jury had before it evidence that an intruder entered the home of Geraldine Abbott during the nighttime hours of 29 September with the intent to commit larceny or intent to commit rape.[4]

With respect to the second aggravating factor, that the murder was part of a course of conduct involving other crimes of violence, there was compelling evidence of the crime of assault with a deadly weapon inflicting serious bodily injury committed against Susie Abbott. During the guilt phase, numerous witnesses testified that Susie Abbott was discovered, close to death, bleeding from knife wounds inflicted over much of her body. Her throat had been cut and she displayed the scar to the jury. This evidence alone was more than sufficient to support the jury's finding that the murder was part of a course of conduct involving other crimes of violence. Thus, although submission of the crime of attempted rape was duplicative, it was also unnecessary, superfluous, and, as a result, harmless.

Where, as here, there is additional independent evidence to support both aggravating factors, thereby rendering the duplicative evidence unnecessary, the case for harmless error is significantly stronger than in those cases where this issue has previously been considered. In *State v. Goodman*, 298 N.C. 1, 257 S.E. 2d 569 (1979), the submission of two aggravating factors based on the same evidence in effect resulted in the necessity for entirely removing one of those factors from the jury's consideration. In assessing whether the erroneous submission in a capital

4. The physical evidence, as corroborated by Susie Abbott's testimony, would support these theories: With respect to the larceny, two one dollar bills were found loose on the floor. Susie Abbott testified that the intruder rummaged through their pocketbooks. The victims' pocketbooks were missing. Furthermore, in the absence of evidence of other intent or explanation for a breaking or entering in the nighttime, it can be inferred that the intent is to commit a larceny. *See State v. Sweezy*, 291 N.C. 366, 230 S.E. 2d 524 (1976); *State v. Hedrick*, 289 N.C. 232, 221 S.E. 2d 350 (1976). In the present case there was also evidence of an intent to commit rape based on evidence that Geraldine Abbott, the murder victim, was sexually assaulted and on evidence of the sexual assault on Susie Abbott. This would not preclude the trial court's submission or the jury's consideration of the substantive offense of attempted rape as a separate felony, in addition to the first-degree burglary.

case of an aggravating factor was harmless error, this Court in *Goodman* considered whether there was a reasonable possibility that the evidence complained of might have contributed to the imposition of the death penalty. *See State v. Taylor*, 304 N.C. 249, 283 S.E. 2d 761 (1981), *cert. denied*, --- U.S. ---, 77 L.Ed. 2d 1398, *reh. denied*, 77 L.Ed. 2d 1456 (1983) (finding no prejudicial error in the erroneous submission of an aggravating factor). *See also Zant v. Stephens*, --- U.S. ---, 77 L.Ed. 2d 235 (1983). In *Goodman* we found the error to be prejudicial primarily due to weaknesses in the State's primary evidence. In the present case, no such weakness exists. More important, however, the error complained of here did not result in the erroneous *submission* of either aggravating factor. Both were properly submitted based on other independent evidence. The question before us is whether the jury would have *found* both aggravating factors in the absence of the duplicative evidence. As noted earlier, there was ample evidence of first-degree burglary of the Abbott residence, and assault with a deadly weapon against Susie Abbott to support the jury's findings. Finally, in light of the vicious brutality of these crimes and the absence of any significant factors in mitigation, there could be no reasonable possibility that consideration of the crime of attempted rape under one, the other, *or both* aggravating factors might have contributed to the imposition of the death penalty in this case. The assignment of error is overruled.

[8] Neither the defendant nor the State presents us with an argument on proportionality. Pursuant to our statutory duty we have carefully reviewed the transcript, record on appeal, and other pertinent material and find nothing which would indicate that the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor. Our review of cases in the proportionality "pool" provides us with no reason to vacate this death sentence.

The victim, a seventy-two year old woman, was brutalized in her home. She was strangled, stabbed, and sexually assaulted. Defendant sexually assaulted her mentally retarded daughter and, in addition to numerous stab wounds, defendant inflicted a nearly fatal cut to this second victim's throat. In fact, the knife wounds were inflicted with such force that the murder weapons, a serrated steak knife and a pocketknife, were both broken when discovered at the scene of the crime. Defendant offered little in

mitigation of this outrageous offense. Considering both the crime and the defendant, the circumstances of this case fall well within the class of first-degree murders in which we have previously upheld the penalty of death. *See State v. Craig*, 308 N.C. 446, 302 S.E. 2d 740, *cert. denied*, --- U.S. ---, 78 L.Ed. 2d 247 (1983); *State v. Williams*, 308 N.C. 47, 301 S.E. 2d 335, *cert. denied*, --- U.S. ---, 78 L.Ed. 2d 177, *reh. denied*, --- U.S. ---, 78 L.Ed. 2d 704 (1983); *State v. McDougall*, 308 N.C. 1, 301 S.E. 2d 308, *cert. denied*, --- U.S. ---, 78 L.Ed. 2d 173 (1983); *State v. Brown*, 306 N.C. 151, 293 S.E. 2d 569, *cert. denied*, 459 U.S. 1080 (1982); *State v. Smith*, 305 N.C. 691, 292 S.E. 2d 264, *cert. denied*, 459 U.S. 1056 (1982); and *State v. Rook*, 304 N.C. 201, 283 S.E. 2d 732 (1981), *cert. denied*, 455 U.S. 1038 (1982). We do not here discuss these cases further.

The facts of each case are fully set out in the opinions. We have likewise reviewed all cases in the pool in which life sentences have been imposed. We find none that are applicable. We deem it appropriate, however, to reiterate the legal principles which have guided us in reaching our result today.

[9] Although the United States Constitution does not require a comparative proportionality review, *Pulley v. Harris*, --- U.S. ---, 79 L.Ed. 2d 29 (1984), that requirement is statutorily mandated. N.C.G.S. § 15A-2000(b)(2). In *State v. Williams*, 308 N.C. 47, 301 S.E. 2d 335 this Court discussed at some length its approach in conducting a proportionality review. We rejected any approach that would include "mathematical or statistical models involving multiple regression analysis or other scientific techniques, currently in vogue among social scientists" . . . with " 'seductive appeal of science and mathematics.' " *Id.* at 80, 301 S.E. 2d at 355. We concluded that "[t]he factors to be considered and their relevancy during proportionality review in a given capital case *are not readily subject to complete enumeration and definition.* Those factors will be as numerous and as varied as the cases coming before us on appeal." *Id.* (Emphasis added.) We stated in *Williams*, and emphasize now, that we believe our approach to proportionality review achieves its goal of " 'substantially eliminat[ing] the possibility that a person will be sentenced to die by the action of an aberrant jury.' " *Id.* at 82, 301 S.E. 2d at 356.

[10] Thus, although the cases in the pool offer guidance in determining whether a sentence of death in a particular case is excessive or disproportionate, ultimately each case must rest on its own unique facts. An analysis which involves further inquiry into the endless combinations, variations, permutations, and nuances that an in-depth review of every case in the pool would yield would be a fruitless endeavor. We are satisfied that the facts of this case fully support the jury's decision to recommend a sentence of death.

No error.

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

STATE OF NORTH CAROLINA v. CRAIG McCRAY

No. 204A84

(Filed 8 January 1985)

1. **Homicide § 9— first-degree murder of prison inmate—response to taunting—no self-defense**

In a prosecution for first-degree murder, there was no evidence of self-defense where there was a great deal of animosity and tension between defendant, a prison inmate, and deceased, another inmate, which had been brought on by deceased's taunting and intimidating defendant; where defendant, after deceased pointed a finger and laughed at him, went to the back of his cell block to get a knife, went to a different cell block where neither inmate lived and stabbed deceased; and where defendant chased the fleeing decedent through a number of cell blocks, ignoring the shouts and whistles of the prison guards, cornered deceased at a stairway facing a locked door, and repeatedly stabbed deceased, switching hands and continuing when another inmate grabbed him.

2. **Homicide § 9.4— first-degree murder of one prison inmate by another—defense of home not appropriate**

The doctrine of defense of home did not apply where defendant, a prison inmate, responded to taunts from decedent, another inmate, by attacking decedent in a cell block in which neither lived, then chasing decedent through a number of cell blocks and corridors while decedent ran for his life.

3. **Homicide § 19.1— first-degree murder—evidence of deceased's violent character—properly excluded**

In a prosecution for first-degree murder where the State's and defendant's own evidence clearly indicated that defendant was the aggressor and initiated

the fatal assault, evidence of decedent's character and reputation as a violent and dangerous person was properly excluded.

4. **Homicide § 27.1— first-degree murder—instruction on voluntary manslaughter—properly denied**

Defendant was not entitled to a jury instruction on the lesser included offense of manslaughter based on a sudden heat of passion triggered by terror where defendant, a prison inmate, responded to repeated taunts by another inmate by calculatedly retrieving a hidden knife, going to a different cell block and attacking the other inmate without warning, then chasing and cornering the other inmate, stabbing him a total of twenty times despite shouts and whistles from prison guards, pleas from the victim, and attempts to grab the knife, and stated after the attack that he meant to kill the deceased.

5. **Criminal Law § 86.2— first-degree murder—cross-examination of defendant about prior criminal acts—no error**

In a prosecution for first-degree murder by a prison inmate using a knife, there was no error in allowing the district attorney to cross-examine defendant about specific acts committed by defendant which resulted in convictions for seven robberies, several of which involved a knife. A criminal defendant who takes the stand in his own behalf may be asked whether he has committed specific criminal acts.

6. **Criminal Law § 75.12— first-degree murder—incriminating statement—no Miranda warning—admitted for impeachment**

In a prosecution for first-degree murder, there was no error in admitting defendant's statement that he meant to kill decedent where the statement was made without any *Miranda* warning and in response to an officer's question about what happened, where defendant's statement was introduced only on rebuttal after defendant denied that he meant to kill decedent and denied making the statement, and where the court conducted a *voir dire* hearing before admitting the evidence.

7. **Criminal Law §§ 85, 97.2— first-degree murder—only one of five character witnesses allowed—no abuse of discretion**

There was no abuse of discretion where the court allowed defendant to present only one of five character witnesses; moreover, any possible error is harmless within the meaning of G.S. 15A-1443(a) or (b) given the overwhelming evidence that defendant sought out, attacked, chased, and killed decedent.

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

BEFORE *Brown, J.*, at the 12 December 1983 Criminal Session of Superior Court, HALIFAX County, defendant was convicted of first-degree murder. Pursuant to N.C.G.S. § 7A-27(a), he appeals from a judgment sentencing him to life imprisonment. Heard in the Supreme Court 10 September 1984.

Defendant was tried upon an indictment, proper in form, which alleged that he murdered Alphonso Revell on 19 December 1982. At that time defendant and Revell were both confined as inmates in the Caledonia Prison in Halifax County. On 15 December 1983, the jury found the defendant guilty of first-degree murder. Following a sentencing hearing conducted pursuant to N.C.G.S. § 15A-2000, the jury recommended that defendant be sentenced to life imprisonment. Judge Brown entered judgment sentencing defendant to life imprisonment; this sentence to commence at the expiration of the sentence for which the defendant was imprisoned when the killing occurred.

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

James S. Livermon, Jr., for the defendant-appellant.

MEYER, Justice.

The defendant was charged with the murder of fellow prison inmate Alphonso Revell. At trial he admitted killing Revell but testified to the effect that he did so in self-defense. The majority of defendant's assignments of error are addressed to the trial court's rulings on the issue of self-defense. We find no reversible error and affirm the defendant's conviction and sentence.

I.

In its case-in-chief, the State presented the testimony of a number of prison employees and officials who witnessed various portions of the events just prior to Revell's death.

Gary Cook testified that he was employed by the North Carolina Department of Corrections at the Caledonia Prison Unit on 19 December 1982. At approximately 7:15 or 7:20 a.m., he had been on duty in Building Number One, where the intensive management and hospital wings are located. As he was on his way to Building Number Two, a dormitory building, Cook heard a guard's whistle summoning others for assistance.

Cook entered Building Number Two and ran down the corridor separating Cell Block "A" from Cell Block "B", until he reached a stairway approximately 45 feet away. Cook noticed blood on the hallway floor and wall in front of "B" Block. He

climbed the stairway to the second floor where "E" and "F" Blocks are located. Following the trail of blood, Cook eventually went around "F" Block and discovered inmate Alphonso Revell lying at the bottom of a stairway against a locked door. Defendant McCray was standing beside a Department of Corrections officer. McCray had a great deal of blood covering his body and a bloody homemade prison knife (known as a "shank"), approximately 8 to 10 inches long, in his hand.

Cook and another officer removed McCray from the scene and strip-searched him. Cook observed that McCray did not have any cuts, wounds, or other physical damage to his body, although he observed a large amount of blood on McCray.

On rebuttal after defendant had testified on his own behalf, Cook testified that while searching McCray, he asked McCray what happened. McCray responded, "I was tired of this man f---ing with me; I meant to kill him."

Two other prison guards testified to the effect that defendant had chased Revell through a sizeable portion of Building Two and continued to chase Revell and stab him with a "shank" despite efforts to stop him.

Orlando Lewis testified that he was on the second floor of Building Two near "E" and "F" Blocks at approximately 7:15 to 7:20 a.m. While he was conducting a routine search of the barber shop, he observed inmate Revell running away from McCray on the floor below. McCray was chasing Revell, and Revell's shirt had blood around his lower front abdomen and back. McCray had a "shank" in his right hand. Lewis ran behind them and yelled for McCray to stop. McCray looked back at Lewis and continued to chase Revell. At this point, Lewis began to blow his whistle continuously.

Lewis then went to unlock a door to allow other officers access to the area. By this time, McCray and Revell were at the stairway. McCray was behind Revell and had his left arm wrapped around Revell, holding onto him tightly. McCray continuously stabbed Revell with the "shank," which he held in his right hand. Lewis again yelled to McCray to stop. According to Lewis, Revell yelled "help" three times, each time his voice getting lower. McCray continued to stab Revell. After other prison

officers arrived and had McCray in custody, McCray turned and kicked Revell in the head as Revell lay at the base of the stairway.

Jeffrey C. Ritter testified that he was on duty in the dining hall of the first floor of Building Two on the morning in question. Ritter heard a whistle and ran to Door 353, which was locked. The door was located at the base of the stairway leading up to "E" and "F" Blocks (fifteen feet away). He saw McCray and Revell standing at the top of the stairway. McCray was holding Revell tightly with his left hand and was stabbing Revell with a homemade knife in his right hand. According to Ritter, Revell was yelling, "Stop stabbing me!" and "Help!" as he tried to pull away from McCray.

Ritter, who had been blowing his whistle the entire time, continued to watch as Revell and McCray started falling down the steps and landed on a flat area. There, Revell again tried to pull away from McCray, causing the two to fall further down the stairs. Ritter yelled at McCray to stop, but McCray did not respond. At the base of the steps, McCray straddled Revell and continued to stab him. Revell yelled, "Help! Stop!", very faintly as the stabbing proceeded. At this point, Ritter saw a hand grab McCray's right hand. McCray then shifted the knife to his left hand and lunged with the knife into Revell's chest. When McCray withdrew the blade, there was a gush of blood.

Another prison guard, Jasper Howard, testified that upon arriving at Door 353, he observed inmate Revell lying on his back in a pool of blood. Inmate Alonzo Willis was restraining McCray, who was still trying to get to Revell. In McCray's hand was a homemade prison knife. Other prison officers came down the stairway and shouted to McCray to drop the knife, which he did. Revell attempted to get up, but was unable to. Howard got a stretcher and helped to take Revell to the prison hospital. Howard did not see any weapons in the area, other than the knife wielded by McCray.

Grady Massey testified that he was a personal health assistant employed by the Department of Corrections at Caledonia Prison on December 19, 1982. At approximately 8:00 a.m., he visually examined Craig McCray to make sure that he was not physically injured in the affray. The visual examination revealed

no cuts, bleeding, or injuries of any kind. McCray told Massey that he was not injured.

Halifax County Deputy Sheriff Charles E. Ward testified that he observed the dead body of Alphonso Revell at approximately 10:30 a.m. on December 19, 1982. He observed at least 13 stab wounds on Revell's back, side, and chest.

The final State's witness was Dr. John Allen Wolfe. Wolfe testified, as an expert forensic pathologist, about the autopsy he performed on the body of Alphonso Revell in the office of the Chief Medical Examiner at Chapel Hill on December 20, 1982. During the autopsy, Dr. Wolfe observed a total of 20 stab wounds, eight of which passed into the body and penetrated vital body structures resulting in a large amount of bleeding into Revell's chest and abdomen. Ten of the stab wounds were to the back. There were four major wounds to Revell's right side, all of which resulted in severe injuries. There was one stab wound to the right upper chest. The wounds varied in depth, with the deepest wounds penetrating five and one-quarter inches. In Dr. Wolfe's opinion, Alphonso Revell died as the result of severe blood loss from the multiple stab wounds he received.

On cross-examination, Dr. Wolfe testified that Revell was 23 years old, six feet one and a half inches tall and weighed 172 pounds.

The defendant presented the testimony of two witnesses. On direct examination, defendant, Craig McCray, testified that he was 30 years old and had been in prison for a total of 12 years. At the time of the stabbing incident he was serving a sentence of 25 to 50 years imprisonment for seven counts of armed robbery. McCray testified that he did not know Alphonso Revell personally, but had seen him from time to time because they slept in the same dormitory.

The first actual contact that defendant had with Revell came in December 1982 and arose out of an incident concerning another inmate at Caledonia. That inmate had asked McCray to help protect him from Revell, defendant agreed to do so, and this agreement created animosity between Revell and the defendant. Shortly thereafter, Revell tried to provoke a fight with defendant and defendant "just played it on off" in an attempt to avoid a con-

frontation. According to McCray, within the prison community this behavior on his part was "the sign of weakness," which other inmates would be likely to take advantage of when the opportunity arose.

McCray testified further that Revell began to threaten him about what he was going to do. According to McCray, ". . . he [Revell] kept on making verbal statements about what he was going to do to me. . . . He would say that, I'm gonna get you—you know—I' gonna hound you too—you know—kept on making statements." McCray took Revell's statements as threats and concluded that at some point Revell would sneak up on him and hurt him. In the defendant's own words, the situation "kept on brewing and brewing." McCray testified that he went to Revell to talk to him but that Revell just looked at him and laughed. According to McCray, "He kept on making statements to other people about what he was going to do, then I'm saying if he don't stop, if he keeps on pushin' me, I'm going to have to do something sooner or later." In the days immediately preceding the killing, McCray and Revell eyed each other warily. McCray requested and received a transfer from "G" Block (where they both were housed) to "B" Block. However, Revell continued to harass McCray by watching him, by "circling" him, and by making inquiries about him in "B" Block. On the day before the stabbing, Revell, clasping a "shank" at his side, "circled" McCray and then walked away, stopped at a gate and pointed his finger at McCray. Later that day, Revell asked another inmate which bed McCray slept in and that inmate told him that McCray slept in the top bed. Revell then walked by and "circled" with his hand tucked in his coat pocket.

McCray testified that, "I knew he was trying to close in on me . . . I know I can't do nothing else but fight 'cause I ain't got nowhere else to go . . . I was afraid of the harm he could do to me. Yes, I was afraid of him." McCray rejected going to prison authorities because it would adversely affect his reputation among his prison peers and would make him vulnerable.

On the morning of the killing, Alphonso Revell came over to "B" Block, pointed to McCray, and started to laugh at him. Revell left and went to "A" Block to get a cup of coffee. McCray then testified that:

He [Revell] had went back and got a coffee from another inmate. He was drinking coffee. So he came in and when he saw me coming, he watched me. Then he went in and set the coffee down. So by this time I'm just up on him. So at this time he shuffling—he shuffling. He watching me. So at the time—

* * *

So at this time I'm approaching so he start shuffling. So when I gets up to him I pulls out my shank. He looks at me. He do like—he flinched. I stabbed at him and hit him in the neck. He jumped between the beds, he reaching down, so I swung at him again and another inmate approached right there and he flinched so I backed up. I'm looking at him. He steady—Alphonso steady flinching so I'm steady looking at him like this right here, my hands like I got them now—you know—at the time everything happened so spontaneously, I'm jumpy. I stabbed him again and he ran out then jumped down through the beds and ran to the door. He ran to the door. He stopped and did like this and he looked at me—you know—and he started back coming towards me again—you know—so I started walking towards him and started running at him and he broke out and started running up the stairway and I kept chasing him, chasing him, chasing him until we go to the bottom of the stairs and I just snapped (snapped fingers). We was on the staircase. He ran under me. He ran up and under me tried to jack me up and I spreaded my legs and then I just kept stabbin him.

* * *

So at this time when he ran back up to me and I spread my legs and started stabbing him, we fell down the steps. I fell on my back and tossed over—I turned him over. I stabbed him and he grabbed my arm. We steady struggling, steady struggling, and at the time another inmate from the shop grabbed my hand, and I was just—I wasn't there—you know—and when I became conscious of where I was at—you know—Alphonso was laying on the floor after I got up and then when I got up Alphonso tried to get back up and I still had the shank in my hand so other inmate stepped between us—you know—and the police was coming in—officers was

> coming in so I dropped the shank on the floor. He reached to pick the shank up so I kicked him and then other inmate pushed me back and then the officers grabbed me by the shoulder and handcuffed me and took me in the back lobby and then from there—you know—to segregation.

McCray also testified that when he approached Revell in "A" Block, he assumed that Revell was ready to fight and that Revell was armed. McCray testified that he knew of Revell's character and reputation in the prison as a violent fighting man and stated that, "Every time I had seen the man he usually have a shank in his possession or a shank in the block or somewhere around." McCray said nothing to Revell as he advanced and explained that he attacked Revell because:

> . . . 'cause I know sooner or later that he could hit me—he could stab me any time he get ready. He could do what he wanted to do 'cause I was trying to get away from him by not showing no sign that I would advance on him or try to straighten it out or do anything that just—when you show kindness to a person or weakness or anytime you humble yourself in any type of way. It could be in relenting, any type of humbleness is a sign of weakness. . . .

When specifically asked by defense counsel about threats that Alphonso Revell made to him McCray testified that:

> He kept telling me, say, I ain't going to do nothing to you—you know—if I want to do something to you, I can get you any time I get ready—you know—this and that there—you know—I kept telling him, I say, Well, man, why you keep on telling other inmates you gonna do this and do that there—you know—he say, Don't even worry about it—you know—we goina handle this here—you know—then he would come back. After he keep leading on, he say—then he would say, What you want to do—you know—and I tell him—you know—like—hey, man—you know—like—it ain't got to be like this—you know—he come back with another statement—you know—like—he'd just come by sometime, he'd just shake his finger at me and laugh—you know—I'd shuck it on off—you know—or he'd tell some other inmate about what he was—.

The defendant concluded his direct examination testimony by saying that he was five feet seven inches tall and weighed 169 pounds. He was a weight lifter and had won several trophies when he was on the Central Prison AAU Weight Lifting Team.

On cross-examination, the defendant testified that after Alphonso Revell shook his finger at McCray and laughed at him from the hallway separating "A" and "B" Blocks, McCray went from the doorway of "B" Block to the sink at the back of "B" Block and got his knife. He walked from the back of "B" Block to the doorway (approximately 25 feet), crossed the hallway into "A" Block, walked to where Revell was standing in the back of "A" Block, and struck Revell in the neck with the knife.

Following the defendant's testimony, defense counsel attempted to present the testimony of five prison inmates, Byron J. Stevens, Keith Ward, Clinton Thomas, Charles C. Morrow and Joe Andrew. In essence, these witnesses were prepared to testify that Alphonso Revell had a bad reputation as a violent and dangerous fighting man and that McCray had a good reputation as a non-violent individual. In addition, Thomas, Morrow and Luther were prepared to testify that in the days immediately preceding 19 December 1982, they overheard the decedent, Alphonso Revell, make statements to his associates that he was going to attack or kill Craig McCray.

Prior to calling Stevens, Ward, Thomas, Morrow and Luther, the trial judge informed defense counsel, outside the presence of the jury, that he would sustain objections to any evidence the defendant intended to offer as to the character and reputation of the deceased as a violent and dangerous person because there was no evidence of self-defense arising from the evidence thus far presented. Additionally, the judge limited the number of character witnesses that defendant could present on his own behalf. However, the trial judge did allow preservation of their testimony for the record.

The only other witness that defendant was permitted to present to the jury was fellow inmate Charles C. Morrow. Morrow was called as a character witness and he testified that defendant McCray's character and reputation at the time of the killing at Caledonia Prison was good.

At the conclusion of the trial, the court refused to charge the jury on the issue of self-defense and refused to allow defense counsel to argue self-defense as a theory of defense to the jury in his closing argument.

II.

The principal question presented by this appeal is whether the trial court erred in ruling that, as a matter of law, there was no evidence of self-defense arising from the testimony of the defendant. Based upon this ruling, the trial court prohibited the defendant from offering witnesses who were prepared to testify about the victim's reputation as a dangerous and violent man, refused to charge the jury on the issue of self-defense, and refused to allow defense counsel to argue self-defense as a theory of defense to the jury in his closing argument. The defendant assigned error to these rulings and the question of self-defense forms the primary basis of his appeal.

In his brief, the defendant concedes that the evidence reflects that on the morning of the killing, the defendant was the aggressor and precipitated the fatal encounter, thereby forfeiting his right of self-defense. However, defendant contends that these events should not be viewed in isolation. Defendant ardently argues that when the long-standing situation between the parties is taken into account, the evidence may be fairly read to demonstrate that the deceased was actually the aggressor and that the defendant was simply initiating an attack which would prevent the deceased from ultimately killing the defendant. According to the defendant, the fatal encounter was set in motion by the victim earlier in the month when the victim goaded and threatened the defendant. In addition, the defendant asserts that the evidence shows that he was entitled to the right of self-defense under the doctrine of home or habitat. We do not agree.

A.

[1] The critical question presented is whether there was any evidence of self-defense presented in this case. In resolving this question the facts are to be interpreted in the light most favorable to the defendant. *State v. Watkins*, 283 N.C. 504, 196 S.E. 2d 750 (1973).

"A person may kill in self-defense if he be free from fault in bringing on the difficulty and it is necessary, or appears to him to be necessary to kill so as to save himself from death or great bodily harm." *State v. Davis*, 289 N.C. 500, 509, 223 S.E. 2d 296, 302, *death penalty vacated*, 429 U.S. 809 (1976). Accordingly, to be entitled to an instruction on self-defense a defendant must present evidence tending to show (1) he was free from fault in the matter, and (2) it was necessary, or reasonably appeared to be necessary, to kill in order to protect himself from death or great bodily harm. *State v. Spaulding*, 298 N.C. 149, 257 S.E. 2d 391 (1979).

The requirement that a defendant must be free from fault in bringing on the difficulty before he may have the benefit of self-defense ordinarily means that he himself must not have precipitated the fight by assaulting the decedent or by inciting in him the reaction which caused the homicide. *State v. Jennings*, 276 N.C. 157, 171 S.E. 2d 447 (1970).

"[T]he right of self-defense rests upon necessity, real or apparent; and, in the exercise of his lawful right of self-defense, a person may use such force as is necessary or apparently necessary to protect himself from death or great bodily harm. (Citation omitted.) In this connection, the full significance of the phrase 'apparently necessary' is that a person may kill even though to kill is not actually necessary to avoid death or great bodily harm, if he believes it to be necessary and has a reasonable ground for that belief. The reasonableness of his belief is to be determined by the jury from the facts and circumstances as they appeared to him at the time of the killing." *State v. Gladden*, 279 N.C. 566, 572, 184 S.E. 2d 249, 253 (1971).

Application of these principles to the facts in the case under discussion reveals that: (1) the defendant was not free from fault, and (2) there was no necessity—real or apparent—for the defendant to kill in order to protect himself from death or great bodily harm at the time in question. Defendant's evidence was to the effect that in the days preceding the fatal encounter a great deal of animosity and tension between the deceased and McCray was generated by the actions of the deceased in taunting and intimidating the defendant. Revell had repeatedly signaled the defendant, by "circling" and pointing to him, that he was after the defendant and might come and "get" defendant any time he was

ready to. Nevertheless, in the time immediately prior to the fatal attack, the defendant readily admitted that the deceased was simply standing and shuffling his feet when the defendant, without warning, attacked him—striking the first blow with a knife which cut the deceased's neck. We are not persuaded by defendant's argument that Revell should be considered the aggressor in the fatal affray by reason of his prior actions.

The evidence, when viewed in the light most favorable to the defendant, indicates that he was not without fault and voluntarily and aggressively initiated an armed attack upon the deceased on the morning of 19 December 1982. The evidence plainly shows that on the morning in question, Revell came to Cell Block "B" where the defendant lived, pointed his finger at the defendant and laughed at him. After this, Revell left and went across the hall to Cell Block "A", where neither the defendant nor Revell lived. The defendant then went to the sink at the back of Cell Block "B", got his "shank" which was hidden there, left his cell block and entered Cell Block "A" looking for Revell. He found Revell drinking coffee and without warning, defendant advanced and stabbed Revell in the neck. Although he assumed Revell was armed with a "shank," no weapon was found. When Revell attempted to flee, the defendant chased him through a number of cell blocks, ignoring the shouts and whistles of the prison guards and cornered Revell at a stairway facing a locked door. There, McCray repeatedly stabbed Revell, despite Revell's pleas. When another inmate attempted to grab defendant's right hand, defendant switched the knife to his left hand and continued stabbing Revell.

We hold that upon these facts no evidence of self-defense is presented as a matter of law. The most that can be said of the events preceding the fatal encounter is that they shed light on the motive for the killing. It appears that defendant sought out and attacked Revell in order to stop Revell from intimidating and ridiculing defendant for his perceived weakness in front of other inmates. By his words, Revell had let defendant know that he intended to keep taunting defendant, that he wasn't "going to do nothing" to defendant, but that *if* he wanted to, he could get defendant "any time I get ready." According to defendant, the situation was such that *he* was "going to have to do something sooner or later." Rather than take any more abuse, defendant

decided to act before Revell did something to hurt him. In defendant's own words, "I was tired of this man f---ing with me; I meant to kill him."

Where a defendant aggressively seeks out his victim and brings on the fatal attack by his own actions, he may not avail himself of the defense of self-defense. *State v. Watkins*, 283 N.C. 504, 196 S.E. 2d 750; *State v. Brooks*, 37 N.C. App. 206, 245 S.E. 2d 564 (1978). All of the evidence presented tended to show that the defendant was the aggressor in the fatal affray. No evidence was presented which indicated that an attack from Revell was either made or was imminent. Accordingly, defendant may not claim that he was without fault and that his attack upon Revell was "apparently necessary" *at the time of the killing.*

[2] Nor are we persuaded by defendant's argument that his evidence should be considered in light of the legal doctrine of "defense of home." The defendant asserts that he had no duty to retreat in the face of Revell's intimidation and could "stand his ground, repel force with force so as to overcome the assault of another while the defendant was in his home. . . ." The defendant contends that the entire Caledonia Prison is to be considered his "home" for purposes of his argument that he had no necessity to retreat from Revell. According to the defendant, his "home and his curtilage" included "the prison, its cells, its dorms, its building and its surroundings within the guarded fences."

Ordinarily, when a person who is free from fault in bringing on a difficulty is attacked in his own home or on his own premises, the law imposes on him no duty to retreat before he can justify his fighting in self-defense. The person is entitled to stand his ground, to repel force with force, and to increase his force to overcome the assault and to secure himself from harm. *State v. Johnson*, 261 N.C. 727, 136 S.E. 2d 84 (1964). The evidence in the case under discussion does not warrant application of this rule because: (1) the defendant was not free from fault because he was the aggressor, (2) the defendant was not physically attacked by the victim, and (3) the defendant was not defending his habitation.

By his own testimony, the defendant was housed in Cell Block "B." Revell came to Cell Block "B" that morning, but left after taunting and laughing at the defendant. Revell went to Cell Block "A"—where neither man lived—to get some coffee. The

defendant got his "shank," left his cell block, found Revell in Cell Block "A", approached and stabbed him in the neck without warning. Clearly, the defendant never had to retreat because he was the attacker. Rather, the facts show that defendant chased Revell through a number of cell blocks and corridors while Revell ran for his life. Furthermore, the entire Caledonia Prison simply may not be considered as the defendant's "home" for purposes of the self-defense and defense of one's habitation doctrines. The "defense of one's habitation" rule has absolutely no application in this case. Accordingly, the trial judge correctly concluded that no evidence of self-defense was presented by the defendant as a matter of law.

B.

[3] In cases where an issue of self-defense is properly raised, evidence of a homicide victim's violent character is admissible to show the defendant's reasonable apprehension of death or bodily harm, if the defendant was aware of the decedent's reputation as a violent and dangerous fighting man. *State v. Winfrey*, 298 N.C. 260, 258 S.E. 2d 346 (1979). It is also admissible to shed light upon who the aggressor was. *Id.* Consequently, where, as in this case, the State's and the defendant's own evidence clearly indicates that the defendant was the aggressor and initiated the fatal assault, no issue of self-defense arises and the trial judge may properly exclude evidence of the decedent's character and reputation as a violent and dangerous person because it is not relevant to the issues presented. Therefore, the defendant's assignment of error with regard to this ruling is without merit.

C.

Defendant raises several issues by his final assignment of error relating to the question of self-defense. First, he argues that the trial judge erred by not charging the jury on the issues of self-defense and defense of one's home and by not allowing defense counsel to argue these theories to the jury. Next, the defendant asserts that the trial judge erred by not allowing him to argue that he killed Revell in the sudden heat of the passion of terror. According to the defendant, his "terror" robbed the crime of malice thereby requiring the trial judge to submit the lesser included crime of voluntary manslaughter to the jury.

[4] For the reasons set forth in Part II, A & B of this opinion, we hold that this assignment of error is without merit as to the

doctrines of self-defense and defense of one's habitat. In his second argument, defendant cites *State v. Jennings*, 276 N.C. 157, 171 S.E. 2d 447, for the proposition that "terror" can trigger a "sudden heat of passion" which can reduce a homicide from murder to manslaughter. While this may be true as an abstract proposition, in this case the facts in evidence clearly refute the assertion that the defendant acted under the "sudden heat of passion" of terror.

The evidence reveals that defendant was annoyed and antagonized by Revell's actions. In the defendant's own words, the situation "kept on brewing" and if Revell did not stop taunting him, he was "going to have to do something sooner or later." After the most recent episode, the defendant calculatedly retrieved his knife from its hiding place in Cell Block "B" and went to Cell Block "A" where he attacked Revell without warning. Defendant continued to chase Revell and eventually cornered him at a stairway blocked by a locked door. Despite shouts and whistles from the prison guards, the pleas of his victim, and attempts to grab the knife from his right hand, defendant continued to stab Revell a total of 20 times. Following the attack, defendant made a statement that he *meant to kill the deceased.*

These simply may not be considered the actions of a terrified man. Rather, they are the actions of a man angry at the taunts of the victim challenging the defendant's status in the prison community. Such taunts do not constitute sufficient provocation to raise a "sudden heat of passion" which can rob the crime of malice and reduce it to manslaughter. *State v. Watson*, 287 N.C. 147, 214 S.E. 2d 85 (1975).

In summary, it is clear that the defendant was not entitled to a jury instruction on the lesser included offense of manslaughter. Nor was he entitled to argue this theory to the jury. The trial judge correctly refused to charge the jury on these matters as they were not supported by the evidence. *State v. Jennings*, 276 N.C. 157, 171 S.E. 2d 447. This assignment of error is overruled.

III.

[5] The defendant testified on direct examination that he had been an inmate within the prison system for about twelve years and was currently serving a prison sentence of twenty-five to fif-

ty years imprisonment for seven counts of armed robbery. He did not elaborate on the circumstances of the crimes. On cross-examination, and over the defendant's objection, the district attorney was permitted to inquire into the specific acts committed by the defendant which resulted in the seven robbery charges of which he was convicted. Several of the robberies were committed while the defendant was armed with a knife. Without citing any authority, the defendant contends that the district attorney's "needless specific questioning . . . exceeded the bounds of recognized and accepted limits of cross-examination and thereby the defendant was materially and substantially prejudiced" in his right to a fair trial. This contention clearly lacks merit.

It is well established that a criminal defendant who takes the stand as a witness in his own behalf may, for purposes of impeachment, be asked whether he has committed specific criminal acts or has been guilty of specific reprehensible conduct. *State v. Beaty*, 306 N.C. 491, 293 S.E. 2d 760 (1982); *State v. Gainey*, 280 N.C. 366, 185 S.E. 2d 874 (1972). Therefore, the trial judge properly overruled the defendant's objections to this line of questioning.

IV.

[6] Moments after the defendant killed Alphonso Revell, he made an incriminating statement to Corrections Officer Gary Cook. Without giving the defendant any *Miranda*[1] warning, Cook asked the defendant, "What happened?" Defendant responded, "I was tired of the man f---ing with me. I meant to kill him." The State did not introduce the incriminating statement into evidence during its case-in-chief.

On cross-examination, the defendant denied that he meant to kill the decedent and denied making any statement to Cook that he meant to kill Revell. In rebuttal, the State called Officer Cook for purposes of impeaching the defendant under the rule of *State v. Overman*, 284 N.C. 335, 200 S.E. 2d 604 (1973) and *Harris v. New York*, 401 U.S. 222, 28 L.Ed. 2d 1 (1971).

Upon the defendant's objection to Cook's testimony, the trial judge sent the jury out and held a voir dire hearing to determine the admissibility of defendant's statement to Cook. Defense counsel then began to question Cook as to his police training in an

1. *Miranda v. Arizona*, 384 U.S. 436, 16 L.Ed. 2d 694 (1966).

effort to show that Cook was "aware that the proper procedure would have been to advise the defendant of his rights . . . before the defendant made his statement." The trial judge indicated that he was not interested in the officer's training and stated that "the court will determine what is the proper procedure" once defense counsel had established *what* the officer actually did. The trial judge then directed defendant to "move on."

The defendant assigns error to the denial of his efforts to question Corrections Officer Cook as to his prior police training. Defendant argues that by this line of questioning, he was attempting to lay a foundation to show that his right against self-incrimination was violated. Defendant has not assigned error to the denial of his motion to suppress the incriminating statement for *all* purposes, including impeachment.

Although they cannot be used to establish the State's case-in-chief, statements obtained by the police in violation of *Miranda* may be used to impeach the credibility of a defendant if he takes the stand in his own defense. *Harris v. New York*, 401 U.S. 222, 28 L.Ed. 2d 1; *State v. Overman*, 284 N.C. 335, 200 S.E. 2d 604. Even assuming that defendant's questions regarding Officer Cook's training would have been relevant to the issue of whether a *Miranda* violation had occurred, the trial judge acted well within his authority in controlling the hearing and directing defense counsel to focus his questions upon the actual actions of the officer with regard to the interrogation. *See State v. McDougall*, 308 N.C. 1, 22, 301 S.E. 2d 308, 321, *cert. denied*, --- U.S. ---, 104 S.Ct. 197 (1983). Moreover, the statement was properly admissible for impeachment purposes *despite* the *Miranda* violation in light of *Harris* and *Overman* and that was the sole purpose for which the State attempted to offer it. Defendant has demonstrated neither error with regard to the admission of Cook's testimony nor abuse of discretion with regard to the trial judge's control over the voir dire hearing. This assignment of error is wholly lacking in merit.

V.

[7] Although the defendant was prepared to offer the testimony of five fellow inmates as to his good character and reputation in the Caledonia Prison, the trial judge only permitted him to present the one character witness to the jury. Charles C. Morrow

was permitted to testify before the jury that the defendant's character and reputation at the prison was good. Defendant's offer of proof for the record indicates that the excluded witnesses all testified to the effect that defendant's character and reputation was as a "good guy" who "got along with everybody," and was not known to be a "violent type." The defendant argues that the trial judge prevented him from presenting this testimony to the jury and thereby prejudiced his right to a fair trial.

The State submits that the trial judge apparently concluded that the other four witnesses were redundant because they would not have added anything to Morrow's testimony and that he acted within the bounds of his discretion in excluding this redundant evidence.

It is well-settled that a "criminal defendant, if he so elects, may always offer evidence of his good character as *substantive evidence* on the issue of guilt or innocence." (Emphasis original.) *State v. Denny*, 294 N.C. 294, 297, 240 S.E. 2d 437, 439 (1978). *See also State v. Davis*, 231 N.C. 664, 58 S.E. 2d 355 (1950); *State v. Hice*, 117 N.C. 782, 23 S.E. 357 (1895). *See generally* 1 Brandis on North Carolina Evidence § 104 (1982). Here, the defendant was permitted to offer *some* evidence of his good character, but was not permitted to offer *all* of evidence which he was prepared to offer on this issue. Thus, the question becomes one of the judge's conduct of the trial.

We have often stated that the manner of the presentation of evidence is a matter resting primarily within the discretion of the trial judge, and his control of the case will not be disturbed absent a manifest abuse of discretion. *See, e.g., State v. Harris*, 308 N.C. 159, 301 S.E. 2d 91 (1983); *State v. McDougall*, 308 N.C. 1, 301 S.E. 2d 308. The trial judge may, in his sound discretion, limit the number of character witnesses a defendant may call to the stand. *State v. Wright*, 274 N.C. 380, 163 S.E. 2d 897 (1968). While the question in this case is a close one, we agree with the State's contention that the trial judge acted within his discretion in excluding the additional character witnesses.

Moreover, assuming *arguendo* that the exclusion of the defendant's character witnesses was erroneous, any possible error was harmless within the meaning of N.C.G.S. § 15A-1443(a) or (b). Beyond any doubt the exclusion of these witnesses' recital of the

defendant's reputation in the Caledonia Prison community could not have affected the outcome of the defendant's trial, given the overwhelming evidence that the defendant sought out, attacked, chased and killed Alphonso Revell.

We have carefully reviewed the briefs of the parties, the trial transcript and the record on appeal and have concluded that defendant received a fair trial, free of prejudicial error.

No error.

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

FRED FLEMING, EMPLOYEE, PLAINTIFF v. K-MART CORPORATION, EMPLOYER, DEFENDANT, SELF-INSURED

No. 241PA84

(Filed 8 January 1985)

1. **Master and Servant § 65.2— workers' compensation—back injury—referred pain—amount of compensation**

When an injury to the back causes referred pain to the extremities of the body and this pain impairs the use of the extremities, an award of workers' compensation must take into account such impairment.

2. **Master and Servant § 65.2— workers' compensation—back injury and pain in legs—permanent total disability**

The Industrial Commission's conclusion that plaintiff is entitled to an award of compensation for permanent total disability under G.S. 97-29, not just for loss of use of the back under G.S. 97-31(23), is supported by the Commission's findings that, in addition to his initial back injury, plaintiff also suffers from arachnoiditis, resulting in extreme pain in plaintiff's legs which makes walking and other movement practically, if not functionally, impossible, and that plaintiff is incapable of earning any wages because of his back injury and arachnoiditis. G.S. 97-2(9).

3. **Master and Servant § 69— workers' compensation—total disability—combined effect of all injuries**

Even though no single injury of a claimant resulted in total and permanent disability, the claimant is entitled to receive compensation under G.S. 97-29 so long as the combined effect of all the injuries caused permanent and total disability as that term is defined in G.S. 97-2(9).

4. Master and Servant § 69— workers' compensation—loss of use of legs—total and permanent disability

Where the Industrial Commission's findings support a conclusion that plaintiff suffered total loss of use of both legs due to arachnoiditis, he is entitled under G.S. 97-31(17) to compensation for total and permanent disability in accordance with the provisions of G.S. 97-29.

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

Justice MEYER dissenting.

ON discretionary review of the decision of the Court of Appeals, 67 N.C. App. 669, 313 S.E. 2d 890 (1984), affirming the opinion and award of the Industrial Commission filed 7 September 1982, as amended 11 October 1982. Heard in the Supreme Court 10 October 1984.

On 27 December 1978 plaintiff was injured while lifting boxes of paint in the course of his employment with defendant. After being treated initially by a family physician for back pain resulting from the accident, plaintiff was examined on 20 February 1979 by Grady E. Price, an orthopedic surgeon. A myelogram was performed on Mr. Fleming which revealed a large ruptured disk between his fourth and fifth lumbar vertebrae. On 26 February 1979 Dr. Price performed a laminectomy, removing the disk material which was causing plaintiff pain. Plaintiff was readmitted to the hospital in November 1979 for further back surgery; at this point an arthritic spur in the third space on his left side was removed. Dr. Price also removed some scar tissue wrapped around a nerve root in hopes of alleviating some of plaintiff's pain. These two operations did not relieve chronic pain plaintiff felt in his back and legs. However, because this pain apparently arose from the scar tissue formed from the operations and because additional surgery would create more scar tissue, Dr. Price advised Mr. Fleming that further operations would not be helpful. Since his second operation, Mr. Fleming has suffered chronic back and leg pain which prevents him from remaining in any one physical position for an extended period of time.

Plaintiff applied for workers' compensation benefits, and after a hearing a deputy commissioner of the Industrial Commission filed an opinion and award on 23 December 1981. This opinion and award found as facts that plaintiff had suffered an injury by accident arising out of and in the course of his employment by

defendant and that he sustained a fifty percent permanent partial disability to his back as a result of the accident. The commissioner determined that because plaintiff's only injury was to his back, he was entitled to receive compensation only under N.C.G.S. 97-31(23). Therefore the commissioner awarded plaintiff compensation of $132 per week for 150 weeks.

Plaintiff appealed this ruling to the Full Commission, which vacated and set aside the deputy commissioner's opinion and award on 7 September 1982. The Full Commission found as facts, inter alia, that as a result of the medical treatments he received for his back injury, plaintiff developed arachnoiditis, "the binding down of the spinal nerve roots"; that arachnoiditis is responsible for plaintiff's current disabling pain in his back and legs; that plaintiff is totally unable to pursue work of any kind and therefore is incapable of earning any wages; and that plaintiff is permanently and totally disabled as a result of the accident and the development of arachnoiditis. The Commission concluded as a matter of law that because of his injury and arachnoiditis plaintiff is incapable of earning the wages which he was receiving at the time of his injury, and therefore plaintiff is totally disabled within the meaning of N.C.G.S. 97-2(9); that plaintiff is entitled to an award of compensation for permanent total disability under N.C.G.S. 97-29; and that plaintiff is entitled to all medical expenses incurred as a result of his injury and arachnoiditis. The Commission awarded plaintiff $88 per week (which was later amended to $132 per week) during the period of total permanent disability. The Commission also ordered defendant to pay medical expenses which the plaintiff incurred because of the injury and arachnoiditis.

Defendant appealed this order to the Court of Appeals, which affirmed. Defendant's petition to this Court for discretionary review was allowed 6 July 1984.

Walker, Palmer & Miller, by George J. Miller, for plaintiff.

Hedrick, Eatman, Gardner, Feerick & Kincheloe, by John F. Morris and Edward L. Eatman, Jr., for defendant.

MARTIN, Justice.

The sole issue before us is whether the Court of Appeals erred by affirming the Industrial Commission's opinion and award

which found that plaintiff is permanently and totally disabled and therefore entitled to compensation under N.C.G.S. 97-29. In relevant part, N.C.G.S. 97-29 provides:

> Except as hereinafter otherwise provided, where the incapacity for work resulting from the injury is total, the employer shall pay or cause to be paid, as hereinafter provided, to the injured employee during such total disability a weekly compensation equal to sixty-six and two-thirds percent (66⅔%) of his average weekly wages, but not more than the amount established annually to be effective October 1 as provided herein, nor less than thirty dollars ($30.00) per week.
>
> In cases of total and permanent disability, compensation, including reasonable and necessary nursing services, medicines, sick travel, medical, hospital, and other treatment or care of rehabilitative services shall be paid for by the employer during the lifetime of the injured employee.

The term "disability" as used in the Workers' Compensation Act is defined by N.C.G.S. 97-2(9). This statute provides that the term means "incapacity because of the injury to earn wages which the employee was receiving at the time of injury in the same or any other employment." In *Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, 595, 290 S.E. 2d 682, 683 (1982), we held that:

> [I]n order to support a conclusion of disability, the Commission must find: (1) that plaintiff was incapable after his injury of earning the same wages he had earned before his injury in the same employment, (2) that plaintiff was incapable after his injury of earning the same wages he had earned before his injury in any other employment, and (3) that this individual's incapacity to earn was caused by plaintiff's injury.

See also, e.g., Lucas v. Burlington Industries, 57 N.C. App. 366, 291 S.E. 2d 360, *cert. granted*, 306 N.C. 385 (1982), *remanded by order* (9 November 1982).

In the present case the Industrial Commission made the following findings of fact:

> 1. On December 27, 1978, plaintiff sustained an injury by accident arising out of and in the course of his employment

as Manager of the Paint Department with defendant employer. At that time, he experienced some back and bilateral leg pain while lifting heavy boxes of paint. He was initially treated by a family practitioner in Huntersville, North Carolina, but as his symptoms of back and leg pain worsened, he sought medical assistance from a specialist.

2. Grady E. Price, an orthopedic surgeon, examined plaintiff on February 20, 1979. Dr. Price diagnosed a ruptured disc. Corrective surgery was recommended and performed at the Orthopedic hospital of Charlotte by Dr. Price on February 26, 1979.

3. A laminectomy was performed, and that portion of the disc believed to be putting pressure on the nerve was removed. Preoperative leg pain subsided only temporarily, so Dr. Price prescribed oral cortisone.

4. Plaintiff's condition did not adequately respond to nonsurgical treatment, and he was again readmitted to the hospital for surgery by Dr. Price on November 19, 1979.

5. During this surgery, the third space was operated on and an arthritic spur, which may or may not have been causing pressure on the nerve, was spotted. The scar tissue wrapped around the nerve root was removed.

6. Plaintiff was discharged from the hospital on November 27, 1979, and was examined by Dr. Price on a December 28, 1979 follow-up visit. Plaintiff was complaining of stiffness and aching in his back, and with leg pain.

7. Dr. Price communicated with plaintiff regularly in January, February, and March of 1980, during which time, plaintiff continued to experience pain in his back and leg.

8. A myelogram was performed in August 1980 revealing another defect at the third and fourth spaces. Dr. Price felt that additional surgical treatment would not be helpful.

9. Plaintiff continued to suffer from back and leg pain, and saw Dr. Price through February 1981. The pains were so severe, plaintiff could not be up for more than 30 minutes at a time. He had to lie down and rest frequently during the

day. If he sat for long periods, his back hurt and he would have to get up to relieve the pain. When he did, his legs hurt and he had to sit back down. Thus, although on medication, plaintiff could not get comfortable at any one time during the day in both the back and legs.

10. Dr. Archie T. Coffee, Jr., a neurologist, first examined plaintiff on April 7, 1981. Plaintiff related symptoms of pain in his lumbar spine, low back area, and his left leg.

11. Dr. Coffee, like Dr. Price, concluded that as a result of the treatment for the occupational injury to his back, plaintiff developed arachnoiditis. The end result of arachnoiditis is the binding down of the spinal nerve roots causing impairment and dysfunction.

12. Archnoiditis [*sic*] is responsible for plaintiff's current disabling pain in his back and leg.

13. Plaintiff is totally unable to pursue work of any kind, therefore, is incapable of earning any wages.

14. Plaintiff has sustained a permanent total disability as a result of the aforesaid injury by accident and the subsequent development of arachnoiditis.

The Commission concluded as matters of law, among other things, that:

1. Plaintiff is incapable to earn the wages which he was receiving at the time of his injury in the same or any other employment because of the injury and subsequent arachnoiditis, and is, therefore, totally disabled. G.S. 97-2(9).

2. Plaintiff is entitled to an award of compensation for permanent total disability under G.S. 97-29.

Review of an award by the Industrial Commission is limited to the questions (1) whether there was competent evidence before the Commission to support its findings, and (2) whether such findings support its legal conclusions. *Perry v. Furniture Co.*, 296 N.C. 88, 249 S.E. 2d 397 (1978). Upon reviewing the record we have concluded that all of the Commission's findings of fact are supported by evidence brought before it.

Both Dr. Price, an orthopedic surgeon, and Dr. Archie Coffee, Jr., a neurosurgeon, doctors who had treated or examined plaintiff, testified that they were of the opinion that plaintiff is incapable of earning any wages because of his accidental injury and arachnoiditis. As the Court of Appeals correctly notes, the testimony of these two experts concerning plaintiff's arachnoiditis and pain amply supports the Industrial Commission's findings with respect to plaintiff's actual medical condition. Indeed defendant does not argue that plaintiff is not, in fact, incapable of earning any wages because of his accidental injury and the ensuing arachnoiditis.

Instead, defendant takes issue with the Commission's determination that plaintiff suffered permanent total disability within the meaning of the Workers' Compensation Act. Both Dr. Price and Dr. Coffee rated plaintiff as having a permanent partial disability of fifty percent of the spine, even when plaintiff's leg pains were taken into account. Defendant argues that it is thus evident that plaintiff suffered only a partial loss of use of the back, and thus under our decisions in *Little v. Food Service*, 295 N.C. 527, 246 S.E. 2d 743 (1978), and *Perry v. Furniture Co.*, 296 N.C. 88, 249 S.E. 2d 397 (1978), plaintiff is entitled to receive compensation only under the schedule set forth in N.C.G.S. 97-31(23). We disagree.

In *Little*, plaintiff hurt her back in a work-related accident. The Commission only awarded her compensation for permanent partial disability under N.C.G.S. 97-31(23) even though the injury to plaintiff's spinal cord also resulted in

> weakness *in all of her extremities*, and numbness or loss of sensation *throughout her body*. The doctors further testify that she has suffered diminished mobility and has "difficulty with position sense and with recognition of things in her hands when objects are placed in her hands." All of this testimony is uncontradicted.

295 N.C. at 531, 246 S.E. 2d at 745. Because the Industrial Commission limited plaintiff's recovery to an award under N.C.G.S. 97-31(23), this Court remanded the case, noting:

> The impairments described above are compensable under other sections or subsections of the Workmen's Compensa-

tion Act and are not subsumed under the provisions of subsection (23) which provides compensation only "for loss of use of the back." If the Commission determines plaintiff has suffered these impairments, as the uncontradicted evidence tends to show, the award must take into account these and all other compensable injuries resulting from the accident. "[T]he injured employee is entitled to an award which encompasses all injuries received in the accident." *Giles v. Tri-State Erectors*, 287 N.C. 219, 214 S.E. 2d 107 (1975).

Id., 246 S.E. 2d at 746. We also observed:

> If [plaintiff] is unable to work and earn *any* wages, she is totally disabled. G.S. 97-2(9). In that event, unless all her injuries are included in the schedule set out in G.S. 97-31, she is entitled to an award for permanent total disability under G.S. 97-29. If all her injuries are included in the schedule set out in G.S. 97-31, she is entitled to compensation exclusively under G.S. 97-31. This is true from the language of the statute itself. *See Watts v. Brewer*, 243 N.C. 422, 90 S.E. 2d 764 (1956); *Stanley v. Hyman-Michaels Co.*, 222 N.C. 257, 22 S.E. 2d 570 (1942). *Compare Larson, supra*, § 58.20, n. 34 *et seq.*
>
> If she is able to work and earn *some* wages, but less than she was receiving at the time of her injury, she is partially disabled. G.S. 97-2(9). In that event she is entitled to an award under G.S. 97-31 for such of her injuries as are listed in that section, and to an additional award under G.S. 97-30 for the impairment of wage earning capacity which is caused by any injuries *not listed* in the schedule in G.S. 97-31. *See Morgan v. Norwood*, 211 N.C. 600, 601-02, 191 S.E. 345, 346 (1937). *See generally* W. Schneider, Workmen's Compensation Text § 2318 (1957).

Id. at 533, 246 S.E. 2d at 747.

In *Little* there was no evidence that plaintiff was totally disabled because of her injuries. The cause was remanded to determine her capacity to work and earn wages. The evidence before the Commission was not sufficient to support a finding that the referred injuries caused by Little's back condition resulted in loss of use of additional parts of her body that would

cause total physical disability. Her additional impairment was limited to weakness in her extremities and loss of sensation throughout her body. The evidence before the Commission was not sufficient to support a finding of total disability, and the Court remanded the case for the additional purpose of making findings under N.C.G.S. 97-30 to determine whether plaintiff was entitled to an additional award under that section.

Here, plaintiff is incapable of earning any wages and is therefore totally disabled as the result of his back injury and the resulting arachnoiditis.

In *Perry*, the plaintiff injured his back in a work-related accident and was awarded workers' compensation under N.C.G.S. 97-31(23). However, similarly to the *Little* case, the Commission failed to make findings as to whether plaintiff suffered any permanent loss of use of either or both legs when there was competent evidence before the Commission that would have supported such findings. Because "the injured employee is entitled to an award which encompasses all injuries received in the accident," *Giles v. Tri-State Erectors*, 287 N.C. 219, 225, 214 S.E. 2d 107, 111 (1975), this Court remanded the *Perry* case for findings with respect to any loss of use of plaintiff's legs.

[1, 2] The present appeal is thus factually different from both *Little* and *Perry* and these cases do not compel a reversal of the decision of the Court of Appeals. In addition to his initial back injury, plaintiff also suffered from arachnoiditis, resulting in extreme disabling pain in plaintiff's legs. This pain, although emanating from plaintiff's spinal cord, is not experienced in the back but rather in the legs, making walking and other movement practically, if not functionally, impossible. We hold that when, as here, an injury to the back causes referred pain to the extremities of the body and this pain impairs the use of the extremities, then the award of workers' compensation must take into account such impairment. *See Giles v. Tri-State Erectors*, 287 N.C. 219, 214 S.E. 2d 107. In the present case, unlike the *Perry* and *Little* cases, the Industrial Commission issued an opinion and award appropriately taking into account injuries both to plaintiff's back and to his legs. The Commission's finding that plaintiff was totally and permanently disabled within the meaning

of N.C.G.S. 97-2(9) is clearly supported by its findings of fact and is thus binding upon this Court.

[3] If an injured employee is permanently and totally disabled as the term is defined by N.C.G.S. 97-2(9), then he or she is entitled to receive compensation under N.C.G.S. 97-29. *See West v. Bladenboro Cotton Mills*, 62 N.C. App. 267, 302 S.E. 2d 645 (1983); *Cook v. Bladenboro Cotton Mills*, 61 N.C. App. 562, 300 S.E. 2d 852 (1983). *See generally* Note, *North Carolina General Statutes Section 97-31: Must it Provide Exclusive Compensation for Workers who Suffer Scheduled Injuries?*, 62 N.C.L. Rev. 1462 (1984). This is true even though no single injury of claimant resulted in total and permanent disability, so long as the combined effect of all of the injuries caused permanent and total disability.

[4] Although it is clear that because plaintiff is totally unable to earn any wages, he is disabled within the meaning of N.C.G.S. 97-2(9) and thus entitled to benefits under N.C.G.S. 97-29 directly, we note that if the Commission had analyzed plaintiff's case by turning first to the schedule of injuries in N.C.G.S. 97-31, it should have come to the same conclusion. N.C.G.S. 97-31(19) states that "[t]otal loss of use of a member . . . shall be considered as equivalent to the loss of such member . . . ." N.C.G.S. 97-31(17) provides that "[t]he loss of . . . both legs . . . shall constitute total and permanent disability, to be compensated according to the provisions of G.S. 97-29." The Commission's findings support a conclusion that plaintiff suffered total loss of use of both of his legs due to arachnoiditis. Therefore, under N.C.G.S. 97-31(17) plaintiff would be entitled to receive benefits under N.C.G.S. 97-29.

Affirmed.

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

Justice MEYER dissenting.

At the outset I point out that I find no fault in providing total permanent disability for the injuries and loss of ability to earn wages suffered by this claimant. A worker who has suffered injuries which render him unable to work and earn *any* wages

should be so compensated. Unfortunately our legislature has thus far enacted no legislation which would permit it.

The majority of this Court has today rewritten a significant feature of our Workers' Compensation Act through the process of "judicial legislation." The rules governing compensation under the Act have their origin in a legislative act—they are not "judge-made" and are therefore not subject to change at the whim of the appellate courts.

N.C.G.S. § 97-31 provides, in pertinent part:

> In cases included by the following schedule the compensation in each case shall be paid for disability during the healing period and in addition the disability shall be deemed to continue for the period specified, and *shall be in lieu of all other compensation,* including disfigurement, to wit:
>
> *(23) For the total loss of use of the back, sixty-six and two-thirds per centum (66 and ⅔%) of the average weekly wages during 300 weeks.* The compensation for partial loss of use of the back shall be such proportion of the periods of payment herein provided for a total loss as such partial loss bears to total loss, except that in cases where there is 75 per centum (75%) or more loss of use of the back, in which event the injured employee shall be deemed to have suffered "total industrial disability" and compensated as for total loss of use of the back. (Emphasis added.)

Chairman William Stephenson of the North Carolina Industrial Commission in his dissent from the Full Commission's Opinion and Award of 7 September 1982 explained the history of this provision of this statute:

> Prior to July 1, 1955, impairment to the back was a "general nature" impairment, and the money an injured employee received for the same was tied to his ability to work and earn wages. Almost every back disability case was litigated. In 1955, the Industrial Commission saw the need to designate the back as a specific member of the body and sponsored Chapter 1026 of the Session Laws of 1955. Since then, the amount of money one receives for a disability to the back is in no way related to his capacity to earn.

The issues in this case are not novel. N.C.G.S. § 97-31(23) and its meaning have been discussed by the Court in its decisions in *Little v. Food Service*, 295 N.C. 527, 246 S.E. 2d 743 (1978) and *Perry v. Furniture Co.*, 296 N.C. 88, 249 S.E. 2d 397 (1978).

In *Little*, medical testimony indicated that plaintiff sustained an injury to her spinal cord, which was not repaired by subsequent surgery, and which resulted in incomplete use of the extremities, weakness of grip, generalized weakness in both arms and both legs, loss of mobility, numbness to pinprick throughout the body, and difficulty with tactile recognition of objects placed in the hands. One physician rated the plaintiff at 50% physical disability of "total life function" and another physician rated the plaintiff at 40% disability to the neurological system. The Industrial Commission found that plaintiff suffered an average permanent partial disability of 45% of loss of use of her back and compensation was awarded for 135 weeks pursuant to N.C.G.S. § 97-31(23). On appeal, this Court reversed and stated that the award must take into account all other compensable injuries resulting from the accident. The plaintiff would not be limited to an award for permanent disability to the back when uncontradicted evidence indicated other impairments which were compensable *under other sections of the Workers' Compensation Act.*

In *Perry* medical testimony indicated that the plaintiff suffered a 50% permanent partial disability or loss of use of the back and compensation was awarded for 150 weeks pursuant to N.C.G.S. § 97-31(23). The plaintiff testified that he was suffering pain in his back and legs and that he was totally disabled as a result of his pain. Plaintiff contended that therefore he was entitled to compensation for permanent and total disability under N.C.G.S. § 97-29 based upon the evidence. Justice Huskins, writing for the Court, stated:

> The language of G.S. § 97-31 . . . compels the conclusion that if by reason of a compensable injury an employee is unable to work and earn *any* wages he is totally disabled, G.S. § 97-2(9), and entitled to compensation for permanent total disability under G.S. § 97-29 *unless all his injuries are included in the schedule set out in G.S. § 97-31.* In that event the injured employee is entitled to compensation exclusively under G.S. § 97-31 regardless of his ability or inability to earn wages in

> the same or any other employment; and such compensation is "in lieu of all other compensation, including disfigurement." (Emphasis in original.)

296 N.C. at 93-94, 249 S.E. 2d at 401.

In *Perry*, the Court remanded the case to the Industrial Commission for Findings of Fact as to the amount of permanent disability or loss of use to plaintiff's legs caused by this injury. The Court instructed, "If plaintiff has suffered no loss of use of a leg by reason of his injury, the case is closed. *If, in addition to his back injury, he has suffered some loss of use of either or both legs, the Commission shall make Findings of Fact as to the amount and, within statutory limits, issue an Award pursuant to G.S. § 97-31(15).*" (Emphasis added.) The court did not indicate that the Commission could consider an award pursuant to N.C.G.S. § 97-29, as contended by the plaintiff, even if there was evidence of permanent disability or loss of use to plaintiff's legs as a result of his compensable injury.

In the instant case, the evidence is clear and unequivocal. The Court of Appeals acknowledged in its opinion that "Dr. Coffee stated that his disability rating for Plaintiff's leg would be zero, since he found no 'actual functional incapacity'" and "Similarly, Dr. Price reported that 'there is no disability to the leg. He has leg pain but the problem is not in the leg itself but originates in the back.'" All of the evidence in this case is that plaintiff sustained an injury to the back and any disability which he retains is a result of this back injury. Chairman Stephenson in his dissenting opinion said "Where is this arachnoiditis? It is in the back." To argue that inflammation or scarring of the nerves in the spinal canal is not part of the back would be the same as arguing that nerves in the arm or the leg are not part of that particular member.

The Court of Appeals in its opinion states, "In medical terms no functional disability was apparent; however, this by no means excluded the possibility that plaintiff suffered sufficient pain in his legs to be legally disabled within the meaning of the Act." Relying on the *Perry* decision, the Court of Appeals found that the Commission was correct in considering the "referred pain" in the plaintiff's legs, in looking beyond Section 97-31(23) and in not limiting plaintiff's award to that section.

In my opinion, the Court of Appeals and the Full Industrial Commission have taken it upon themselves to make a medical determination, in direct contradiction to the medical evidence adduced at the hearing, that the plaintiff suffered sufficient pain in his legs to be legally disabled within the meaning of the Workers' Compensation Act. This is a determination which is beyond the expertise of either the Industrial Commission or the courts. In the absence of expert medical testimony on the subject, neither the commission nor the courts can make a finding as to permanent disability to a specific part of the body.

> Where . . . the injury is *subjective* and of such a nature that laymen cannot, with reasonable certainty, know whether there will be future pain and suffering, it is necessary . . . that there "be offered evidence by expert witnesses, learned in human anatomy, who can testify, either from a personal examination or knowledge of the history of the case, or from a hypothetical question based on the facts, that the plaintiff, with reasonable certainty, may be expected to experience future pain and suffering as a result of the injury proven." (Citations omitted.)

Gillikin v. Burbage, 263 N.C. 317, 326, 139 S.E. 2d 753, 760-61 (1965).

> Where, however, the subject matter—for example, a ruptured disc—is "so far removed from the usual and ordinary experience of the average man that expert knowledge is essential to the formation of an intelligent opinion, only an expert can competently give opinion evidence as to the cause of death, disease, or a physical condition." Where "a layman can have no well-founded knowledge and can do no more than indulge in mere speculation . . . there is no proper foundation for a finding by the trier without expert medical testimony." The physical processes which produced a ruptured disc belong to the mysteries of medicine. . . . (Citations omitted.)

Id. at 325, 139 S.E. 2d at 760.

If the Court of Appeals had found that the evidence was not sufficient concerning disability, if any, in the plaintiff's legs, the cause should have been remanded to the commission for further

findings on that issue in accordance with *Perry*. There was no evidence and no basis upon which the commission or the Court could find permanent total disability under Section 97-29 on the facts in this case.

The evidence in this case indicates that plaintiff sustained an injury to his back and any disability which plaintiff retains is as a result of the back injury. The majority of the Full Commission and the Court of Appeals have significantly bent the law to provide payment under Section 97-29 for permanent total disability. There is no evidence that the plaintiff has sustained an injury to any portion of his person other than his back. The evidence is unequivocal that all of the plaintiff's problems originate in his back and that he is entitled to compensation solely under Section 97-31(23) for loss of use of the back.

The rule in *Little* and *Perry* is clear and sound. If the plaintiff's injury is included in the schedule set out in N.C.G.S. § 97-31, plaintiff is entitled to compensation exclusively under the terms of that section. As the Court has said numerous times, this is true from the language of the statute itself. For the very reasons set out by Chairman Stephenson in his dissenting opinion quoted above, the General Assembly has made a policy decision that the amount of money an employee can receive for a permanent disability to the back, as well as any other injury to a scheduled member of the body, is not related to his capacity to earn wages in the same or any other employment. Neither the Industrial Commission nor the courts have authority to alter or bend this legislative directive in individual cases, no matter how compelling the claim may be. The legislature has acted for legitimate reasons and the commission and the courts are bound to carry out the law as it is written.

I would applaud legislative action amending our Workers' Compensation Act to provide this claimant the award mistakenly allowed him by the Full Commission, the Court of Appeals and the majority in the opinion in this case. In the absence of such an amendment, I would vote to uphold the Act as it is written. I would reverse the Court of Appeals and remand for an appropriate award under N.C.G.S. § 97-31(23).

STATE OF NORTH CAROLINA v. BILLY RUDOLPH BRASWELL

No. 526A83

(Filed 8 January 1985)

1. **Criminal Law § 75.7— defendant not in custody when incriminating statements made to officers—statements admissible**

Defendant was not denied his rights under the federal or North Carolina constitutions by the admission of statements made without *Miranda* warnings where the deputies to whom the statements were made were friends of defendant who went to defendant's house to tell him of his wife's shooting death; found defendant's empty patrol car in his driveway with the driver's door open and an empty revolver and a necktie bearing a bullet hole inside; discovered the back door to the house ajar and stepped in; found defendant, who told them to come in, sitting in a recliner with two gunshot wounds to the chest; and administered emergency medical treatment and called an ambulance. A reasonable person in defendant's position would not have believed himself to be in custody, and the court's finding of voluntariness on *voir dire* was supported by the evidence.

2. **Constitutional Law § 66— defendant absent from voir dire of witness—no error**

Defendant waived his right to be present during a *voir dire* hearing concerning the admissibility of certain testimony where the trial judge announced his decision to have a *voir dire* hearing following an objection by defendant's counsel, defendant knew or should have known that a *voir dire* hearing would be held, neither defendant nor his counsel asserted his right to attend, and his counsel was present at the hearing. Furthermore, any error was harmless since defendant was present when the testimony was presented to the jury and there is nothing in the record to show that defendant's presence at direct examination significantly aided his counsel on cross-examination.

3. **Homicide § 17.2; Criminal Law § 80.1— first-degree murder—letters of defendant implying intent to murder—admissible**

In a prosecution for first-degree murder, a proper foundation was laid for three letters written by defendant which implied that he intended to murder his wife and commit suicide where a sheriff testified that the victim had found the letters in defendant's coat and revealed some of the contents to him, where defendant stated that he wrote the letters, and where the letters were written a little more than a month before the murder.

4. **Constitutional Law § 48— test for effective assistance of counsel**

The test set out in *Strickland v. Washington*, --- U.S. ---, 80 L.Ed. 2d 674, is expressly adopted as a uniform standard to be applied to measure ineffective assistance of counsel under the North Carolina Constitution. Art. I, §§ 19 and 23, N. C. Constitution.

5. **Constitutional Law § 48— first-degree murder—defendant not denied effective assistance of counsel**

Defendant was not denied the effective assistance of counsel where the evidence of his guilt was overwhelming and the alleged errors of defense counsel related to actions on rulings by the trial court which were not prejudicial to defendant, evidence which would have been merely cumulative, or the interviewing and preparation of defense witnesses who could not have aided defendant or who gave the only favorable testimony they could give. It is not reasonably probable that the jury would have reached a different result had none of the alleged errors of counsel occurred. U.S. Constitution amendments VI and XIV.

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

APPEAL by defendant pursuant to N.C.G.S. § 7A-27(a) from the judgment entered by *Llewellyn, J.*, at the 23 May 1983 Criminal Session of PITT County Superior Court. Heard in the Supreme Court 15 November 1984.

Defendant was charged in an indictment, proper in form, with the first-degree murder of his wife, Lillie Braswell. Following a verdict of guilty he was sentenced to life imprisonment.

The State's evidence tended to show that Lillie Braswell had moved out of the family home a few days before her death. On the morning of 27 September 1982 defendant, who was a deputy sheriff, was in uniform and driving an unmarked Pitt County Sheriff's Department vehicle when he passed his wife's car on the highway, and after turning around and following her for a short distance motioned her to pull over. After they had stopped, Lillie Braswell entered defendant's car. At some point while she was in the car defendant drew his service revolver and shot her four times. Mrs. Braswell attempted to leave the car and collapsed on the shoulder of the road where her body was discovered a short time later by another driver. After the shooting defendant drove back to his home.

On being notified of the shooting Deputy Nobles and SBI Agent Honeycutt arrived at the scene. Deputy Nobles recognized Lillie Braswell and left the scene to locate defendant. As he passed by defendant's residence he spotted a silver unmarked patrol car under the carport. Deputy Nobles then contacted Chief Deputy Oakley and returned to defendant's residence with Oakley and two other officers. Upon arriving they noticed that the

driver's door of the patrol car was open and found on the front seat a sheriff's uniform necktie with a bullet hole in it, a Colt revolver, and some papers. The officers, seeing the back door to the house ajar, entered, and observed defendant sitting in a recliner. A small handgun was lying on the floor nearby, and defendant was found to have suffered two gunshot wounds to the chest. The officers administered emergency medical treatment and summoned an ambulance.

While the officers were in the house defendant stated that he had not meant to hurt his wife and just wanted to be left alone to die. Upon being asked what happened to the gun that he had shot himself with he replied that it was beside the chair and that he had used two guns. These statements were recorded by Deputy Vandiford. Defendant objected to the introduction of this and other evidence at trial which, together with his plea of ineffective assistance of counsel, is the subject of this appeal.

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

Harrell, Titus and Hassell, by Richard C. Titus and Robert A. Hassell for the defendant-appellant.

MEYER, Justice.

I.

[1] Defendant argues that the trial court erred by admitting into evidence the revolver found in his house and the statements made by him in response to questions asked by Chief Deputy Oakley on the grounds that they were obtained in violation of his rights under the fifth and fourteenth amendments to the United States Constitution and article I, §§ 19 and 23 of the North Carolina Constitution. Defendant bases his argument on his contention that he was in custody once the officers entered his house and that they were required to inform him of his rights under the rule of *Miranda v. Arizona*, 384 U.S. 436, 16 L.Ed. 2d 694 (1966) before questioning him. After a careful review of the evidence we conclude that defendant was not in custody when the officers entered his house and hold that defendant's constitutional rights have not been violated.

The rule of *Miranda* requiring that suspects be informed of their constitutional rights before being questioned by the police only applies to custodial interrogation. *State v. Clay*, 297 N.C. 555, 559, 256 S.E. 2d 176, 180 (1979). A suspect is in custody when a reasonable person in his position would believe that "he had been taken into custody or otherwise deprived of his freedom of action in any significant way. . . ." *State v. Davis*, 305 N.C. 400, 410, 290 S.E. 2d 574, 580-81. Ordinarily, when a suspect is not in custody at the time he is questioned any admissions or confessions made by him are admissible so long as they are made knowingly and voluntarily. *State v. Connley*, 297 N.C. 584, 589-90, 256 S.E. 2d 234, 237 (1979), *cert. denied*, 444 U.S. 954, 62 L.Ed. 2d 327 (1979). A careful examination of the circumstances surrounding the officers' entry into defendant's residence reveals that the officers were justified in making the entry and in questioning defendant.

Deputies Oakley and Nobles were friends of defendant and had gone to his house in order to inform him of his wife's death. Upon finding defendant's empty patrol car in his driveway with the driver's door open, containing an empty revolver and a necktie bearing a bullet hole, the officers had good reason to believe that defendant might be injured and in need of assistance. This alone would justify their entry pursuant to N.C.G.S. § 15A-285 which authorizes entry by a police officer into buildings, vehicles, etc. when he believes it is reasonably necessary to save a life or prevent serious bodily harm. *State v. Jolley*, 312 N.C. 296, 321 S.E. 2d 883 (1984).[1] Further, when the officers discovered the back door to the house ajar and stepped in, defendant, who was very pale and sitting in a recliner, told them to come in. They did so and discovered the defendant had suffered two gunshot wounds

1. Many states have adopted emergency entry exceptions to the fourth amendment. *See People v. Amato*, 193 Colo. 57, 562 P. 2d 422 (1977); *State v. Miller*, 486 S.W. 2d 435 (Mo. 1972); *People v. Mitchell*, 39 N.Y. 2d 173, 383 N.Y.S. 2d 246, 347 N.E. 2d 607 (1976), *cert. denied*, 426 U.S. 953, 49 L.Ed. 2d 1191 (1976); *People v. Brooks*, 7 Ill. App. 3rd 767, 289 N.E. 2d 207 (1972); *Lebedun v. State*, 283 Md. 257, 390 A. 2d 64 (1978); *State v. Max*, 263 N.W. 2d 685 (S.D. 1978). The United States Supreme Court has also held that warrantless entries by police officers and other public officials are justified if there is a compelling need and no time to secure a warrant. *Michigan v. Tyler*, 436 U.S. 499, 509, 56 L.Ed. 2d 486, 498 (1978) (firemen need not obtain warrant or consent to enter a burning building and once inside may seize evidence of arson in plain view).

to the chest, called an ambulance, and administered emergency medical treatment. These facts demonstrate that the officers had ample justification to enter defendant's house.

After the officers had found him, defendant told them that he wanted to die and not to call the rescue squad. Defendant also stated that he had not wanted to hurt his wife but that she would not listen to him. Deputy Oakley noticed that defendant's holster was empty and asked where his gun was and what had he done. Defendant replied that he had two guns, one on the floor by his chair and one in the patrol car. Deputy Vandiford noted defendant's answer and some of his other statements in his notebook. He testified that Deputy Oakley, who was a close friend of defendant, was not interrogating defendant but was talking to him like a father in an attempt to calm him.

Once the deputies had entered defendant's house their primary purpose was to preserve his life and keep his condition from worsening before the ambulance arrived. Viewed objectively there is nothing in the officers' conduct that would lead a reasonable person in defendant's position to believe that he was in custody. The fact that the officers had probable cause to believe that defendant had murdered his wife is immaterial for two reasons. First, the officers testified that they did not go to defendant's house to arrest him, but to inform him of his wife's death. Second, any subjective intent the officers may have had to arrest defendant is immaterial because their subjective intent is irrelevant to the question of whether a reasonable person in defendant's position would believe himself to be in custody. *Davis*, 305 N.C. at 410, 290 S.E. 2d at 580-81. Therefore, we hold that defendant was not in custody while Deputies Oakley, Nobles and Vandiford were in his house, and they were under no duty to inform defendant of his constitutional rights before questioning him.

Even though defendant was not entitled to be informed of his constitutional rights his answer to Deputy Oakley's question concerning the location of his gun is inadmissible unless it was voluntarily and understandingly made. *Connley*, 297 N.C. at 589-90, 256 S.E. 2d at 237 (1979). The trial court properly held a voir dire hearing during which Deputy Vandiford testified, *inter alia*, that defendant was rational when he answered the questions. After

the hearing was concluded the trial court found as a fact that no threats or promises of reward were made to defendant and that he was competent at the time he made his statements. "Findings of fact made by the trial judge following a voir dire hearing on the voluntariness of a defendant's confession are conclusive on appeal if supported by competent evidence in the record." *State v. Baker*, 312 N.C. 34, 39, 320 S.E. 2d 670, 674 (1984). The trial court's findings that no threats or promises were made to defendant and that he was competent are supported by competent and substantial evidence and are thus binding on this Court. The trial court's conclusion that defendant's statements were voluntarily and understandingly made is supported by the findings. Defendant was not denied his rights under the federal constitution or the North Carolina Constitution.

II.

[2] Approximately midway through the State's case, Sheriff Ralph Tyson of Pitt County was called to the stand. Defendant objected, apparently on the basis that the testimony would be hearsay, and the trial judge recessed the court in order to conduct a voir dire hearing. For some reason not disclosed by the record defendant did not attend the hearing though his counsel was present. Defendant argues that by conducting the hearing out of his presence the trial court denied him his rights under the sixth and fourteenth amendments of the United States Constitution to confront the witnesses against him. Defendant denies that he waived his confrontation rights and contends that, because he was tried upon an indictment charging him with a capital felony, he is prevented by the public policy of the State from waiving his right to be present at any stage of the trial.

It is well-established that under both the federal and North Carolina constitutions a criminal defendant has the right to be confronted by the witnesses against him and to be present in person at every stage of the trial. *State v. Moore*, 275 N.C. 198, 208, 166 S.E. 2d 652, 659 (1969). The constitutional right of an accused *to be confronted by* the witnesses against him is a personal privilege which he may waive expressly or by a failure to assert it in apt time even in a capital case. *Id.* at 209-10, 166 S.E. 2d at 659-60. However, when a defendant is being tried for a capital felony public policy prevents the accused from waiving his right

to be present at any stage of the trial. *Id.* at 209, 166 S.E. 2d at 659.

Because the State announced that it did not seek the death penalty in this case for lack of any aggravating circumstance the case lost its capital nature. *State v. Leonard*, 296 N.C. 58, 62, 248 S.E. 2d 853, 855 (1978). For that reason defendant's constitutional right to be present at all stages of the trial was a purely personal right that could be waived expressly or by his failure to assert it.

The record does not disclose an express waiver by defendant of his right to attend the hearing. However, defendant may also waive this right by a failure to timely assert it, as he has done in this case. The trial judge announced his decision to have a voir dire hearing on the admissibility of Sheriff Tyson's testimony following an objection by defendant's counsel. Defendant does not contend that he was absent from the courtroom while the State was presenting its case, and we conclude that defendant knew or should have known that a voir dire hearing of Sheriff Tyson would be held. Defendant, an experienced deputy sheriff, had attended previous voir dire hearings during the course of the trial and doubtless knew the general purpose of a voir dire. Yet, neither he nor his counsel asserted his right to attend. The most likely reason for defendant's absence is that neither he nor his counsel felt that his presence was necessary. Defendant's counsel was present in the courtroom at the time the trial judge announced his intention to hold a voir dire hearing and at the hearing itself. In a non-capital case counsel may waive defendant's right to be present through failure to assert it just as he may waive defendant's right to exclude inadmissible evidence by failing to object. The inaction of defendant and his counsel amounted to a failure to timely assert defendant's right to be present. While it is the better practice for the trial judge to obtain an explicit waiver from a defendant before conducting a voir dire hearing or any other important proceeding in the defendant's absence, it was not error for him to fail to do so.

Assuming *arguendo* that the trial judge erred in conducting the hearing out of defendant's presence, defendant was not prejudiced thereby. The purpose of the voir dire hearing was to determine, according to the test of *State v. Alston*, 307 N.C. 321, 298 S.E. 2d 631 (1983), whether it was necessary for Sheriff Tyson to

recount what the victim had previously said to him concerning her fear of the defendant and whether there was a reasonable probability that the sheriff's hearsay testimony would be truthful. The trial court found the testimony to be admissible, and defendant has not challenged that ruling. A transcript of Sheriff Tyson's voir dire testimony is available to us and we have reviewed it for comparison against his testimony on direct and cross-examination. There is nothing in the record to suggest that defendant's presence at the direct examination of Sheriff Tyson significantly aided his counsel on cross-examination, and we fail to see how defendant's presence could have altered the outcome of the voir dire hearing.

"Every violation of a constitutional right is not prejudicial. Some constitutional errors are deemed harmless in the setting of a particular case, not requiring the automatic reversal of a conviction, where the appellate court can declare a belief that it was harmless beyond a reasonable doubt." *State v. Taylor*, 280 N.C. 273, 280, 185 S.E. 2d 677, 682 (1972). The right to be present at all critical stages of the prosecution is subject to harmless error analysis. *Rushen v. Spain*, --- U.S. ---, 78 L.Ed. 2d 267, 272 n. 2 (1984). We believe that denial of a defendant's right to confront the witnesses against him is subject to the same harmless error analysis. That is particularly true when the alleged denial consists of the voir dire examination, in the presence of defendant's counsel, of a witness for the State who substantially repeats his voir dire testimony at trial. It is difficult to imagine any way in which defendant was prejudiced by his failure to attend the hearing. After examining the record and assuming error *arguendo* we conclude that any error which may have resulted from defendant's failure to attend the hearing is harmless beyond a reasonable doubt.

III.

[3] At trial three letters written by defendant, which implied that he intended to murder his wife and commit suicide, were admitted into evidence over defendant's objection. Defendant argues that these letters were admitted without proper foundation and are irrelevant. He also contends that the letters were admitted in violation of the rule against hearsay. These arguments are without merit.

A proper foundation for admission of the letters was laid by Sheriff Tyson's testimony that the victim had found the letters in defendant's coat and revealed some of the contents to him and by defendant's statement that he wrote the letters on August 15. From the context of the statement it appears that defendant was referring to 15 August 1982, a little more than a month before his wife's death on 27 September 1982. This testimony amply demonstrates that defendant wrote the letters, and that is all that is required. Threats by the defendant in a homicide case have always been freely admitted to identify him as the killer, disprove accident or justification, and to show premeditation and deliberation. *State v. Myers*, 299 N.C. 671, 675, 263 S.E. 2d 768, 771 (1980). Remoteness in time between the threat and the homicide goes only to the weight of the evidence. *Id.*; *State v. Shook*, 224 N.C. 728, 730, 32 S.E. 2d 329, 331 (1944). Such threats have been held to be admissible even though they were made some years before the homicide. *State v. Bright*, 215 N.C. 537, 2 S.E. 2d 541 (1939) (two years); *State v. Payne*, 213 N.C. 719, 197 S.E. 573 (1938) (three or four years). When a husband is charged with murdering his wife the State may introduce evidence covering the entire period of his married life to show malice, intent, and ill will toward the victim. *State v. Creech*, 229 N.C. 662, 670, 51 S.E. 2d 348, 354 (1949). Here, the threats were made less than two months before the murder. We hold that the trial court did not err in admitting the letters. We do not discuss defendant's argument that the letters were admitted in violation of the rule against hearsay since he has failed to address that point in his brief. N.C. R. App. P. 28(a).

IV.

[4] By motion for appropriate relief filed with this Court, the defendant contends that he was irreparably prejudiced by ineffective assistance of counsel in violation of his right to a fair trial under the sixth and fourteenth amendments to the United States Constitution. We have carefully examined the record and hold that defendant was afforded a fair trial.

A defendant's right to counsel includes the right to the effective assistance of counsel. *McMann v. Richardson*, 397 U.S. 759, 771, 25 L.Ed. 2d 763, 773 (1970). When a defendant attacks his conviction on the basis that counsel was ineffective, he must show that his counsel's conduct fell below an objective standard of

reasonableness. *Strickland v. Washington*, --- U.S. ---, 80 L.Ed. 2d 674, 693 (1984). In order to meet this burden defendant must satisfy a two part test.

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, *a trial whose result is reliable*. (Emphasis added).

Id. at ---, 80 L.Ed. 2d at 693.

Defendant has also argued that the conduct of counsel violated his rights under Article 1, §§ 19 and 23 of the North Carolina Constitution, perhaps suggesting that the North Carolina test for ineffective assistance of counsel is separate from and less stringent than the standards for ineffective assistance of counsel under the federal constitution, as interpreted by *Strickland v. Washington*. We disagree. In *State v. Weaver*, 306 N.C. 629, 295 S.E. 2d 375 (1982), we adopted the federal standard for ineffective assistance of counsel set out in *McMann v. Richardson*, 397 U.S. 759, 25 L.Ed. 2d 763 (1970). In so doing, we noted that "[t]he courts . . . have consistently required a stringent standard of proof on the question of whether an accused has been denied constitutionally effective representation. . . . To impose a less stringent rule would be to encourage convicted defendants to assert frivolous claims which would result in unwarranted trial of their counsels." 306 N.C. at 640, 295 S.E. 2d at 381 [quoting *State v. Milano*, 297 N.C. 485, 494, 256 S.E. 2d 154, 159 (1979) and *State v. Sneed*, 284 N.C. 606, 613, 201 S.E. 2d 867, 871-72 (1974)]. *Strickland v. Washington* does no more than explain the test to be applied in interpreting the *McMann* standard. Indeed, the test for prejudice set out in *Strickland* comports fully with our statutorily enacted test for prejudice under North Carolina law. *See* N.C.G.S. § 15A-1443(a). Therefore, we expressly adopt the test set out in *Strickland v. Washington* as a uniform standard to be applied to measure ineffective assistance of counsel under the North Caro-

lina Constitution. Under these standards, the defendant was not denied effective assistance of counsel.

[5] The fact that counsel made an error, even an unreasonable error, does not warrant reversal of a conviction unless there is a reasonable probability that, but for counsel's errors, there would have been a different result in the proceedings. *Strickland* at ---, 80 L.Ed. 2d at 698. This determination must be based on the totality of the evidence before the finder of fact. *Id.* at ---, 80 L.Ed. 2d at 698.

> Although we have discussed the performance component of an ineffectiveness claim prior to the prejudice component, there is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one. In particular, a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. The object of an ineffectiveness claim is not to grade counsel's performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed. Courts should strive to ensure that ineffectiveness claims not become so burdensome to defense counsel that the entire criminal justice system suffers as a result.

Id. at ---, 80 L.Ed. 2d at 699-700.

Thus, if a reviewing court can determine at the outset that there is no reasonable probability that in the absence of counsel's alleged errors the result of the proceeding would have been different, then the court need not determine whether counsel's performance was actually deficient. After examining the record we conclude that there is no reasonable probability that any of the alleged errors of defendant's counsel affected the outcome of the trial.

The evidence of defendant's guilt was overwhelming. Letters written by him before the crime strongly imply that he intended to kill his wife and then commit suicide. The uncontradicted evidence in this case fully supports this explanation of the victim's

death and Deputy Braswell's injuries. There was irrefutable evidence that defendant and his wife were having marital problems, and defendant admitted to having struck his wife in the past. Witnesses who drove by defendant's car at the time of the shooting saw the victim fall out of his patrol car and remarked that defendant appeared calm and unhurt. Another witness saw what was certainly defendant's unmarked patrol car drive away at a high rate of speed without weaving or leaving the road after stopping at an intersection. When defendant was found at his home suffering from two gunshot wounds he stated that he had not intended to hurt his wife. He also said he wanted to be left alone to die and that he would otherwise go to prison. All of this evidence was admissible, despite defendant's claims to the contrary, and is particularly damning because defendant did not *at that time* claim that his wife had shot him or that he had acted in self-defense.

The only evidence defendant had to rebut the State's case was his assertion that his wife shot him once and then inexplicably remained sitting across from him without firing again while defendant drew his revolver and shot her four times. Since defendant had only this unlikely story for a defense it is highly improbable that a reasonable jury could reach any conclusion other than that defendant had murdered his wife. However, defendant argues that he was denied the effective assistance of counsel in the following respects:

(a) First, counsel failed in (1) not vigorously opposing the introduction of the statements defendant made to the officers who came to his house, (2) allowing the voir dire hearing on Sheriff Tyson's testimony to be held in defendant's absence and (3) not vigorously objecting to the introduction into evidence of nor seeking limiting instructions on the three letters written by defendant which implied that he intended to kill his wife. Having previously examined each of these arguments and having found no prejudice to defendant, we will not address them further.

(b) Counsel allowed the introduction of other letters and a cassette recording that were not dated to show motive and state of mind.

Whether counsel erred on this point is immaterial. The letters and cassette recording merely restate what was in the other

three letters and were merely cumulative. Defendant was not prejudiced by introduction of this evidence.

(c) Counsel failed to adequately cross-examine defendant's son, and during cross-examination elicited adverse testimony including hearsay regarding defendant's prior marital problems.

While this testimony was damaging and some of it may have been inadmissible it would not have affected the outcome of the trial. The marital disharmony experienced by defendant and his wife and the contents of the three letters implying that defendant intended to murder his wife and commit suicide had already been put before the jury by clearly admissible evidence. The adverse testimony of defendant's son was merely cumulative.

(d) Counsel failed to properly interview defense witness Chief Deputy Oakley.

While Deputy Oakley's testimony did not assist defendant greatly it did contradict some of what State's witness Deputy Vandiford said. There was little Oakley or any other witness would testify to that would aid defendant, and it is difficult to see how defendant was prejudiced in any way by counsel's failure to interview Oakley before examining him.

(e) Counsel failed to properly prepare SBI Chemist Creasy as a defense expert witness and failed to timely object to State cross-examination concerning experiments Creasy conducted with the murder weapon.

After examining the testimony of Mr. Creasy, we cannot discover any way in which the actions of counsel prejudiced defendant. Mr. Creasy testified that handwipings from the palms of the victim revealed concentrations of barium, lead and antimony that were consistent with the victim having fired a revolver. On cross-examination Mr. Creasy testified that based on test firings by him the residue found on the victim's hands could also have been the result of her being shot at close range, and in his opinion that was more likely. On redirect examination counsel brought out the fact that Mr. Creasy had used the service revolver of defendant to perform the tests rather than the Smith and Wesson revolver with which defendant claimed the victim had shot him. Defendant now argues that he was prejudiced by counsel's failure

to object to the testimony concerning the tests on the service revolver conducted by Mr. Creasy. While it is possible that such tests might have been improperly admitted, defendant was not prejudiced by their admission. Counsel got from Mr. Creasy what he obviously wanted, an admission that the results of the handwiping tests were consistent with the victim having fired a revolver. This lent some support to defendant's claim of self-defense. Since Mr. Creasy testified that such tests could not conclusively indicate whether Deputy Braswell had fired the gun, counsel had obtained from Mr. Creasy the only favorable testimony that the witness could give. Mr. Creasy's testimony that the results of the handwiping tests were also consistent with the victim having been shot at close range did not significantly strengthen the State's case since defendant claimed to have shot the victim with his service revolver in self-defense.

In summary, we conclude that counsel's conduct did not affect the outcome of the trial.

After carefully reviewing the evidence in this case according to the standards laid down in *Strickland v. Washington*, --- U.S. ---, 80 L.Ed. 2d 674, we hold that it is not reasonably probable that the jury would have reached a different result had none of the alleged errors of counsel occurred. Therefore, defendant was not denied effective assistance of counsel and received a fair trial as required by the sixth and fourteenth amendments of the United States Constitution.

The defendant's motion for appropriate relief is denied. Based on our review of the record, we hold that defendant has received a fair trial free from prejudicial error.

No error.

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

STATE OF NORTH CAROLINA v. WILLIAM SIDNEY ALBERT, MICHAEL STEPHEN DEAREN, DORIS MANGUM MILLS

No. 524A83

(Filed 8 January 1985)

1. **Criminal Law §§ 75, 84— revocation of plea arrangement—confession not involuntary—testimony not fruit of poisonous tree**

Defendant's statement given as a result of a plea arrangement was not involuntary because the plea arrangement was subsequently revoked when defendant violated a condition thereof where defendant was at all times represented by counsel, was fully advised of his rights, and was not coerced or induced into making the statement. Therefore, even if a portion of the testimony of defendant's daughter was based on information taken from defendant's statement, such testimony was not inadmissible as "fruit of the poisonous tree."

2. **Criminal Law § 114.2— instruction on witness as accomplice—no expression of opinion**

The trial court's instruction that the evidence tended to show that a witness "was an accomplice in the commission of these crimes that are charged" did not constitute an expression of opinion that the crimes had, in fact, been committed.

3. **Criminal Law § 92.5— failure to renew motion for severance**

Failure to renew a motion for severance as required by G.S. 15A-927(a)(2) waived any right to severance, and review was limited to whether the trial court abused its discretion in ordering joinder at the time of the trial court's decision.

4. **Criminal Law § 92.1— consolidation of charges against three defendants**

The trial court did not abuse its discretion in allowing consolidation and joinder of murder and attempted armed robbery charges against three defendants where the State's motion for joinder was based on the theory that all three defendants formed a scheme to murder the victim and steal his money. G.S. 15A-926(a).

5. **Criminal Law § 113.7— charge on aiding and abetting**

The trial court's instruction that in order to find the two codefendants guilty of aiding and abetting an attempted armed robbery and a second-degree murder, the jury must first find that the armed robbery was in fact attempted and the murder was committed by defendant properly conformed to the evidence as presented, and the court did not commit plain error in failing to instruct that the codefendants could be convicted if the jury found that defendant "or some other person" was the perpetrator of the crimes.

6. **Criminal Law § 101.4— jury examination of documents containing markings**

Defendant failed to show that the trial court abused its discretion in permitting the jury to examine certain documents because they contained mark-

ings or underlining where the record did not indicate what markings appeared on the documents, the jury was instructed to ignore underlining on one document, and the court fully complied with the procedures set forth in G.S. 15A-1233(a).

7. Arrest and Bail § 9.1— breach of condition of bail bond—revocation of bond

Defendant's violation of a condition of her release on bond that she have no contact with a male codefendant was a legitimate reason for the trial court's exercise of its discretion to revoke her bond. G.S. 15A-534(f).

8. Homicide § 12— propriety of murder indictment

A murder indictment in the form prescribed by G.S. 15-144 was proper although it alleged both a capital and a non-capital offense and thereby failed to inform defendant of the precise charge against which she would be required to defend at trial.

9. Conspiracy § 5.1; Criminal Law § 79— admissibility of statements by coconspirators

There was sufficient evidence to establish the existence of a conspiracy to murder the female defendant's husband and that the female defendant was one of the conspirators, and statements of the two male codefendants made in furtherance of the conspiracy were competent evidence against the female defendant.

10. Criminal Law §§ 69, 99.2— telephone conversation—admissibility—propriety of court's questions

A witness was properly permitted to testify regarding a telephone conversation with the female defendant tending to show her complicity in the murder of her husband, and the trial court did not err in asking the witness questions to clarify the witness's identification of the second party to the telephone conversation.

11. Criminal Law § 99.4— court's comments upon ruling on objections—no expression of opinion

The trial judge did not improperly express an opinion on the quality of counsel's objections when, upon complaint by counsel that he couldn't understand a witness, he commented, "Well, no wonder, you object every time she opens her mouth. But you're entitled to make your objection," or when he remarked to counsel for two defendants who were objecting simultaneously to the witness's testimony that "when you object one time, let the witness finish her answer and then make your motion to strike." The trial judge's comments were well within his discretion in an effort to control the conduct of the trial and promote an orderly examination of the witness.

12. Criminal Law §§ 79.1, 87.4— statement by coconspirator—opening of door by defendant—veracity of statement proper subject for redirect

The trial court properly allowed into evidence during redirect examination a pretrial statement made by the witness implicating herself, defendant and a codefendant in a murder where defendant opened the door to evidence concerning the statement on cross-examination of the witness. Furthermore,

the prosecutor's question to the witness concerning the veracity of the statement was a proper subject for redirect examination.

13. Criminal Law § 79— acts or declarations by coconspirators

The testimony of three witnesses, in addition to corroborating another witness's testimony, was admissible as relating to acts or declarations by conspirators in furtherance of a conspiracy to murder the female defendant's husband.

14. Criminal Law § 138— mitigating factors—passive participant—advanced age—supporting spouse—insufficient evidence

The trial court did not err in failing to find as factors in mitigation of the second-degree murder of defendant's husband that defendant was a passive participant, that she was a female of advanced years, and that she was the primary supporting spouse of the family since (1) the evidence did not compel a finding that defendant was a passive participant, (2) the defendant's age of fifty-three years would not support a finding in mitigation of the crime charged, and (3) the fact that defendant was the primary supporting spouse bears little relevance in mitigation of the crime charged.

15. Criminal Law § 138— mitigating factor—no prior criminal record—necessity for finding

The trial court erred in failing to find as a factor in mitigation of a second-degree murder that the female defendant had no record of criminal convictions where the prosecutor stipulated, in response to a question by the court as to whether any of the three defendants had a prior criminal record, that only a male codefendant had a prior criminal record.

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

BEFORE *Judge Julius A. Rousseau,* at the 16 May 1983 Criminal Session of Superior Court, GUILFORD County, each of the defendants were convicted of second degree murder and attempted armed robbery. They each appeal as a matter of right from sentences of life imprisonment for second degree murder. Their motions to bypass the Court of Appeals on fourteen year sentences of imprisonment for attempted armed robbery were allowed on December 13, 1983. Heard in the Supreme Court September 12, 1984.

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

Neill A. Jennings, Jr. for defendant-appellant Albert.

E. Raymond Alexander, Jr. for defendant-appellant Dearen.

John F. Comer for defendant-appellant Mills.

MITCHELL, Justice.

On November 6, 1982 Coy Mills was murdered in front of his home in Greensboro, North Carolina. Two witnesses watched as Coy Mills and his wife Doris Mills, a defendant in this case, drove up to the house. Doris Mills was driving. She left the car and walked quickly toward the house, while the victim remained near the car. After hearing two gunshots, the witnesses watched as an assailant held a gun to the victim's head and shot a third time. One of the witnesses followed the assailant and saw him drive away in a blue Datsun.

Brenda King, the daughter of the defendant William Albert, testified at trial for the State. Her testimony tended to show that William Albert and Doris Mills had been planning to murder Coy Mills for several months. Albert first solicited the help of his daughter Beverly and her boyfriend Michael Tillman. Tillman was to arrange to have Coy Mills killed in return for which he was to receive marijuana. When Tillman refused to cooperate, Albert asked Brenda King to supply him with drugs which would put Coy Mills "to sleep." Doris Mills was present on one occasion when Brenda King gave William Albert some insecticide which contained arsenic. When the plan to poison Coy Mills failed, Albert solicited the help of Michael Dearen, Brenda King's boyfriend. King took $300.00 from the drugstore where she was working so that Dearen could buy a gun. Albert then arranged with Doris Mills to have Coy Mills home by 9:00 p.m. on the evening of the murder. Doris Mills was to delay the victim Coy Mills by having him get an item from the trunk of the car while she ran to the house. Earlier that evening, Brenda King had seen Albert and Dearen together in Albert's truck. Albert had a gun in his hands. Shortly before 9:00 p.m. Dearen left driving King's blue Datsun. At approximately 9:30 p.m., Michael Dearen returned home and informed Brenda King that Coy Mills had been shot three times. Dearen said that he was unable to get Coy Mills' money because Mills had fallen on his side. Over twelve thousand dollars was found in Coy Mills' pocket after the killing.

Brenda King was questioned shortly after the murder and denied any involvement. William Albert later agreed to testify on behalf of the State and encouraged Brenda King to tell the truth. She gave a statement in which she admitted her involvement and

implicated Albert, Dearen and Doris Mills. Charges against her were dismissed on the condition that she give truthful testimony at trial.

As a condition of a plea arrangement with Albert, he was to have no further contact with Doris Mills. Following numerous violations of this condition, the plea arrangement was withdrawn.

We will address each defendant's assignments of error separately.

WILLIAM SIDNEY ALBERT

[1] The defendant William Albert first contends that the trial court erred in denying his motion to suppress the testimony of Brenda King and in allowing her to testify in violation of his constitutional rights. The argument is premised on the defendant's assertion that his statement, given as a result of a plea arrangement which was later revoked, must be treated as involuntary. Thus, he reasons, Brenda King's testimony, which he alleges was based upon information taken from his statement, was inadmissible as "fruit of the poisonous tree." We disagree. Even assuming *arguendo* that some portions of King's testimony reflected facts supplied by Albert's recollection of the events leading up to the murder, Albert's statement was entirely voluntary.

At the defendant's request, the trial court conducted a *voir dire* on the admissibility of Brenda King's testimony. The trial court's findings can be summarized as follows: the defendant was represented by the public defender for the Eighteenth Judicial District who advised him that he did not have to make any statement to anyone; that on behalf of the defendant, his attorney contacted the district attorney and offered to enter into a plea arrangement; that as a result of such negotiations, the defendant was to be granted immunity in return for his truthful testimony at trial and Brenda King, his daughter, would receive a suspended sentence; the defendant was at all times represented by counsel, was fully advised of his rights, and was not coerced or induced into making his statement; that the defendant subsequently violated a condition of the plea arrangement and, as a result, it was revoked. The trial court concluded that Albert's statement was voluntary and King's testimony was admissible. These findings of fact are fully supported by the evidence. Therefore, they are

binding upon this Court. *See State v. Corley*, 310 N.C. 40, 311 S.E. 2d 540 (1984).

We are not concerned here with the admissibility of Albert's extrajudicial statement, but rather with his tenuous assertion that King's testimony was influenced in some measure by what she learned from his statement. We find nothing in the present case which would preclude King from testifying concerning facts divulged to her by Albert.

[2] The defendant Albert next contends that the trial court expressed an opinion by stating to the jury that the evidence tended to show that Brenda King "was an accomplice in the commission of these crimes that are charged." The defendant did not object to this portion of the instructions. Our review is therefore limited to determining whether "plain error" was committed. *State v. Odom*, 307 N.C. 655, 300 S.E. 2d 375 (1983).

We do not agree that the trial court's statement expressed an opinion that the crimes had, in fact, been committed. The trial court correctly referred to the crimes as *charged*. Furthermore, the evidence clearly tended to show that Brenda King was, in fact, an accomplice but was testifying under a grant of immunity. The statement complained of was made during the portion of the instructions dealing with the credibility of the witnesses and immediately following the statement, the trial court cautioned the jury to examine King's testimony with great care because of her involvement in the crimes charged. Under these circumstances, we find the trial court's statement was not error.

MICHAEL STEPHEN DEAREN

[3] The defendant Dearen first contends that the trial court erred by allowing the State's motion for joinder of all defendants and consolidation of the charges and by denying his motion for a separate trial. Although the defendant objected prior to trial, he did not renew his motion to sever at the close of the State's evidence or at the close of all the evidence. We held in *State v. Silva*, 304 N.C. 122, 282 S.E. 2d 449 (1981), that failure to renew a motion for severance as required by N.C.G.S. 15A-927(a)(2) waived any right to severance and that review was limited to whether the trial court abused its discretion in ordering joinder at the

time of the trial court's decision "and not with the benefit of hindsight." *Id.* at 127, 282 S.E. 2d at 453.

[4] N.C.G.S. 15A-926(a) provides in pertinent part that: "Two or more offenses may be joined . . . for trial when the offenses . . . are based on the same act or transaction or on a series of acts or transactions connected together or constituting parts of a single scheme or plan." In the present case the State's motion for joinder was based on the theory that the defendants William Albert, Michael Dearen and Doris Mills formed a scheme to murder Coy Mills and steal his money. Albert and Mills would then be able to develop their relationship and Michael Dearen would receive a share of the victim's money. All of the acts of the defendants the State sought to prove tended to support this theory. We find no abuse of discretion in the trial court's decision to allow consolidation and joinder.

[5] The defendant Dearen next contends that the trial court erred in its instruction to the jury that in order to find Dearen's codefendants guilty of aiding and abetting an attempted armed robbery and second degree murder, they must first find that the armed robbery was in fact attempted by Dearen and that he committed the murder. In the absence of objection to this instruction, we only review for "plain error."

Under the State's theory of the case, Dearen was the perpetrator while Albert and Mills aided and abetted him. Dearen first argues that he was prejudiced by the instructions as given in that they failed to inform the jury that Albert and Mills could be convicted if the jury found Dearen or *some other person* was the perpetrator of the crimes. "[T]he charge was presented in such a manner," argues the defendant, "as to lead the jury to believe that the guilt of William Albert and Doris Mills hinged *solely* on the jury's finding that appellant did the actual shooting." It is true that the instructions, as fully supported by the evidence at trial, reflected the State's theory that Dearen was the perpetrator in fact and Albert and Mills aided and abetted. In so instructing the trial court properly conformed its instructions to the evidence as presented. N.C.G.S. 15A-1232. Absent an objection or a request to the contrary, we cannot say that more was required. Certainly, there was no "plain error." *See State v. Odom*, 307 N.C. 655, 300 S.E. 2d 375 (1983).

[6] The defendant Dearen's final assignment of error concerns the trial court's decision to permit the jury to examine certain exhibits pertaining to the testimony of the witness Brenda King. Pursuant to N.C.G.S. 15A-1233(a), the trial court permitted the jury to examine the following documents: a calendar King used to organize her version of the sequence of events; her November 18 statement; a later handwritten statement; and her November 13 statement in which she denied any involvement in the crimes and which she later repudiated. It is the defendant's contention that the trial court abused its discretion in granting the jury's request to review these documents because they included not only the words previously read to the jury in open court, but also markings or underlining which had been used for emphasis or notation.

The record does not indicate exactly what markings appeared on the documents. The jury was specifically instructed to ignore underlining on one of the documents. The trial court fully complied with the procedures set forth in N.C.G.S. 15A-1233(a) and, under the facts presented, the defendant has failed to meet his burden of showing that the trial court abused its discretion in permitting the jury to examine these documents. *See State v. Barnett*, 307 N.C. 608, 300 S.E. 2d 340 (1983).

DORIS MANGUM MILLS

The defendant Doris Mills first contends that the trial court abused its discretion in allowing the State's motion for joinder. Although the defendant did move for severance prior to a *voir dire* hearing held on the admissibility of extrajudicial statements of the defendant Albert and the witness King, her motion was not renewed at the close of the State's evidence, nor at the close of all the evidence. As a result the defendant waived any right to severance, and our review is limited to whether the trial court abused its discretion as of the time it ordered joinder. *State v. Silva*, 304 N.C. 122, 282 S.E. 2d 449 (1981). For the reasons previously stated herein with regard to the defendant Dearen's similar contention, the trial court did not err when it ordered joinder.

[7] The defendant next contends that the trial court erred in allowing the State's motion to revoke her bond, in ordering that she be arrested and held without bond and by denying her motion that bond be set. We find no error.

Following her arrest on a warrant issued November 18, 1982, the defendant was released on a $20,000.00 secured bond "on the condition that she not have any contact with Bill Albert." On January 28, 1983, a detective with the Greensboro Police Department followed the defendant from her place of work to Sherwood Street where she met Albert. The two proceeded to the Ramada Inn Motel where they registered. On January 31 the district attorney made a motion to revoke the defendant's bond. The motion was allowed and the defendant was rearrested. The defendant's subsequent motion to set a new bond was denied. On February 28 the defendant filed a written motion to be released on bond citing health reasons and inability to confer with counsel. On April 5 this Court denied the defendant's petition for a Writ of Habeas Corpus.

We find nothing in the record which would indicate that the defendant's health problems were not properly treated. There is no indication that her ability to confer with counsel or prepare her defense was in any way impaired by her incarceration. Inasmuch as N.C.G.S. 15A-534(f) provides that "any judge may . . . revoke an order of pretrial release" such decisions are discretionary. The defendant's violation of a condition of her release was a legitimate reason for the trial court's exercise of its discretion to revoke her bond. This contention is without merit.

[8] The defendant argues next that the trial court erred in denying her motion to dismiss the bill of indictment for murder. The motion was grounded on the fact that the indictment alleged both a capital and a non-capital offense thereby failing to inform her of the precise charge against which she would be required to defend at trial. The indictment is in the form prescribed by N.C.G.S. 15-144. This argument is without merit. *See State v. Williams*, 304 N.C. 394, 284 S.E. 2d 437 (1981).

[9] The defendant contends that the trial court erred in admitting as evidence against her the testimony of Brenda King concerning conversations between King and the defendants Albert and Dearen. The defendant says that the State failed to show by independent evidence the existence of a conspiracy, and therefore the declarations of Albert and Dearen were not admissible against her. We do not agree.

The testimony of one conspirator is competent and sufficient to establish the existence of a conspiracy. *State v. Carey*, 285 N.C. 497, 206 S.E. 2d 213 (1974). "When the State shows a *prima facie* conspiracy, the declarations of the coconspirators in furtherance of the common plan are competent against each of them. This is so even where the defendants are not formally charged with a criminal conspiracy." *State v. Covington*, 290 N.C. 313, 325-26, 226 S.E. 2d 629, 639 (1976) (citations omitted). It is not error for a trial court, in its discretion, to admit such declarations subject to later proof of a conspiracy. *State v. Tilley*, 292 N.C. 132, 232 S.E. 2d 433 (1977).

In the present case there was testimony that in the late summer and early fall of 1982, the defendant Doris Mills on several occasions had given an employee of Misty's Lounge certain substances and instructed her to put them in Coy Mills' beer. The defendant and Albert at times passed love letters or notes to each other at the lounge. Brenda King testified that on at least one occasion the defendant Doris Mills was present when King gave Albert an insecticide. At that time Doris Mills asked how much insecticide she should put into the victim's drink and indicated that she wanted him dead. There was sufficient evidence to establish the existence of a conspiracy to murder Coy Mills and that Doris Mills was one of the conspirators. Therefore, the statements of Dearen and Albert made in furtherance of the conspiracy were competent evidence against Mills.

[10] The defendant contends that the trial court erred in allowing Brenda King to testify regarding a purported telephone conversation with the defendant Mills and by examining the witness from the bench. By this testimony the State sought to prove the defendant's complicity in the murder of her husband, Coy Mills. Brenda King testified that on the evening of the murder and at the request of her father, William Albert, she telephoned Misty's Lounge and asked to speak to the defendant Doris Mills. The purpose of the telephone call was to insure that the defendant had Coy Mills home by 9:00 p.m. The witness testified that she spoke to the defendant Doris Mills. The trial court then asked the witness how she knew with whom she had talked. The witness responded, "I said, 'Doris.' and she said, 'yes.' " The witness then affirmatively answered two additional questions posed by the trial

court: "Had you ever talked to her before? Did you recognize her voice?"

Although the defendant questions the admissibility of the testimony concerning the witness's telephone conversation with her, she presents us with no argument, nor do we find any reason for its exclusion. We reject the defendant's contention that the trial court's brief interrogation of the witness constituted error. The questions were phrased in a neutral and detached manner and were intended to clarify the witness's identification of the second party to the telephone conversation. *See State v. Rinck*, 303 N.C. 551, 280 S.E. 2d 912 (1981).

[11] The defendant's next assignment of error concerns what she characterizes as the trial court's unduly prejudicial comments upon "the quality of counsel's objections." During the examination of Brenda King, defense counsel interposed numerous and frequent objections, often before the witness could begin her answer. Defense counsel complained that he could not understand what the witness was saying. The trial court responded, "Well, no wonder, you object every time she opens her mouth. But you're entitled to make your objection." The witness was then instructed that if she heard an objection, she was not to answer until the court ruled. Later, counsel for both the defendant Mills and the defendant Dearen began objecting simultaneously to the witness's testimony. The trial court stated: "We have to have some formal rulings. I understand you are entitled to make your objection and I don't object, but when you object one time, let the witness finish her answer and then make your motion to strike." We find nothing improper in the trial court's comments. They were well within its discretion in an effort to control the conduct of the trial and promote an orderly examination of the witness. *See State v. Harris*, 308 N.C. 159, 301 S.E. 2d 91 (1983).

[12] The defendant next contends that the trial court erred in allowing into evidence Brenda King's November 18 statement implicating herself, Albert Dearen and Doris Mills in the murder of Coy Mills, and in allowing King's testimony concerning the veracity of that statement. The defendant argues that as an accomplice Brenda King could not corroborate herself and that the voluntary confession of a conspirator made after the conspiracy has ended cannot be used against a fellow conspirator.

The record discloses that it was the defendant, not the prosecution, who initiated the testimony concerning this statement on cross examination. Once the defendant had opened the door during the cross examination of the witness, the State merely introduced the entire statement during its redirect examination. The prosecutor's question to the witness concerning the veracity of the statement was a proper subject for redirect examination. We find no error.

[13] By her next assignment of error, the defendant contends that testimony of the witnesses Michael Tillman, Becky Albert Thore and Beverly Albert was improperly admitted. Tillman testified that the defendant Albert had, prior to November 6, solicited Tillman's help in an effort to secure someone to murder Coy Mills. Becky Albert Thore testified that she was present and observed Brenda King give pills to the defendant Albert and was present during conversations between Albert, King, and Tillman concerning plans to murder Coy Mills. Beverly Albert testified that she observed Brenda King give the defendant William Albert pills and was also aware, through conversations between various members of the group, of the plan to murder Coy Mills. The testimony, in addition to corroborating much of Brenda King's testimony, was admissible as it related to acts or declarations by conspirators in furtherance of a conspiracy. *See State v. Covington*, 290 N.C. 313, 226 S.E. 2d 692 (1976). We find no error.

The defendant Mills next contends, as did the defendant Albert, that the trial court erred in its charge to the jury by identifying Brenda King as "an accomplice in the commission of these crimes that are charged." As noted in our earlier discussion of this issue, we do not agree that the trial court expressed an opinion that the crimes had been committed. We find no error.

Likewise, we have previously addressed the defendant's next assignment of error pertaining to the propriety of the trial court's decision to permit the jury to examine Brenda King's statements and a calendar prepared by the witness. As discussed under the defendant Dearen's final assignment of error, the trial court fully complied with the statutory procedures which allow, at the trial court's discretion, the jury to reexamine requested materials introduced into evidence. The defendant has failed to demonstrate an abuse of discretion.

[14] The defendant's final assignment of error concerns the sentencing phase of her trial. The trial court imposed the maximum sentence of life imprisonment upon her conviction of second degree murder based on its finding of one aggravating factor—that the murder was premeditated and deliberated, and one mitigating factor—that she was a person of good character. The defendant argues that the trial court erred in failing to find two statutory mitigating factors: lack of prior criminal record, N.C.G.S. 15A-1340.4(a)(2)a; and that she was a passive participant, N.C.G.S. 15A-1340.4(a)(2)c. She further argues that the trial court erred in failing to find two non-statutory mitigating factors: that she was a female of advanced years; and that she was the primary supporting spouse of the family.

The evidence may support, but does not compel a finding that the defendant was a passive participant in the crimes. The defendant's age, fifty-three years, would not support a finding in mitigation that she was of advanced years. The fact that the defendant was the primary supporting spouse bears little relevance in mitigation of the crimes charged. Therefore, we hold that the trial court properly rejected these factors in mitigation.

[15] With respect to the defendant's contention that she was entitled to a finding in mitigation that she had no record of criminal convictions, we agree that the trial court erred in failing to find this factor. The State correctly points out that "the defendant bears the burden of persuasion on mitigating factors if he seeks a term less than the presumptive." *State v. Jones*, 309 N.C. 214, 219, 306 S.E. 2d 451, 455 (1983). The State argues that the only evidence on this factor came through an assertion by the defendant's attorney that the defendant had "no record at all in her lifetime" and had "never been in court before" except as a juror. Were this the case, we would agree that the defendant, by failing to offer testimony as to her lack of a criminal record, failed to carry her burden on this factor. However, the record discloses that the trial court inquired of the prosecutor, "Mr. Solicitor do any of them have a prior criminal record?" The prosecutor answered "only Mr. Dearen. . . ." In *State v. Jones*, we recognized that evidence is credible as a matter of law when the "nonmovant establishes proponent's case by admitting the truth of the basic facts upon which the claim of the proponent rests." *Id.* at 220, 306 S.E. 2d at 455. Inasmuch as the State appears to have

stipulated that neither the defendant Mills nor the defendant Albert had a criminal record, we hold that the trial court erred in failing to find this fact in mitigation. We remand the second degree murder case against Doris Mills to Superior Court, Guilford County, for resentencing.

Although the defendant Albert did not raise the issue of his sentence or argue it in his brief, we note that the trial court failed to find this factor in mitigation of his sentence for second degree murder. Pursuant to Rule 2 of the North Carolina Rules of Appellate Procedure, we remand the second degree murder case against Albert to Superior Court, Guilford County, for resentencing, in order to prevent a manifest injustice. *See State v. Boykin*, 307 N.C. 87, 296 S.E. 2d 258 (1982).

Albert—83CRS15628—no error.

Albert—83CRS15629—remanded for resentencing.

Dearen—82CRS54185—no error.

Dearen—83CRS15534—no error.

Mills—82CRS54198—remanded for resentencing.

Mills—83CRS15533—no error.

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

STATE OF NORTH CAROLINA v. RICKY WAYNE CRAVEN

No. 123A84

(Filed 8 January 1985)

1. Criminal Law § 34.7— indecent liberties with a child—other offenses—admissible

In a prosecution for first-degree sexual offense and for taking indecent liberties with a child, there was no error in permitting the victim's brother and another child to testify about incidents with defendant other than those

for which defendant was charged because such evidence was admissible to show mens rea and specific intent.

2. **Criminal Law § 89— exclusion of evidence impeaching witnesses—other impeaching evidence introduced—no prejudice**

In a prosecution for first-degree sexual offense and taking indecent liberties with a child, there was no prejudice in the exclusion of testimony with which defendant hoped to show that the children testifying against him had fantasized the events in question, or in sustaining objections to questions defendant wished to ask one of the children on cross-examination, where defendant introduced ample evidence to impeach the credibility of the children and did not preserve for the record the answer the child would have given on cross-examination.

3. **Criminal Law § 169.7— exclusion of testimony about whether neighbors and teachers questioned about children's truthfulness—neighbors and teachers not questioned—no prejudice**

In a prosecution for first-degree sexual offense and taking indecent liberties with a child, there was no prejudicial error in the exclusion of testimony that a detective had not talked with teachers or neighbors about the reputation for truthfulness of children testifying against defendant because the detective stated that she had never talked with teachers or neighbors about the children, and thus answered defendant's question.

4. **Constitutional Law § 70— right to confrontation waived by failure to assert**

In a prosecution for first-degree sexual offense and taking indecent liberties with a child, the trial court did not err by allowing into evidence a written statement prepared by the victim's sister, even though the sister had testified and left the courtroom. Defendant waived his right to confront the sister about the statement by failing to request that she be recalled.

5. **Criminal Law § 73.2— statements not within hearsay rule—written note admitted to explain subsequent action—testimony admitted as corroboration**

In a prosecution for first-degree sexual offense and taking indecent liberties with a child, there was no error in the admission of a note from the classmate of the victim's sister because the note was admitted for the limited purpose of showing why and when the victim's stepmother confronted his sister. The victim's stepmother was properly allowed to testify about what the sister said she had seen defendant do because the testimony corroborated testimony already given by the sister.

6. **Rape and Allied Offenses § 19— indecent liberties with a child—uncorroborated evidence from victim—motion to dismiss denied**

The uncorroborated testimony of the victim was sufficient to survive defendant's motion to dismiss. G.S. 14-202.1.

7. **Criminal Law § 114.2— characterization of defendant's action in recapitulation—no expression of opinion**

There was no error in the court's statement during its recapitulation of the evidence that defendant "put his hand between the legs of Peter Brim

and tried to feel between his legs" when Peter Brim had only testified that defendant "played between my legs." Peter Brim had also testified in detail about the sexual acts of defendant with him, and the judge instructed the jury that it was to determine the true facts.

8. **Criminal Law § 99.9— judge's question to a witness—clarification of testimony —no error**

Where the victim's sister testified that she "saw Peter and Ricky" and the court asked "saw—you mean you saw Ricky's mouth on his penis" the court's question in context was clearly an attempt to clarify the witness's testimony and did not rise to the level of an opinion.

9. **Constitutional Law § 30— motion for appropriate relief—evidence not disclosed by State**

Where the trial court denied defendant's motion for appropriate relief on the grounds that defendant had failed to request written statements from the victim's stepmother, the case was remanded for a hearing de novo to determine whether the undisclosed evidence would have created a reasonable doubt in the jury's mind which did not otherwise exist in light of all other evidence the jury heard.

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

APPEAL by defendant from judgment entered by *Long, J.*, at the 14 November 1983 session of Superior Court, FORSYTH County. Heard in the Supreme Court 15 November 1984.

Defendant was charged in indictments proper in form with committing a sexual offense in the first degree and with taking indecent liberties with a child. Evidence for the state tended to show that defendant was employed at an automobile body repair shop in High Point and was also an assistant pastor at the Bibleway Baptist Church in Winston-Salem. On 24 April 1982 defendant and his wife were baby-sitting with ten-year-old twins, Peter and Paul Brim, and their fourteen-year-old sister Lori, at defendant's mobile home in Kernersville. On this date defendant performed fellatio on Peter Brim while Peter was sitting on the toilet. Other evidence tended to show that defendant sexually fondled and "French kissed" Peter Brim on other occasions.

Defendant testified and denied committing any sexual acts upon Peter Brim. He also presented character witnesses on his own behalf.

Defendant was convicted of sexual offense in the first degree and of taking indecent liberties with a child. For his conviction of

the sexual offense, defendant was sentenced to life in prison, and for the conviction of taking indecent liberties, defendant was sentenced to three years' imprisonment. Defendant appeals his conviction of the sexual offense to this Court pursuant to N.C.G.S. 7A-27(a). His motion to bypass the Court of Appeals to appeal his conviction of taking indecent liberties with a child was allowed by this Court on 16 July 1984.

Rufus L. Edmisten, Attorney General, by Jane Rankin Thompson, Assistant Attorney General, for the state.

Harvey L. Kennedy for defendant.

MARTIN, Justice.

[1] The first question for review is whether the trial court erred by permitting seven-year-old Lee Burns to testify that defendant kissed him in the mouth and touched him on his penis and behind several times during the spring of 1983. During his cross-examination of Peter Brim, defendant attempted to elicit testimony that defendant may have inadvertently touched Peter's penis while bathing him or while drying him after a bath. To counter this the state offered Lee Burns's testimony for the purpose of showing defendant's mens rea for the crimes with which he was charged in the instant case. On this point the state argued to the trial court that evidence of defendant's intentional sexual molestation of Lee Burns was relevant to the question of whether defendant had intentionally, as opposed to inadvertently, touched Peter Brim's genital area. Over defendant's objection the trial court permitted Burns's testimony for this purpose and so instructed the jury.

Defendant argues that it was error for the trial court to have admitted Burns's testimony. Defendant explains that in *State v. McClain*, 240 N.C. 171, 81 S.E. 2d 364 (1954), this Court held that evidence that a defendant committed crimes other than the one for which he is being tried is inadmissible unless offered for one of several listed purposes. Defendant first argues that the testimony of Lee Burns was insufficient to establish that defendant's touching of him rose to the level of being a criminal offense as there was no evidence that the touching was improper, immoral, lewd, or lascivious. Defendant concludes that the testimony

should not have been admitted because it did not tend to show that defendant had in fact committed another crime. *Cf. State v. Moore*, 309 N.C. 102, 305 S.E. 2d 542 (1983). Second, defendant argues that Burns's testimony was incompetent to show defendant's specific intent to commit a sexual offense in the first degree as specific intent is not an element of this crime. *State v. Boone*, 307 N.C. 198, 297 S.E. 2d 585 (1982). Third, defendant contends that because defendant's touching of Burns occurred approximately one year after the incidents with which he was charged in the present case, they were too remote in time and too dissimilar in kind to have any probative value in the instant case. *See State v. Gammons*, 258 N.C. 522, 128 S.E. 2d 860 (1963).

We hold that Lee Burns's testimony was relevant to show that when defendant touched Peter Brim, it was not inadvertent but, rather, was with the mens rea required to be proven of all crimes. Moreover, while specific intent is not an element of sexual offense in the first degree, *Boone*, 307 N.C. 198, 297 S.E. 2d 585, specific intent is an element of the offense of taking indecent liberties with children. N.C. Gen. Stat. § 14-202.1; *State v. Turgeon*, 44 N.C. App. 547, 261 S.E. 2d 501 (1980). Defendant's behavior toward Lee Burns and Peter Brim was very similar and occurred under strikingly comparable circumstances. Both Lee and Peter had twin brothers and had been placed in defendant's care for baby-sitting. While at defendant's mobile home, defendant intentionally touched both young boys in their genital areas for sexual purposes. The touching was not accidental or inadvertent. Lori Brim testified that after he performed fellatio upon Peter, defendant told her that there was nothing wrong with what he did and that if Lori were a boy, he would have done it to her too. Lee Burns's testimony was properly admitted for the purpose of tending to prove that defendant had the mens rea to commit the sexual offense in the first degree and to show that defendant had the specific intent to commit the crime of taking indecent liberties with a child. The evidence was competent as showing the attitude, animus, and purpose of the defendant. *State v. Davis*, 229 N.C. 386, 50 S.E. 2d 37 (1948). *See generally* Annot., 88 A.L.R. 3d 8 (1978).

In a related argument, defendant contends that the trial judge erred in overruling an objection to a question asked by the state of Paul Brim, the victim's twin brother. After eliciting

testimony from Paul that defendant put his tongue in Paul's mouth when kissing him, the state asked Paul: "What your brother told about what happened in the bathroom, you didn't see that, did you?" Paul answered no. The state then asked, "Anything like that ever happen to you?" Defendant objected, and the trial judge asked the state the purpose for which the testimony was sought to be admitted into evidence. The state replied, "if his answer is in the affirmative, to show motive or intent or disposition of the defendant." Defendant again objected but was overruled by the trial court. The state then proceeded to question the witness:

Q. Did he ever do anything like that to you?

A. I guess.

Q. Well, yes or no?

A. One time he felt between my legs, and I—

Q. Where were you when that happened?

A. I was in the bed.

Q. Was your brother with you?

A. Yes, he was—(nods head up and down) Yes.

Q. Y'all were in the bed together?

A. Um-hum. I mean yes.

Defendant assigns as error the trial judge's overruling of defendant's objection. Defendant argues that no time frame was established for when defendant touched the witness and thus the trial judge could not have properly determined whether the incident occurred too remotely to the crimes charged to be relevant. Further, how the witness was touched was not brought out and thus no similarity between this act and the crimes for which defendant was being tried was established. Defendant contends that under *McClain*, 240 N.C. 171, 81 S.E. 2d 364, the evidence should have been excluded. Based upon the analysis and reasoning set forth in the discussion of the preceding assignment, we find no prejudicial error.

[2] The second issue for review is whether the trial court erred by excluding certain testimony by defendant's witnesses Ginger Craven, Frances Parrish, Tamra Snyder, and Louise Craven. Defendant hoped to question these witnesses concerning the Brim family environment and Lee Burns's poor performance at school. Defendant hoped that the testimony of these witnesses would tend to show that the Brim children and Lee Burns sexually fantasized the events in question. Assuming arguendo that such testimony was improperly excluded, we find this was not prejudicial error given other evidence that defendant successfully put before the jury. Without further staining the pages of our reports by detailing this sordid testimony, we find that defendant introduced ample evidence to impeach the credibility of Peter and Lori Brim and Lee Burns. Defendant has failed to prove prejudicial error.

The third question for review is whether the trial court violated defendant's constitutional right of confrontation by restricting defendant's cross-examination of certain witnesses. Defendant lists three questions which he sought to ask Peter Brim for the purpose of impeaching his credibility. In each instance the trial court sustained objections to the question. Also, in each instance defendant failed to preserve for the record the answer that the witness would have given had he been permitted to answer. These omissions are dispositive of this exception as the reviewing court cannot determine if prejudicial error resulted. *State v. McCoy*, 303 N.C. 1, 277 S.E. 2d 515 (1981). *See generally* 1 Brandis on North Carolina Evidence § 26 (1982). Therefore, we must overrule this assignment of error.

[3] The fourth question to which defendant contends the trial judge erroneously sustained an objection was asked during defendant's cross-examination of a detective who had investigated the crimes charged. Defendant asked:

> Q. You never talked with any of the neighbors or the teachers of these children to determine whether or not—what their reputations were, whether they were truthful or not, did you?
>
> MR. WALKER: I object.
>
> THE COURT: Sustained.

Q. You never talked with any of the teachers or neighbors in the community about these children, did you?

A. No.

MR. WALKER: Object to that.

THE COURT: Sustained.

Defendant's assignment of error is without merit because when the witness answered that she had never talked with any of the teachers or neighbors about the children, a fortiori she did not talk with them about the children's reputations for being truthful. As defendant thus elicited the answer to the question about which he now complains, there is hardly prejudicial error.

[4] Finally, defendant contends that the trial judge erred in allowing into evidence a written statement prepared by the victim's sister, Lori Brim. Defendant contends that because this statement was admitted into evidence after Lori had testified and had left the courthouse, defendant was unable to cross-examine Lori about it and therefore defendant's right of confrontation was violated. This assignment of error is meritless. During cross-examination of Detective Harless, defendant moved to require the state to produce all statements made by certain witnesses who had theretofore testified for the state. In considering whether to grant the motion, the trial judge stated that the court has discretionary authority to allow witnesses to be recalled. The court then granted the motion. Defendant examined written statements, including the one at issue here, and listened to recorded statements during a noon recess.

When court resumed defendant referred to the contents of the statement about which he now complains when cross-examining Detective Harless. During the state's redirect examination of Detective Harless, the state moved that Lori Brim's statement be admitted into evidence. This motion was granted and a copy of the statement was circulated among members of the jury. Defendant then further cross-examined Detective Harless about the contents of the statement. Defendant now argues that his right to confront Lori Brim was violated because he had no opportunity to cross-examine her about the note. We hold that defendant waived

his right to confront Lori about the note by failing to request that she be recalled as a witness.[1]

[5] Defendant next assigns as error the admission into evidence of testimony by Peter Brim's stepmother, Mickey Leigh Brim, concerning a note written to Lori Brim by one of Lori's classmates, Shannon McKoy. The note in question had been written in response to a note Lori had written to Shannon in April 1982. Mrs. Brim testified that she found Shannon's note in Lori's purse, and Mrs. Brim was then asked: "Just generally, what was that note about without going into any details?" Defendant objected and the court asked the state, "For what purpose do you offer it, for her state of mind?" The state replied, "And subsequent action, yes, sir." The witness was then permitted to answer that the note "talked about that she shouldn't be scared to tell her stepmother or her father or maybe even tell her teacher, and that if somebody had done that to her brother, then she would be upset and she would tell somebody. And that was the gist of it." Defendant made no motion to strike the answer.

Defendant now argues that Mrs. Brim's testimony about the contents of the note was hearsay erroneously permitted into evidence. We disagree. Hearsay includes testimony by one witness concerning statements made by another person, which testimony is offered to prove the truth of the statements made by the other person. *See generally* E. Cleary, *McCormick on Evidence* § 246 (3d ed. 1984). In the present situation Mrs. Brim's testimony about Shannon McKoy's note was not offered to establish the truth of the note's contents but instead to help explain the subsequent action of Mrs. Brim in confronting her daughter, Lori, about the note. *See State v. Potter*, 295 N.C. 126, 244 S.E. 2d 397 (1978); 1 Brandis, *supra*, § 141. This is evident from the questioning the state pursued immediately after asking Mrs. Brim the question about Shannon's note:

> Q. All right, after reading that note, did you discuss that matter with Lori?

1. We note that the record shows that at the beginning of the third day of the trial, the trial court stated: "All right, members of the jury, the Court has granted permission for two of the state's witnesses to return to school—all four of the school children, and they are available for recall by the defense on short notice if you'll just let us know if you need to have them recalled. All right, the defense may call its next witness."

A. It's still several more hours after that got out—until they got out of school. I had time to think through it. I'm pretty hot headed—I was pretty calm when they got there. I walked down to the bus stop and walked with Lori home. So I talked with Lori by herself and she asked that I not mention it to Peter and Paul because she promised them she wouldn't say anything about it.

Q. What did Lori tell you?

A. That she would get a—

Q. What did she tell you?

A. She said that the man was Ricky and that he had done this thing to Peter.

The evidence to which defendant is objecting was properly admitted to show why and when Mickey Leigh Brim confronted her daughter. It was not admitted for the purpose of establishing the truth of the contents of the note. Mrs. Brim's testimony about the note was not hearsay, and the trial judge properly admitted it for the limited purposes advanced by the state. *Potter*, 295 N.C. 126, 244 S.E. 2d 397.

Under this assignment of error defendant also contends that the trial judge erred in permitting Mrs. Brim to testify as to what Lori Brim had told her. During direct examination Mrs. Brim was asked, "What did [Lori] tell you she had seen?" Upon defendant's objection to this question, the court again asked the state the purpose for which the testimony sought to be elicited was being offered. The state answered that it was offered to corroborate previous testimony. After instructing the jury on corroboration, the trial court permitted Mrs. Brim to answer "[t]hat [Lori] had seen Ricky perform fellatio on her brother." Defendant now argues that it was error for the trial judge to have permitted this testimony because it did not corroborate the testimony of Lori Brim. In fact Mrs. Brim's testimony did corroborate that of Lori, as Lori testified to that effect earlier in the trial. This assignment of error is meritless.

[6] Defendant next assigns as error the trial judge's denial of defendant's motion to dismiss the charge of taking indecent liberties with a minor. N.C.G.S. 14-202.1 provides:

(a) A person is guilty of taking indecent liberties with children if, being 16 years of age or more and at least five years older than the child in question, he either:

(1) Willfully takes or attempts to take any immoral, improper, or indecent liberties with any child of either sex under the age of 16 years for the purpose of arousing or gratifying sexual desire; or

(2) Willfully commits or attempts to commit any lewd or lascivious act upon or with the body or any part or member of the body of any child of either sex under the age of 16 years.

(b) Taking indecent liberties with children is punishable as a Class H felony.

It is elementary that a motion to dismiss is properly overruled if, considering the evidence in the light most favorable to the state, there is any competent evidence supporting each element of the offense charged. *E.g., State v. Summitt*, 301 N.C. 591, 273 S.E. 2d 425, *cert. denied*, 451 U.S. 970 (1981). The uncorroborated testimony of a victim is sufficient to convict a defendant under N.C.G.S. 14-202.1 if his or her testimony suffices to establish all of the elements of the offense. *State v. Vehaun*, 34 N.C. App. 700, 239 S.E. 2d 705 (1977), *disc. rev. denied*, 294 N.C. 445 (1978). Peter Brim's testimony, detailed to some extent hereinbefore, was more than sufficient to survive defendant's motion to dismiss. *See, e.g., Summitt*, 301 N.C. 591, 273 S.E. 2d 425.

[7] Defendant next argues that the trial court erred by misstating certain facts during its recapitulation of the evidence. Specifically, defendant contends that the trial judge erred by telling the jury that the state's evidence tended to show that "in the spring of 1982, the defendant, Ricky Craven, put his hands between the legs of Peter Brim and tried to feel between his legs." Defendant contends that Peter Brim only stated that the defendant "played between my legs two or three times" and thus the trial court's characterization of what defendant tried to do was error.

In fact, however, Peter also testified in lurid detail as to the sexual acts of defendant with him. In light of this additional

testimony the trial court's characterization of the state's evidence was not error. Moreover, the trial judge also instructed the jury that:

> All of the evidence is important and it is your duty to consider it all as you deliberate upon your verdict when [sic]. I tell you what some of the evidence tends to show, I merely mean that if you believe the evidence under discussion, then it would tend to show the existence of certain facts. But what the true facts are and what the evidence does actually show are matters solely within your determination.

Defendant's assignment of error is without merit.

[8] Defendant next argues that the trial judge erred by impermissibly expressing an opinion with respect to evidence before the jury. The remark at issue occurred during the direct examination of Lori Brim:

> Q. Where was his [defendant's] head?
>
> A. Near Peter's penis.
>
> Q. Could you see your brother's penis?
>
> A. I—I saw Peter and Ricky.
>
> THE COURT: Saw—you mean you saw Ricky's mouth on his penis?
>
> Q. What did you do when you saw that?
>
> A. I didn't do anything. I just stared at them.

Defendant argues that the court's comment conveyed to the jury an impression that the court was biased in favor of the state. We disagree. Immediately before the above questioning took place, Lori testified, in the language of the street, that she saw defendant committing fellatio upon Peter. In context it is clear that the trial court's question of the witness was an attempt to clarify the witness's testimony. The remark did not rise to the level of being an opinion as to the defendant's guilt or the witness's credibility. *See State v. Corbett and State v. Rhone*, 307 N.C. 169, 297 S.E. 2d 553 (1982). We reject defendant's argument.

[9] Eighteen days after the verdicts, defendant filed a motion for appropriate relief. He contends that the trial court erred in denying this motion. In the motion defendant alleged that certain written statements which had been prepared by Mickey Leigh Brim and which were in the custody of the state had been improperly withheld from defendant before trial. Defendant did not request access to these statements before or during trial. In its order denying defendant's motion for appropriate relief, the trial court ruled that because defendant failed to request any written statements of Mickey Leigh Brim, the state had not been compelled to disclose them. In light of our recent opinion in *State v. McDowell*, 310 N.C. 61, 310 S.E. 2d 301 (1984), we remand this case to the Superior Court, Forsyth County, for a hearing de novo to determine whether the undisclosed evidence would, "had it been disclosed to the jury which convicted defendant, and in light of all other evidence which that jury heard, likely have created in the jury's mind a reasonable doubt which did not otherwise exist as to defendant's guilt?" *Id.* at 73, 310 S.E. 2d at 309.

We find no error in defendant's trial.

The case is remanded to the Superior Court, Forsyth County, for a hearing de novo on defendant's motion for appropriate relief.

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

STATE OF NORTH CAROLINA v. RALPH RANKIN

No. 346A84

(Filed 8 January 1985)

Constitutional Law § 31; Witnesses § 10— pretrial motion to compel attendance of witness—denial as violation of constitutional right to compulsory process

Defendant was effectively denied his constitutional right to compulsory process in his retrial for first-degree sexual offense by the trial court's denial of his pretrial motion pursuant to G.S. 15A-805(a) to compel the attendance of a proposed witness on grounds that (1) no affidavits were submitted as to why the witness should be brought to court, (2) the witness did not testify at de-

fendant's prior trial, and (3) the witness's presence was requested at a late date, since the statute does not require that affidavits be submitted to show the "good cause" requirement of the statute, a witness need not have testified in a previous trial in order to be subject to production as a witness for any other trial, and the motion should not have been denied without giving defendant an opportunity to show the "good cause" requirement of the statute and to advance substantial reasons why the motion was not filed until the day before trial.

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

Justice MARTIN dissenting.

APPEAL by defendant from *Judge Hal H. Walker* at the 27 February 1984 Criminal Session of GUILFORD County Superior Court.

Defendant, Thomas Braswell and George Totten were indicted for common law robbery and first-degree sexual offense upon Jerry Dean Franklin. These offenses were alleged to have been committed while the men were confined in a four-man cell in Guilford County Jail on 21 April 1981.

This is the third time defendant has been tried upon the charge of first-degree sexual offense. At his first trial, defendant and codefendant Braswell were tried upon charges of first-degree sexual offense and robbery. At this trial, there was a mistrial because the jury was unable to reach a verdict on either charge. At the second trial, Rankin was tried alone while the charges were still pending against Braswell and Totten. At that time, counsel for Braswell and Totten notified defendant's counsel that they had advised their clients to claim the fifth amendment privilege if called to testify in Rankin's trial. Defendant attempted to have Braswell ordered to testify but the trial judge declined to do so. At the second trial, defendant denied that he had committed either of the charged offenses. The jury returned verdicts of guilty of first-degree sexual offense and not guilty of robbery.

Following Rankin's conviction of first-degree sexual offense, Totten and Braswell pleaded guilty to the lesser included offense of second-degree sexual offense. Thereafter this Court granted defendant a new trial in an opinion reported at 306 N.C. 712, 295 S.E. 2d 416 (1982).

At defendant's third trial, the proceeding which is currently before the Court for review, the victim of the alleged assault, Jerry Franklin, testified that Braswell and Totten held him on the floor of the jail while Defendant Rankin put grease on his rectum and had forcible anal intercourse with him. Franklin reported this incident to the jailers when the cells were opened for lunch.

Dr. Wallace R. Nelms, admitted as a medical expert, testified that he examined Jerry Franklin on 3 April 1981 and that he observed a greasy substance and bloodstains on Franklin's underwear. He further testified:

> I concluded that, you know, there was no sign of venereal warts there [which would have indicated involvement with numerous homosexual partners]. There was obvious trauma to the outside of the rectum. He had two fresh external hemorrhoids that looked like they were there from trauma, not just because all of a sudden he developed hemorrhoids; and the anus appeared traumatized, means bruised or battered . . . without seeing the warts and the obvious signs of trauma, I was impressed that this young man probably had been assaulted.
>
> From my experience as a physician doing pelvic exams and doing genital exams, I would say that the thing that came in my mind as soon as I saw the hair [found in the victim's rectum] this looks like a black pubic hair.

Dr. Nelms also gave testimony which tended to corroborate Franklin's trial testimony.

The State also offered evidence tending to show that sperm was found in Franklin's anal canal and there was other evidence which tended to corroborate the testimony of the State's witnesses.

Defendant testified that he had not assaulted Franklin in any manner; that Franklin had "set him up" in order to avoid going to jail on pending robbery charges.

John Carson testified for the defendant and stated that Franklin had admitted to him that he had faked the alleged assault.

Larry Wayne Poole, who had been in the Guilford County Jail in April of 1981, testified that he had discussed with Franklin how he might arrange a fake assault as a way for Franklin to avoid imprisonment for his pending robbery charges.

The jury returned a verdict of guilty of first-degree sexual offense and defendant was sentenced to life imprisonment. He appeals to this Court pursuant to N.C.G.S. § 7A-27(a).

Rufus L. Edmisten, Attorney General, by Isham B. Hudson, Jr., Special Deputy Attorney General, for the State.

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

BRANCH, Chief Justice.

Defendant assigns as error the trial court's denial of his pretrial motion to produce and compel the attendance of a proposed witness, George Totten.

On 27 February 1984, the day before defendant's case was calendared for trial, defense counsel filed the following motion:

> NOW COMES THE DEFENDANT, by and through his attorney, and hereby moves the Court pursuant to 15A-805 to secure the attendance of George Totten, Larry Poole, Bobby James Stanley, Anthony G. Clements and Robert Powell at the trial of the defendant on February 27, 1984. As grounds thereof, he respectfully shows unto the Court the following:
>
> 1. That based upon the investigation by the defendant's attorney, the above-named individuals are deemed to be necessary, essential and material to the defendant's case.
>
> 2. That their attendance is essential to insure the defendant's right to a fair and impartial trial as per the United States and North Carolina Constitution.

At the hearing on defendant's motion, the following dialogue took place between the trial judge and defense counsel:

> THE COURT: All right.
>
> MR. MURPHY: Well, Your Honor—

THE COURT: I will allow and require habeas corpus ad testificandum as to Larry Poole and Bobby Stanley. The court finds that an affidavit was filed on the 27th of February, 1984, of Anthony Clements, but it does not relate to the trial of this matter.

MR. MURPHY: If Your Honor please—

THE COURT: And as to Robert Powell and George Totten, the court finds that no affidavits are submitted as to why they should be brought to court at this time; and the court finds that they were not witnesses in the previous trial and—

MR. MURPHY: If Your Honor please—

THE COURT: Just a minute!

MR. MURPHY: Yes, sir.

THE COURT: —and that their presence was requested at a very late date. The court denies the motion to secure witnesses as to Totten and Powell and Clements. EXCEPTION NO. 1

All right. Now, what's your next motion?

MR. MURPHY: If Your Honor please, may I be heard before we proceed?

THE COURT: I have already ruled on that.

MR. MURPHY: Yes, Your Honor. I would like for the record to reflect that it is the defense's contention that the motion was filed in apt time; that apt time means that it is filed in appropriate time, but I also ask the record to reflect that in 15A-805, there is no mention about anything having to be filed before time.

THE COURT: I have denied the motion—

MR. MURPHY: Yes, sir, Your Honor.

THE COURT: —as to those—

MR. MURPHY: I would—

THE COURT: Just a moment! I have denied the motion as to those EXCEPTION NO. 2 and allowed it as to three of them; and I will request that it be issued at this time and I will sign it.

MR. MURPHY: Your Honor, may I please be allowed to continue reading into the record—

THE COURT: What are you reading from? What was that that you are reading from?

MR. MURPHY: 15A-805.

THE COURT: I have a copy of that, and the court will take judicial notice of it.

MR. MURPHY: Thank you.

THE COURT: What's your next motion?

North Carolina General Statute § 15A-805 provides, in pertinent part, as follows:

> (a) Upon motion of the State or any defendant, the judge of a court in which a criminal proceeding is pending must, for good cause shown, enter an order requiring that any person confined in an institution in this State be produced and compelled to attend as a witness in the action or proceeding.

As indicated by the language of the official commentary,[1] we find the procedure for obtaining habeas corpus ad testificandum to be much more complicated than the procedure pursuant to which defendant's motion was filed. *See* N.C.G.S. § 17-41 *et seq.*

Defendant's motion followed the language of N.C.G.S. § 17-42 which provides for the application for habeas corpus ad testificandum. Obviously his written motion was not sufficient to meet the "good cause" burden imposed by N.C.G.S. 15A-805. Nevertheless, that statute does not require that the motion to produce and com-

1. Official Commentary—This section replaces the old "habeas corpus ad testificandum" with a simple motion and order for the production of a prisoner (or other person confined in an institution). If a conflict arises between two cases, and it cannot be resolved at the trial level, provision is made for resort to the appellate division. The statutes in Article 8, Chapter 17 of the General Statutes are left untouched because of their preexisting applicability to other proceedings.

pel the attendance of witnesses be in writing, that it be made within a certain time, nor does it specify any particular method by which the movant must state "good cause" for the production of the person to be offered as a witness.

In addition to the statutory provisions of N.C.G.S. § 15A-805(a), the United States Supreme Court has recognized a defendant's right to compel the attendance of witnesses as a fundamental constitutional right.

In *Washington v. Texas*, 388 U.S. 14 (1967) the United States Supreme Court reversed defendant's murder conviction because the state law precluded an alleged codefendant from testifying for defendant. In holding that defendant was denied his sixth amendment right to compulsory process, the Court stated:

> The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.

Id. at 19.

It appears that the trial judge denied defendant's motion to produce the witness Totten on the grounds that (1) no affidavits were submitted as to why the witness should be brought to court; (2) the witness did not testify at the previous trial; and (3) the witness's presence was requested at a late date.

Certainly the statute does not *require* that affidavits be submitted to show the "good cause" requirement of the statute. Neither can we find viable reason why a witness must have testified in a previous trial in order to be subject to production as a witness for any other given trial. We do recognize, however, that a trial judge has the duty to supervise and control the course and conduct of a trial, and that in order to discharge that duty he is invested with broad discretionary powers. *Shute v. Fisher*, 270 N.C. 247, 154 S.E. 2d 75 (1967).

A late filed motion might delay the course of a trial and invite dilatory tactics by other parties to litigation. Therefore in instant case it was incumbent on defendant to show substantial reasons why his motion to produce and compel the presence of the witness Totten was not filed until the day before the trial was to commence. Our examination of this record discloses, however, that defendant's motion was denied without permitting him to show the "good cause" requirement of the statute or to advance any reasons, if any he had, why the motion was made at the eve of the trial. For this reason, under the particular facts of this case, we hold that defendant was effectively denied his right of compulsory process.

In considering whether the violation of a constitutional right constitutes prejudicial error, we must determine whether the error was "harmless beyond a reasonable doubt." *State v. Taylor*, 280 N.C. 273, 185 S.E. 2d 677 (1972). We cannot say that the failure to produce and compel the attendance of the eyewitness to the alleged crime was harmless error beyond a reasonable doubt and therefore there must be a

New trial.

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

Justice MARTIN dissenting.

I respectfully dissent. On 12 September 1984 the state filed a motion in this appeal asking this Court to take judicial notice of certain records of the North Carolina Department of Correction. Ruling on the motion was reserved until the determination of the appeal.

The records in question indicate that George Totten was not in prison at the time the motion for his production as a witness was made by defendant. According to the affidavit of the manager of combined records of the Department of Correction, Totten was released from prison on 28 January 1984. The documents verify this affidavit by recording the release date of Totten as 28 January 1984. The motion to secure the attendance of Totten was made on 27 February 1984. These records were certified on 12

September 1984. When these records are considered as evidence (there is no evidence to the contrary), the failure of the trial judge to allow defendant's motion that Totten be produced as a witness could not be prejudicial error. If the trial judge had ordered that Totten be produced as a witness by the Department of Correction, it would have availed the defendant naught, because Totten was not there to be produced as a witness.

So the determining question is whether we should take judicial notice of the records of the Department of Correction. The Department of Correction was duly created by the legislature. N.C. Gen. Stat. § 143B-260 (1983). It is an agency of the state. *Pharr v. Garibaldi*, 252 N.C. 803, 115 S.E. 2d 18 (1960). The Department is required to provide the necessary custody and supervision of criminal offenders. N.C. Gen. Stat. § 143B-261 (1983). In order to carry out this duty, it is essential that the Department keep accurate records of when prisoners are received and discharged from custody. The records in question are such documents. They are public records within the meaning of N.C.G.S. 8C-1, Rule 803(8) (Cum. Supp. 1983). *See* 1 Brandis on North Carolina Evidence § 153 (1982). The courts may take judicial notice of the adjudicative facts contained in public records. *Utilities Comm. v. Southern Bell Telephone Co.*, 289 N.C. 286, 221 S.E. 2d 322 (1976); 1 Brandis, *supra*, §§ 11, 13; N.C. Gen. Stat. § 8C-1, Rule 201 (Cum. Supp. 1983). Judicial notice may be taken at any stage of the proceeding. N.C. Gen. Stat. § 8C-1, Rule 201(f). This Court should allow the state's motion that it take judicial notice of the records in question.

Assuming the defendant could have established "good cause" for the issuance of an order by the trial judge for the production of Totten by the prison authorities, the failure of the trial judge to issue such order did not prejudice defendant in this case. If error, it was harmless beyond all reasonable doubt. N.C. Gen. Stat. § 15A-1443(b) (1983). The state has carried its burden to show that any error by the trial judge was harmless beyond a reasonable doubt. Therefore, I find no legal reason to require this case to be tried a fourth time.

STATE OF NORTH CAROLINA v. JOHNNY L. HYMAN

No. 132A84

(Filed 8 January 1985)

1. **Criminal Law § 34.8— evidence of other offenses—admissible to show scheme**

Where defendant's trial was held before 1 July 1984, evidence of other crimes for which defendant was not on trial was properly admitted under common law rules of evidence to show a common scheme where all of the crimes arose from two robberies and the evidence showed that during both robberies two men stopped at a service station for gas, engaged the attendant in casual conversation, robbed the attendant at gunpoint, placed the attendant in the car and drove for about fifteen minutes, ordered the attendant to get out of the car and run, and fired a shot in his direction. Rule 404(b), N. C. Rules of Evidence.

2. **Criminal Law § 42.5— credit card matching receipt at robbery scene—no evidence of defendant's possession—no prejudice**

In a prosecution arising from a service station robbery in Fayetteville, North Carolina for which defendant was arrested in Conway, South Carolina, there was no prejudice in the admission of a credit card obtained from the Conway Police Department which bore the same number as the top credit card receipt found at the Fayetteville service station, although there was no evidence that defendant or his companion had ever possessed the card, because defendant did not show a reasonable possibility that exclusion would have changed the result at trial.

3. **Criminal Law § 60.2— fingerprint card—identification of defendant as person fingerprinted—sufficient**

There was no error in the admission of a fingerprint card where a jailer testified that he took the fingerprints of Johnny Hyman and a fingerprint technician testified that those fingerprints matched those at the crime scene, but the jailer never identified defendant as being the same Johnny Hyman he fingerprinted. The jailer's testimony permitted a reasonable inference that he took defendant's fingerprints and the failure to provide a more explicit identification goes to the weight to be given the evidence, not its admissibility or sufficiency.

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

APPEAL by the defendant from the judgment of *Judge Wiley F. Bowen* entered November 8, 1983 in Superior Court, CUMBERLAND County.

The defendant was indicted in July of 1980 on charges of armed robbery, aggravated kidnapping, and assault with a deadly weapon with intent to kill inflicting serious bodily injury. The

defendant pleaded guilty to these charges and was sentenced on December 12, 1980 at the regularly calendared term of Superior Court, Cumberland County, Judge Edwin S. Preston, Jr. presiding.

The defendant subsequently petitioned this Court for a writ of certiorari to review the judgment. The petition was denied June 2, 1982. He then petitioned the United States District Court for the Eastern District of North Carolina for a writ of habeas corpus seeking to have his guilty pleas set aside as being unconstitutionally obtained. The petition was granted on July 27, 1983, and the State was directed to retry the defendant or release him.

The defendant was retried in Superior Court, Cumberland County. He was found guilty of all charges on November 8, 1983 and sentenced to consecutive terms of life imprisonment for the armed robbery and kidnapping convictions, and a twenty year term of imprisonment for the assault conviction to run consecutively with the kidnapping sentence. The defendant appealed the armed robbery and kidnapping convictions to this Court as a matter of right under N.C.G.S. 7A-27(a). Heard in the Supreme Court October 11, 1984.

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

Jack E. Carter for defendant appellant.

MITCHELL, Justice.

The defendant brings forward several assignments of error by which he contends that certain evidence was improperly admitted at trial. We find no reversible error.

The State's evidence tended to show that on July 2, 1980, Tommy Thompson was working the night shift as an attendant at Wright's Texaco station on Highway 301 in Fayetteville, North Carolina. Early on the morning of July 3, the station was discovered deserted. The cash register was empty. Thompson was discovered lying in a ditch along Highway 301 by sheriff's deputies around 7:00 p.m. that evening. Thompson was transported to a hospital and examined by Dr. Victor Keranen, a neurosurgeon. Keranen determined that Thompson had been shot in the back. A

few days later Keranen removed a bullet from the base of Thompson's neck. Due to the gunshot wound Thompson was rendered a permanent quadriplegic.

When Thompson was discovered, he told Fayetteville police officers Sessoms and Cook that he had been robbed and later shot. He gave a description of his two assailants and the car they were driving. The police sent out this information to various law enforcement agencies through the Police Information Network. On July 4, the Conway, South Carolina Police Department notified the Fayetteville officers that the car in question and two persons fitting the description of the robbers had been located in Conway. Sessoms and Cook traveled to Conway and met with officers there. Subsequently the car was searched and fifty-eight cartons of cigarettes were discovered in the trunk.

On the morning of July 5, the officers from Fayetteville met with the defendant. He was informed of his constitutional rights and signed a waiver indicating his willingness to discuss the case without the presence of an attorney. He stated that he and a friend, Ezekiel Hall, had left New York City a few days earlier and driven south. North of Richmond they stopped at a service station and after engaging the attendant in conversation, the defendant pulled out a gun and ordered him into the car. The defendant said that he and his companion took about $85.00 that was in the attendant's shirt pocket. After driving for about fifteen minutes, they stopped and the attendant was ordered out of the car. The defendant said he fired one shot over the attendant's head and the attendant ran. The defendant and Hall proceeded driving south.

The defendant stated that later they stopped at another service station. The defendant again talked with the attendant while he pumped gas. As the defendant went into the building to buy some wine, Hall pulled out a gun and announced that it was a stick-up. The defendant said he was surprised by Hall's action as they had not planned to rob the station. They took money from the cash register and from the attendant's pocket. The defendant then placed the attendant in the car, and he and Hall loaded a number of cartons of cigarettes into the car. After driving for ten minutes the defendant stopped the car, and Hall ordered the attendant to get out and run. The defendant stated that Hall fired

one shot and that Hall said that he had shot the man. They continued to drive south and eventually stopped in South Carolina where they stayed until they were apprehended.

After Sessoms and Cook concluded their questioning, they were given a Texaco credit card by Detective Smith of the Conway, South Carolina Police Department. The credit card bore the same number as the credit card receipt which was on top of a stack of receipts found at the Fayetteville service station.

While in the custody of the Fayetteville Police Department, the defendant called his sister in South Carolina and directed her to tell his brother to turn over a gun to Lieutenant Hawkins of the Florence, South Carolina Police Department. Fayetteville police later received a .38 caliber revolver from Lieutenant Hawkins. Ballistics tests showed that the bullet removed from Thompson was fired by the gun obtained from Lieutenant Hawkins. The State also introduced evidence that the defendant's fingerprints were found inside the service station.

The defendant presented no evidence and moved to dismiss the charges against him. The motion was denied, and the case was submitted to the jury. The defendant was found guilty of all charges.

[1] The defendant initially contends that it was error for the trial court to permit the State to introduce, in its entirety, the statement he made to Sessoms and Cook. The defendant moved to suppress part of the statement which referred to the first robbery claiming that it constituted evidence of a crime not charged and had no probative value as to the crimes charged.

For actions and proceedings commenced after July 1, 1984 the admissibility of evidence of crimes for which the defendant is not on trial is governed by Rule 404(b) of the North Carolina Rules of Evidence. Because this case was tried prior to the effective date of the evidence code, we must analyze the defendant's argument in light of the law existing at that time. At common law the general rule was that the State may not introduce evidence tending to show that a defendant has committed an independent offense even though it is of the same nature as the charged offense. *State v. McClain*, 240 N.C. 171, 81 S.E. 2d 364 (1954); *State v. Moore*, 309 N.C. 102, 305 S.E. 2d 542 (1983). In *McClain*, Justice

Ervin writing for the Court enumerated eight exceptions to this general rule. The sixth exception is as follows:

> 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.

State v. McClain, 240 N.C. at 176, 81 S.E. 2d at 367. Evidence offered to show the existence of a plan or scheme must be carefully examined to insure that it is relevant to show a common design and not merely to show the defendant's propensity to commit the offense charged. *State v. Martin*, 309 N.C. 465, 308 S.E. 2d 277 (1983). As we said in *State v. Moore*, 309 N.C. 102, 305 S.E. 2d 542 (1983), there must be some unusual facts present in both crimes or especially similar acts which would indicate that the same individual perpetrated both crimes.

In the present case examination of the circumstances surrounding the two robberies shows a number of similarities. During both robberies two men stopped at a service station for gas, engaged the attendant in casual conversation, robbed the attendant at gunpoint, placed the attendant in the car and drove for about fifteen minutes. They then ordered the attendant to get out of the car and run and fired a shot in his direction. These similarities tend to show a *modus operandi* or common scheme encompassing both crimes.

This case is quite similar to *State v. Jenerett*, 281 N.C. 81, 187 S.E. 2d 735 (1972). In that case the defendant was found guilty of felony murder arising out of a grocery store robbery. The defendant had given a statement in which he confessed to actions which showed an intent to commit crimes similar to those for which he was on trial. We held that the evidence was "competent to show defendant's intent to commit a robbery *and as a part of the chain of circumstances leading up to the matter on trial.* It was also competent to properly develop the evidence in the case at bar." *Id.* at 89, 187 S.E. 2d at 740 (emphasis added). The same is true here. We hold that the trial court properly admitted the entire statement.

[2] The defendant's next assignment of error is that the trial court improperly admitted the Texaco credit card obtained by Sessoms and Cook from the Conway Police Department. Sessoms testified that he received the credit card from Detective Enoch Smith after he and Cook had interviewed the defendant. The defendant points out that there was no evidence introduced which showed that the credit card was obtained from the defendant or his companion. The State contends that the fact that the credit card has the same number as the top credit card receipt found at the scene of the Fayetteville robbery establishes a relevant connection between the credit card and the crimes for which the defendant was on trial, and that the credit card was admissible for this reason. We disagree.

If the State had presented evidence tending to show that the defendant or his companion had ever possessed the card, it would have had probative value in the case. In fact, however, no such evidence was adduced. The State cites *State v. Jarrett*, 271 N.C. 576, 157 S.E. 2d 4 (1967) for the proposition that any object having a relevant connection to the case is admissible. Since no evidence tended to show possession of the credit card by the defendant or his companion, the fact that the numbers on the credit card and on the receipt are the same is not sufficient to support the connection the State suggests.

The defendant has failed to show, however, that the erroneous introduction of the credit card was prejudicial. The defendant confessed that he was present at the station at the time of the robbery. This was supported by the finding of the defendant's fingerprints at the crime scene. The defendant has not shown that there is a reasonable possibility that exclusion of evidence of the credit card would have changed the result at trial. Absent such a showing the defendant is not entitled to relief. N.C.G.S. 15A-1443(a); *State v. Galloway*, 304 N.C. 485, 284 S.E. 2d 509 (1981).

[3] The defendant's final assignment of error concerns the admission into evidence of a fingerprint card. At the trial Bill Hess, a jailer with the Cumberland County Sheriff's Department, testified that he took the fingerprints of Johnny Hyman on July 7, 1980. Susan Griffin, a fingerprint technician with the City-County Bureau of Investigation, testified that latent fingerprints taken at

the crime scene matched the fingerprints of Johnny Hyman taken by Hess. The defendant argues that Hess never identified the defendant as being the same Johnny Hyman he fingerprinted on July 7. The defendant argues, therefore, that the State failed to show that the fingerprints obtained at the station matched those of the defendant.

Although Hess never expressly identified the defendant as the same Johnny Hyman he fingerprinted on July 7, 1980, his testimony that he fingerprinted Johnny Hyman permits a reasonable inference that he took the defendant's fingerprints. The failure of the State to adduce a more explicit identification of the defendant by Hess goes to the weight to be given the evidence, not to its admissibility or sufficiency. This assignment is without merit.

The defendant received a fair trial free from prejudicial error.

No error.

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

STATE OF NORTH CAROLINA v. ERIC JEROME MOORE

No. 347A84

(Filed 8 January 1985)

Robbery § 4.7— armed robbery—evidence showing opportunity—insufficiency to support conviction

The State's evidence disclosed no more than an opportunity for defendant, as well as others, to have taken the victim's wallet containing money and was insufficient to support his conviction of armed robbery where it tended to show that defendant, with the aid of a long knife, sexually assaulted the victim in the bathroom of a store where she worked alone shortly after 1:00 p.m.; the victim stayed in the bathroom for 20 minutes after defendant left; the victim was gone from the store for some two hours after the attack while she was calling and conferring with the police; when the victim returned to the store, she discovered that her wallet was missing from her purse; when the victim had arrived at work around 10:00 a.m. the morning of the attack, she had placed her purse containing a wallet with $30 in it on a stool behind the

cashier's counter; and other customers had been in the store between 10:00 a.m. and the time of the sexual assault.

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

APPEAL pursuant to N.C.G.S. § 7A-27 by defendant from a verdict of guilty of first degree sex offense and a judgment imposing life imprisonment. This Court granted defendant's motion to bypass the Court of Appeals on his conviction of attempted first degree rape and robbery with a dangerous weapon and judgments sentencing him to six years' and fourteen years' imprisonment, respectively. The judgments were entered by *Judge Hal Walker* at the 5 March 1984 Criminal Session of Superior Court of GUILFORD County.

Rufus L. Edmisten, Attorney General, by Guy A. Hamlin, Assistant Attorney General, for the state.

Ann B. Petersen for defendant appellant.

EXUM, Justice.

The only assignment of error brought forward in defendant's brief is whether the state presented sufficient evidence to justify the trial court's submitting to the jury the armed robbery charge (No. 82CRS35339 in superior court).[1] We conclude that it did not. We therefore reverse defendant's armed robbery conviction. Defendant having abandoned all assignments of error in the sex offense case (No. 82CRS35338 in superior court) and the attempted rape case (No. 82CRS35337 in superior court), App. R. 28(a), the appeal in these cases is dismissed.

I.

On Friday, 19 February 1982, Lisa Burton was working alone in the Old Arlington Dry Goods Store in Greensboro. Although the store was open for business, both the front and back doors to the store were locked. Burton said, "The front door was always kept locked as a security reason because of the part of town" in

1. Although defendant assigned errors affecting all three judgments, he has brought forward in his brief only the assignment dealing with the sufficiency of the evidence on the armed robbery charge.

which the store was located. Burton's practice was to unlock the front door and admit customers only after she had first observed them through the front window. Around 1 p.m., Burton unlocked the back door and went outside to walk her dog. While descending the back steps, she was approached by a man who began asking her questions about the shop and, in particular, about the availability of bedspread material and quilts. Not wanting to deal with him, she informed him the store was closed and that he should come back next week. The man persisted, finally telling Burton he wanted to show her a picture of "what he was trying to find." He then showed Burton an obscene picture of a naked woman. Burton grabbed her dog and ran back into the store. Her assailant entered the store behind her before she could close and lock the door. He then backed Burton against a wall, produced a long knife, and ordered her into the bathroom. He told Burton not to move and left the bathroom, closing the door behind him. Burton's attacker returned after about a minute and sexually assaulted her.[2]

He then ordered Burton to get dressed, asked her what was upstairs in the store and left, again closing the bathroom door behind him. He returned after about three minutes and asked Burton whether she was going to tell on him to which she responded negatively. Burton's attacker then left again, without telling her whether he planned to return. Burton waited in the bathroom approximately twenty minutes. When she could no longer hear him moving about the store, she left the bathroom and ran out the back door of the store. Burton left the store at approximately 1:30 p.m.

Burton testified at trial that when she arrived at work around 10 a.m. the morning of her attack, she placed her purse on a stool behind the cashier's counter at the front of the store. The purse contained a wallet with approximately $30 and some credit cards inside. She also testified that at least one, and perhaps as

2. Defendant was initially convicted of first degree sex offense, attempted first degree rape and robbery with a dangerous weapon at the 13 September 1982 Criminal Session of Guilford County Superior Court before Judge Washington. This Court ordered a new trial because of evidentiary errors. *State v. Moore*, 309 N.C. 102, 305 S.E. 2d 542 (1983). A more complete statement of the facts pertinent to the sexual assaults may be found in our first opinion.

many as two or three customers had been in the store since 10 a.m. When Burton returned to the store with police officers after the attack, her purse was there but the wallet was missing.

It is not entirely clear how much time elapsed from the attack until investigators first arrived at the scene of the crime. It is clear, however, that some two hours elapsed between the attack and the time Burton herself returned to the store and discovered the wallet was missing. Burton testified at trial that after the attack she ran out the back door of the store to a nearby antique store which she discovered was closed for lunch. She then ran to an adjacent insurance company and asked a secretary to call police. She testified that police first arrived at the insurance company ten minutes after being summoned.

The investigating officer testified that "after approximately 30 minutes of calming her [Burton] down, I was able to talk with her and get a description." Burton finally accompanied officers back to the store two hours after the attack before going on to the police station. She testified, however, that "there were police in the building . . . almost that whole time." Burton said she knew about this only because police told her they had already been to the store, although she did not know which officers had been there or when they entered the store.

Burton testified that she had ample opportunity to observe her assailant's face since her attack occurred on a bright sunny day and lights were on inside the store. Burton identified defendant as her assailant first in a photographic lineup, later from among thirty to forty men seated in a Guilford County courtroom, and finally at trial. Defendant was also identified by Howard Stone who did odd jobs for the owner of the store. Stone testified that he had seen defendant around the store several times and that he saw defendant running from the back of the store on 19 February 1982, the day of the attack.

II.

Defendant's sole contention is that the evidence offered by the state at trial to support the charge of robbery with a dangerous weapon was insufficient to carry the charge to the jury. We agree.

The robbery charge arises from the theft of Mrs. Burton's wallet on the day of her attack sometime between 10 a.m. when she placed her purse on a stool behind the cashier's counter and her discovery that the wallet was missing some two hours after her encounter with defendant. Defendant contends that the state's evidence was insufficient to prove beyond a reasonable doubt that he, and not someone else, took the wallet.

To sustain the submission of a criminal charge to a jury, there must be substantial evidence of each element of the offense charged *and* of defendant's identity as the perpetrator. *State v. Riddle*, 300 N.C. 744, 268 S.E. 2d 80 (1980). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 265 S.E. 2d 164 (1980). The evidence must be viewed in the light most favorable to the state and the state is entitled to every reasonable inference that can be drawn from the evidence. *State v. Brown*, 310 N.C. 563, 313 S.E. 2d 585 (984); *State v. Lowery*, 309 N.C. 763, 309 S.E. 2d 232 (1983). It is well settled, however, that evidence which is "sufficient only to raise a suspicion or conjecture as to either the commission of the offense or the identity of the defendant as the perpetrator of it will not support a conviction." *State v. Earnhardt*, 307 N.C. 62, 296 S.E. 2d 649 (1982); *State v. Glenn*, 251 N.C. 156, 110 S.E. 2d 79 (1959).

When measured by these standards, the evidence here was insufficient to carry the charge of armed robbery to the jury. Even when considered in the light most favorable to the state and giving the state all reasonable inferences therefrom, the evidence at most creates suspicion that defendant was the perpetrator of this offense.

This Court considered a similar challenge to the sufficiency of the state's evidence in *State v. Murphy*, 225 N.C. 115, 33 S.E. 2d 588 (1945). There, two defendants appealed the trial court's refusal to grant a nonsuit regarding a robbery charge. The evidence showed that the victim had been assaulted by defendants and left unconscious in the street. Two women came along soon after the attack and placed the victim on a nearby porch where he remained for about ten minutes until he regained consciousness. Later, while proceeding homeward on his bicycle, the victim discovered that $82 which had been in his pocket at the

time of the assault was missing. In reversing the trial court's refusal to grant a nonsuit, this Court held that a charge may go to the jury if there is any evidence which proves the fact in issue or "which reasonably conduces to its conclusion as a fairly logical and legitimate deduction," but not where the evidence merely raises a suspicion or conjecture. *Murphy* at 116, 33 S.E. 2d at 589. In applying these principles to the facts of *Murphy*, the Court said:

> We are of the opinion that the evidence discloses no more than an opportunity for the defendants to take the money. And the evidence shows an equal opportunity for others to have taken the money. Under such circumstances to find that any particular person took the money is to enter the realm of speculation, and verdicts so found may not stand.

Murphy at 117, 33 S.E. 2d 589.

Similarly, in *State v. Holland*, 234 N.C. 354, 67 S.E. 2d 272 (1951), the victim was struck in the head with an iron pipe by a passenger in his cab. He was found unconscious in his own bed seven hours later and transported to the hospital. When he awoke eight days later, he found that approximately one-half of the one hundred dollars he was carrying at the time of the assault was missing. In reversing the trial court's refusal to grant nonsuit, the Court held that while the evidence of assault suggested a motive for robbery, the evidence disclosed no more than an opportunity for defendants to have taken it with equal opportunity for the money to have disappeared in other ways.

In the case *sub judice*, the evidence is that although defendant had an opportunity to take Burton's wallet, others might also have had an opportunity during the times (1) Burton waited on customers before the assault, (2) Burton was in the bathroom with the door closed and (3) Burton was away from the store calling and conferring with the police. We think this last period of time is particularly significant. Even if, as Burton testified, police were in the building before she returned some two hours after the assault, approximately forty to forty-five minutes elapsed from the time Burton left the store until police arrived at the insurance company and were able to calm her down enough to determine what had happened. During this time the store was

unattended and the back door unlocked. Anyone in the vicinity—a vicinity in which Burton's sense of insecurity caused her to keep the store's *front* door locked during business hours—could have entered the store during this time and taken the wallet.

The evidence, like that in *Murphy* and *Holland*, discloses no more than an opportunity for defendant, as well as others, to have taken the money. It is, therefore, insufficient under these authorities to sustain defendant's conviction of robbery with a dangerous weapon. Defendant's motion at the close of the evidence to dismiss this charge should have been allowed. Defendant's conviction of this offense in superior court case No. 82CRS35339 is, therefore, reversed.

In No. 82CRS35339—reversed.

In Nos. 82CRS35337 and 82CRS35338—appeal dismissed.

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

MARGARET H. CARTER v. RAYMOND E. CARR

No. 256PA84

(Filed 8 January 1985)

Appeal and Error § 49.1— failure of record to show excluded evidence

The exclusion of testimony will not be considered prejudicial error where appellant failed to show what the excluded testimony would have been or to make a specific offer of what she intended to prove by the testimony.

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

ON discretionary review pursuant to N.C.G.S. § 7A-31(a) of the decision of the Court of Appeals reported at 68 N.C. App. 23, 314 S.E. 2d 281 (1984).

McCain & Essen, by Grover C. McCain, Jr., and Jeff Erick Essen, for plaintiff-appellant.

Henson, Henson & Bayliss, by Perry C. Henson and Jack B. Bayliss, Jr., for defendant-appellee.

PER CURIAM.

Plaintiff brought this medical malpractice action against defendant, Dr. Raymond E. Carr. At trial the jury answered the issues submitted in favor of defendant and plaintiff appealed from judgment entered. The Court of Appeals, in an opinion by Judge Braswell, with Judges Arnold and Wells concurring, found no error in the trial.

We allowed plaintiff's petition for discretionary review on 28 August 1984, but limited our consideration of the appeal 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, defendant's partner who assisted in the operation upon which this action was based.

The portion of the record upon which this assignment of error was based is as follows:

> Q. What did Dr. Canipe do?
>
> A. Well, it appeared to him that her foot was coming and going, that he felt like it would take more time, and just giving it more time maybe and it would come back and everything would be all right.
>
> I said, "Well now, we had two surgeries, and the first one—"
>
> MR. HENSON: We object to what he said to Dr. Canipe who is not a party to this lawsuit. Hearsay.
>
> MR. PISHKO: Your Honor, there has been testimony that Dr. Canipe is Dr. Carr's partner. There is also evidence in the record that they were partners.
>
> MR. HENSON: Still hearsay, Your Honor.
>
> MR. PISHKO: It would be to admission.

THE COURT: I will sustain at this point.

EXCEPTION NO. 1

The pertinent law regarding this assignment of error is succinctly stated in *State v. Satterfield*, 300 N.C. 621, 268 S.E. 2d 510 (1980).

> "A showing of the essential content or substance of the witness's testimony is required before this Court can determine whether the error in excluding evidence is prejudicial." *Currence v. Hardin*, 296 N.C. 95, 249 S.E. 2d 387 (1978). Otherwise stated, "[w]hen evidence is excluded, the record must sufficiently show what the purport of the evidence would have been, or the propriety of the exclusion will not be reviewed on appeal." 1 Stansbury, *supra*, § 26 at 62.

Id. at 628, 268 S.E. 2d at 515-16. *See also, Currence v. Hardin*, 296 N.C. 95, 249 S.E. 2d 387 (1978); *Grimes v. Home Credit Co.*, 271 N.C. 608, 157 S.E. 2d 213 (1967); *Gower v. Raleigh*, 270 N.C. 149, 153 S.E. 2d 857 (1967); N.C.R. Civ. P. Rule 43(c).

Here plaintiff has not shown what the excluded testimony would have been, nor did plaintiff make a specific offer of what she intended to prove by the answer of Dr. Canipe. We therefore affirm the opinion of the Court of Appeals without expressing any opinion as to its analysis on the question of the alleged hearsay testimony.

Affirmed.

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

ETHEL K. CLARK, EMPLOYEE v. AMERICAN AND EFIRD MILLS, EMPLOYER, AND AETNA LIFE AND CASUALTY COMPANY, CARRIER

No. 167A84

(Filed 8 January 1985)

APPEAL by defendants pursuant to N.C.G.S. § 7A-30(2) from the Court of Appeals' decision, 66 N.C. App. 624, 311 S.E. 2d 624 (1984), reversing the Industrial Commission's denial of workers' compensation benefits and remanding to the Commission for further findings of fact. In an opinion written by *Judge Eagles*, *Judge Phillips* concurring and *Judge Webb* dissenting, the Court held that the Commission failed to adequately address the factors outlined in *Rutledge v. Tultex Corporation*, 308 N.C. 85, 301 S.E. 2d 359 (1983) and ordered the Commission to make further findings as to (1) whether plaintiff's exposure to cotton dust "significantly contributed" to the development of claimant's disease; (2) the extent of other non-work-related but contributory exposures and components of the disease; and (3) the manner in which the disease developed with reference to claimant's work history.

Charles R. Hassell, Jr. for plaintiff-appellee.

Hedrick, Eatman, Gardner, Feerick & Kincheloe, by Hatcher Kincheloe and John F. Morris for defendant-appellants.

PER CURIAM.

The decision of the Court of Appeals is affirmed. The Industrial Commission is to determine on remand whether claimant has an occupational disease and whether claimant is disabled as a result thereof in light of the factors enumerated in this Court's opinion in *Rutledge v. Tultex Corporation*, 308 N.C. 85, 301 S.E. 2d 359 (1983).

Affirmed.

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

STATE OF NORTH CAROLINA v. WINSTON FRED WILLIAMS

No. 113PA84

(Filed 8 January 1985)

BEFORE *Martin, J.*, and a jury, at the 8 October 1979 Criminal Session of WAKE County Superior Court, defendant was found guilty of second-degree rape and first-degree burglary and sentenced to life imprisonment on the burglary conviction with a concurrent twenty-five year to life term on the rape conviction. Defendant timely appealed to this Court requesting that an examination be made of the record to determine if any prejudicial error occurred at defendant's trial. We held that there was no error and affirmed the conviction. *State v. Williams*, 300 N.C. 190, 265 S.E. 2d 215 (1980).

Pursuant to 28 U.S.C. § 2254, defendant brought an action for writ of habeas corpus in the United States District Court for the Eastern District of North Carolina. On 3 January 1984, the Honorable Franklin T. Dupree, Jr., ordered that the writ should issue and defendant's conviction be vacated unless the North Carolina appellate courts conducted a direct review of defendant's conviction within sixty days. Thereafter, on 5 March 1984, defendant filed with this Court his petition for certiorari, pursuant to Rule 21 of the North Carolina Rules of Appellate Procedure. Defendant's petition was allowed by this Court on 3 April 1984. On 25 June 1984, the State of North Carolina certified to the United States District Court for the Eastern District of North Carolina that the State had complied with the order of the Honorable Franklin T. Dupree, Jr.

Rufus L. Edmisten, by Walter M. Smith, Assistant Attorney General, for the State-appellee.

Robert E. Zaytoun, for defendant-appellant.

PER CURIAM.

This case is remanded to the Superior Court, Wake County, for a plenary hearing in the nature of a motion for appropriate relief upon defendant's allegations of ineffective assistance of counsel.

Remanded.

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

ROCHELLE L. EASON v. GOULD, INCORPORATED AND EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA

No. 276PA84

(Filed 8 January 1985)

Appeal and Error § 46— equally divided court—Court of Appeals decision affirmed —no precedent

Where one member of the Supreme Court did not participate in the consideration or decision of the case, and the remaining six members of the Supreme Court are equally divided, the decision of the Court of Appeals is left undisturbed and stands without precedential value.

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

ON discretionary review of a decision of the Court of Appeals, 66 N.C. App. 260, 311 S.E. 2d 372 (1984) affirming in part and reversing in part a judgment of the Superior Court, WAKE County, and remanding the cause for further proceedings.

Central Community Legal Services, by Victor J. Boone, for claimant-appellee.

Donald R. Teeter for the Employment Security Commission of North Carolina.

PER CURIAM.

Justice Vaughn took no part in the consideration or decision of this case. The remaining members of this Court being equally divided, with three members voting to affirm the Court of Appeals and three members voting to reverse, the decision of the Court of Appeals is left undisturbed and stands without precedential value. *See State v. Johnson*, 286 N.C. 331, 210 S.E. 2d 260 (1974).

Affirmed.

TINA DARLENE LYNCH v. HARRY ALDENE HAZELWOOD

No. 327PA84

(Filed 8 January 1985)

Appeal and Error § 46— evenly divided court—Court of Appeals decision affirmed —no precedent

Where one member of the Supreme Court took no part in the consideration or decision of the case, and the remaining six members of the Supreme Court are evenly divided, the decision of the Court of Appeals is affirmed and stands without precedential value.

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

ON discretionary review of the decision of the Court of Appeals in an unpublished opinion, pursuant to Rule 30(e) of the North Carolina Rules of Appellate Procedure, affirming the dismissal of plaintiff's action in an order entered by *Huffman, J.*, at the 13 June 1983 session of District Court, MOORE County. Heard in the Supreme Court 11 December 1984.

Pollock, Fullenwider, Cunningham & Patterson, by Bruce T. Cunningham, Jr., for plaintiff appellant.

Staton, Perkinson, West & Doster, by Norman C. Post, Jr., for defendant appellee.

PER CURIAM.

The Court is evenly divided. Under these circumstances, following the uniform practice of this Court and the ancient rule of praesumitur pro negante, the decision of the Court of Appeals is affirmed, not as precedent but as the decision in this case. *Durham v. R.R.*, 113 N.C. 240, 18 S.E. 208 (1893); *Reg. v. Millis*, 8 Eng. Rep. 844 (1844).

Affirmed.

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

CLAUDINE JOHNSON GATES (SPEISER) v. ROY LEE GATES

No. 432A84

(Filed 8 January 1985)

PLAINTIFF appeals as a matter of right, pursuant to G.S. 7A-30(2), from a decision of a divided panel of the Court of Appeals, 69 N.C. App. 421, 317 S.E. 2d 402 (1984), denying plaintiff's motion to dismiss defendant's appeal, vacating the judgment entered on 21 January 1983 by *Fuller, J.*, in District Court, DAVIDSON County and remanding the case for further proceedings.

J. Calvin Cunningham and Charles E. Frye, III, for plaintiff-appellant.

Brinkley, Walser, McGirt, Miller & Smith, by Charles H. McGirt and Stephen W. Coles, for defendant-appellee.

PER CURIAM.

The decision of the Court of Appeals is

Affirmed.

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

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

BARNABY v. BOARDMAN

No. 559PA84.

Case below: 70 N.C. App. 299.

Petition by plaintiff for discretionary review under G.S. 7A-31 allowed 4 December 1984.

CHAMBERLIN v. CHAMBERLIN

No. 596P84.

Case below: 70 N.C. App. 474.

Petition by defendant for discretionary review under G.S. 7A-31 denied 4 December 1984.

COASTAL PRODUCTION v. GOODSON FARMS

No. 561P84.

Case below: 70 N.C. App. 221.

Petition by defendants (Goodson) for discretionary review under G.S. 7A-31 denied 4 December 1984.

DORTON v. DORTON

No. 520P84.

Case below: 69 N.C. App. 764.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 4 December 1984.

GREEN v. MANESS

No. 469P84.

Case below: 69 N.C. App. 403.

Petition by defendant for discretionary review under G.S. 7A-31 denied 4 December 1984.

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

GREEN v. MANESS

No. 470P84.

Case below: 69 N.C. App. 292.

Petition by defendant for discretionary review under G.S. 7A-31 denied 4 December 1984.

HENDERSON v. TRADITIONAL LOG HOMES

No. 560P84.

Case below: 70 N.C. App. 303.

Petition by defendant for discretionary review under G.S. 7A-31 denied 4 December 1984.

IN RE APPEAL OF BARHAM

No. 558P84.

Case below: 70 N.C. App. 236.

Petition by LRM for discretionary review under G.S. 7A-31 denied 4 December 1984.

IN RE SUPERIOR COURT ORDER

No. 532PA84.

Case below: 70 N.C. App. 63.

Petition by NCNB for discretionary review under G.S. 7A-31 allowed 4 December 1984.

LAURI ANN LYNCH

No. 634P84.

Case below: 71 N.C. App. 226.

Petition by Lynch for discretionary review under G.S. 7A-31 denied 4 December 1984.

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

MAXTON HOUSING AUTHORITY v. McLEAN

No. 626A84.

Case below: 70 N.C. App. 550.

Petition by defendant for discretionary review under G.S. 7A-31 denied as to additional issues 4 December 1984.

O'BRIANT v. O'BRIANT

No. 598A84.

Case below: 70 N.C. App. 360.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied as to additional issues 4 December 1984.

SHORT v. GENERAL MOTORS CORP.

No. 585P84.

Case below: 70 N.C. App. 454.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 4 December 1984.

SKINNER v. E. F. HUTTON & CO.

No. 614A84.

Case below: 70 N.C. App. 517.

Petition by plaintiffs for discretionary review under G.S. 7A-31 allowed as to additional issues 4 December 1984.

STATE v. JORDAN

No. 519P84.

Case below: 69 N.C. App. 770.

Petition by defendant for discretionary review under G.S. 7A-31 denied 4 December 1984.

STATE v. POINDEXTER

No. 572P84.

Case below: 68 N.C. App. 295.

Petition by defendant for writ of certiorari to North Carolina Court of Appeals denied 4 December 1984.

STATE v. POTTER

No. 415P84.

Case below: 69 N.C. App. 199.

Petition by Attorney General for discretionary review under G.S. 7A-31 denied 4 December 1984.

STATE v. WHEELER

No. 564P84.

Case below: 70 N.C. App. 191.

Petition by defendant (Wheeler) for discretionary review under G.S. 7A-31 denied 4 December 1984.

STATE v. WOODRUFF

No. 592P84.

Case below: 70 N.C. App. 561.

Petition by Attorney General for discretionary review under G.S. 7A-31 denied 4 December 1984.

WAYNICK CONSTRUCTION v. YORK

No. 575P84.

Case below: 70 N.C. App. 287.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 4 December 1984.

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

WILLIAMS v. BOYLAN-PEARCE, INC.

No. 458A84.

Case below: 69 N.C. App. 315.

Petition by defendant for discretionary review under G.S. 7A-31 denied as to additional issues 14 December 1984.

YOW v. ALEXANDER CO. DEPT. OF SOC. SERV.

No. 557P84.

Case below: 70 N.C. App. 174.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 4 December 1984.

SHARON BENSON BLACK v. T. W. LITTLEJOHN, SR., M.D.

No. 196A84

(Filed 30 January 1985)

Physicians, Surgeons, and Allied Professions § 13— medical malpractice—statute of limitations—meaning of non-apparent injury

As used in the discovery exception for non-apparent injuries in the statute of limitations for malpractice actions, G.S. 1-15(c), the term "bodily injury" denotes an awareness by plaintiff that wrongful or negligent conduct was involved in addition to the fact of his or her injury by defendant. Therefore, plaintiff's discovery of defendant's failure to inform her of the availability of a drug as a less drastic alternative to the hysterectomy performed by defendant physician on plaintiff more than two years earlier qualified as discovery of a non-apparent "injury" which comes within the one-year discovery provision of G.S. 1-15(c), and plaintiff's malpractice action was not barred by G.S. 1-15(c) where the complaint was filed within one year after plaintiff discovered defendant's wrongful conduct or negligence and within four years from the last act of defendant when he performed the surgery.

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

APPEAL by plaintiff, pursuant to G.S. § 7A-30(2), from a divided panel of the Court of Appeals, *Black v. Littlejohn*, 67 N.C. App. 211, 312 S.E. 2d 909 (1984), affirming an order granting defendant's motion to dismiss, entered by *Beaty, J.*, at the 25 October 1982 Civil Session of Superior Court, FORSYTH County.

Badgett, Calaway, Phillips, Davis, Stephens, Peed & Brown, by Herman L. Stephens, for plaintiff-appellant.

Petree, Stockton, Robinson, Vaughn, Glaze & Maready, by J. Robert Elster, Michael L. Robinson, and Jackson N. Steele, for defendant-appellee.

FRYE, Justice.

On 1 October 1978, defendant, a licensed physician specializing in obstetrics and gynecology, performed surgery on plaintiff. The surgical procedures performed included a total abdominal hysterectomy, a bilateral salpingo oophorectomy, appendectomy and lysis of adhesions. Defendant prescribed and performed the surgery for plaintiff to alleviate and resolve a certain condition diagnosed by defendant as endometriosis. Plaintiff, in her af-

fidavit, stated that defendant told her "he had done everything he could to avoid a hysterectomy and that nothing else would work." On 17 August 1981, plaintiff, who was at that time employed as a medical secretary, changed units on her job. Thereafter, she became aware that a drug called Danocrine was being used to treat endometriosis. In September or October 1981, plaintiff was advised by a doctor and resident where she worked that her hysterectomy "might have been unnecessary." These incidents aroused in plaintiff "some suspicions that Danocrine should have been tried in my case."

Afterwards, plaintiff was again treated for endometriosis by a second doctor, Dr. Jonathan Weston. During July 1982, Dr. Weston prescribed Danocrine to treat plaintiff's condition. Plaintiff called the Food and Drug Administration and learned that the drug had been approved for the treatment of endometriosis on 21 June 1976 and had been available for use by physicians as early as September 1976, a date more than two years before defendant had performed surgery to treat plaintiff's endometriosis. Plaintiff in her affidavit stated that "it was only when I began being treated with Danocrine for my present endometriosis that it was completely apparent to me that my hysterectomy was unnecessary."

On 16 August 1982, plaintiff commenced a medical malpractice action against defendant, alleging lack of informed consent to the surgery performed by defendant. Defendant, in his answer, denied any negligence on his part. He also included in his answer a motion to dismiss, pursuant to Rule 12(b)(6), asserting that the action was barred by the three-year statute of limitations contained in G.S. 1-15(c). The motion to dismiss was allowed by order entered 26 October 1982, dismissing the complaint. Plaintiff timely appealed to the Court of Appeals, and that court affirmed the trial court's dismissal of plaintiff's action.

I.

The issue on this appeal is whether plaintiff's discovery of defendant's failure to inform her of the availability of a drug as a less drastic alternative to the hysterectomy performed by defendant on plaintiff more than two years earlier qualifies as discovery of a non-apparent "injury" that comes within the one-year discovery provision of G.S. 1-15(c). This Court concludes that it does.

The heart of the controversy in this case centers around an interpretation of G.S. 1-15(c), the statute of limitations applicable to professional malpractice actions. That statute states:

> Except where otherwise provided by statute, a cause of action for malpractice arising out of the performance of or failure to perform professional services shall be deemed to accrue at the time of the occurrence of the last act of the defendant giving rise to the cause of action: Provided that whenever there is bodily injury to the person, economic or monetary loss, or a defect in or damage to property which originates under circumstances making the injury, loss, defect or damage not readily apparent to the claimant at the time of its origin, and the injury, loss, defect or damage is discovered or should reasonably be discovered by the claimant two or more years after the occurrence of the last act of the defendant giving rise to the cause of action, suit must be commenced within one year from the date discovery is made: Provided nothing herein shall be construed to reduce the statute of limitation in any such case below three years. Provided further, that in no event shall an action be commenced more than four years from the last act of the defendant giving rise to the cause of action: Provided further, that where damages are sought by reason of a foreign object, which has no therapeutic or diagnostic purpose or effect, having been left in the body, a person seeking damages for malpractice may commence an action therefor within one year after discovery thereof as hereinabove provided, but in no event may the action be commenced more than 10 years from the last act of the defendant giving rise to the cause of action.

It is plaintiff's contention that she suffered from an injury that was not readily apparent at the time of its origin, that is, at the time of the operation on 1 October 1978; and that her discovery of her alleged injury at some point after 17 August 1981, a date more than two years after the surgery, brings her within the second provision of G.S. 1-15(c). If applicable, this portion of the statute would allow plaintiff one year from the date of her discovery of the "injury, loss, defect, or damage" to bring an action for malpractice. Furthermore, plaintiff did commence her action on 16 August 1982, a date within one year after her alleged

discovery, thus satisfying this particular requirement of the statute.

This one-year-from-discovery exception contained within the second provision of G.S. 1-15(c) is subject to a four-year absolute or outer time limit within which plaintiff must bring an action for malpractice. This outer time limit begins with the last act of the defendant giving rise to the cause of action. Since plaintiff commenced her malpractice action on 16 August 1982, or within one year after she allegedly discovered her injury and within four years from the last act of defendant when he performed surgery on 1 October 1978, she contends that the trial court improperly granted defendant's motion to dismiss based upon the three-year statute of limitations contained in G.S. 1-15(c).

The Court of Appeals held that plaintiff's cause of action accrued on 1 October 1978, the date on which defendant performed the surgery on plaintiff, and that her injury was apparent, thus bringing her within the three-year limitation period contained in the first provision of G.S. 1-15(c). That court disagreed with plaintiff's contention that she did not discover her injury until more than two years after the surgery was performed and that she should be allowed to take advantage of the discovery provision for non-apparent injuries within G.S. 1-15(c). The primary reason for the Court of Appeals' refusal to allow plaintiff the additional time afforded by this second provision rests upon that court's interpretation of what the legislature meant by plaintiff's discovery of an "injury, . . . not readily apparent to the claimant at the time of its origin, . . ." Without citation of authority, the Court of Appeals reasoned that the term "injury" should be interpreted as follows:

> The clear purpose of the exception in G.S. 1-15(c) allowing for a four-year limitation period in certain cases is to provide for latent injuries where the physical damage to a prospective plaintiff is not readily apparent, and not for those cases in which the injury is obvious but the alleged negligence of the doctor is not. We do not believe our legislature intended to equate discovery of injury with the discovery of negligence.

67 N.C. App. at 213, 312 S.E. 2d at 911.

Based upon this reasoning, the Court of Appeals determined that plaintiff's "injury" was the removal of her ovaries and other reproductive organs and that she was aware of this "physical injury" from the time of surgery. Therefore, the court concluded, what she did indeed discover on 17 August 1981 was not her injury but defendant's negligence in not advising her of the alleged alternative treatment for her endometriosis. *Black*, 67 N.C. App. 211, 312 S.E. 2d 909.

For reasons to be explained hereinafter, we do not agree with either the holding or rationale espoused by the Court of Appeals.

II.

Since the term "injury" is not explicitly defined in the statute, it is the task of this Court to ascertain what the legislature intended when it adopted this particular language as part of G.S. 1-15(c). *State v. Hart*, 287 N.C. 76, 213 S.E. 2d 291 (1975). Certain rules of statutory construction normally serve as aids to this Court in determining legislative intent. One general rule is that the Court looks to the purpose and spirit of the statute and what it sought to accomplish. *In Re Hardy*, 294 N.C. 90, 240 S.E. 2d 367 (1978); *Stevenson v. City of Durham*, 281 N.C. 300, 188 S.E. 2d 281 (1972). Also, it is useful to consider the history and circumstances surrounding the legislation and the reason for its enactment. *Sale v. Johnson*, 258 N.C. 749, 129 S.E. 2d 465 (1963).

In 1975, prior to the adoption of G.S. 1-15(c), a person injured by the negligence of another had two applicable time periods within which to bring an action: 1) G.S. 1-52(5) provided for a three-year period commencing when a cause of action accrued[1] for injuries to the person or right of another; and 2) G.S. 1-15(b) provided for a three-year period for non-apparent injuries commencing with a plaintiff's discovery of an injury but not to exceed ten years from the negligence or last act of defendant. This latter statute, G.S. 1-15(b), was enacted in 1971 to mitigate the some-

1. The cause of action was deemed to accrue from the date defendant committed the wrongful act, regardless of the injured party's knowledge that defendant had acted wrongfully. *Wilson v. Development Co.*, 276 N.C. 198, 171 S.E. 2d 873 (1970); *Shearin v. Lloyd*, 246 N.C. 363, 98 S.E. 2d 508 (1957).

times harsh results of G.S. 1-52. *Williams v. General Motors Corporation*, 393 F. Supp. 387 (M.D.N.C. 1975) (applying North Carolina substantive law). The net effect of G.S. 1-15(b) was to overrule prior case law that had held that a cause of action for medical malpractice "accrues from the date of the wrongful act or omission." *Shearin v. Lloyd*, 246 N.C. 363, 369, 98 S.E. 2d 508, 513 (1957) (plaintiff's cause of action for medical malpractice based on defendant's negligence in leaving a foreign object in plaintiff's body at time of surgery accrued immediately on closing of incision, not when plaintiff discovered the foreign object subsequent to the three-year statute of limitations contained in G.S. 1-52(5)). The enactment of G.S. 1-15(b) equated to a legislative adoption of the discovery rule. *Johnson v. Podger*, 43 N.C. App. 20, 257 S.E. 2d 684, *cert. denied*, 298 N.C. 806, 261 S.E. 2d 920 (1979).

The enactment of G.S. 1-15(c) developed as part of the North Carolina Medical Malpractice Actions law, which was adopted during a rash of similar legislation enacted by other states during the mid-1970's. *See* N.C. Gen. Stat. §§ 90-21.11-21.14 (1981). Comment, *An Analysis of State Legislative Responses to the Medical Malpractice Crisis*, 1975 Duke L. J. 1417. This process of legislative reform originated with the crisis in the medical profession that revolved around the exorbitant cost of medical malpractice insurance and the dramatic increase in medical malpractice claims. Abraham, *Medical Malpractice Reform: A Preliminary Analysis*, 36 Md. L. Rev. 489 (1977).

In a report submitted to the General Assembly by the commission appointed to study and make certain recommendations regarding the professional malpractice crisis, the most significant recommendation made was to lower the outside time limit to four years for actions based on professional malpractice. North Carolina Professional Liability Insurance Study Commission, Report to the General Assembly of 1976, at 28 (1976) (hereinafter cited as Insurance Study). In other words, the Study Commission suggested that the ten-year outer limit contained in the discovery provision of G.S. 1-15(b) be reduced to four years.

In addition to this decrease in the outer time limit within which a malpractice action could be commenced, it was also recommended that the legislature enact the following provisions: 1) a three-year period that would start to run at the time of the

negligent act for injuries that are ascertainable at that time; and 2) a one-year-from-discovery provision for actions for injuries that are discovered between two and three years after the negligent act, with a requirement that the action be filed within one year from the discovery but subject to an overall four-year outer limit. Insurance Study, at 28. In response to these recommendations, the legislature enacted G.S. 1-15(c), a specific malpractice statute of limitations. *See* 1 D. Louisell and H. Williams, *Medical Malpractice* ¶ 13.02 (1984) (hereinafter cited as Louisell and Williams) (the authors list seven jurisdictions that have failed to enact a specific malpractice statute of limitations).

In addition to the three-year period accruing at the time of the negligent act, our lawmakers chose to include two separate discovery provisions—one for injuries, losses, defects or damages not readily apparent and the other for certain foreign objects left in the body—rather than the exclusive one-year-from-discovery provision with a four-year outer limit recommended by the study commission. Also, the legislature retained the discovery provision of G.S. 1-15(b) for causes of action for bodily injury other than actions for wrongful death and malpractice. Thus, the statute contained a discovery provision for personal injuries, other than malpractice, in G.S. 1-15(b)[2] and the dual discovery provisions for non-apparent injury and foreign objects for professional malpractice actions contained in G.S. 1-15(c). Most significantly, the legislature rejected the commission's recommendation that a four-year outer limit should apply in discovery situations. Instead, a ten-year outer limit was retained for discovery of foreign objects and a four-year outer limit adopted for discovery of non-apparent injury.

The majority of the jurisdictions with malpractice statutes of limitations provide some absolute statutory outer limit similar to that contained in our statute. Prosser and Keaton on Torts § 30 (5th ed. 1984). This outer limit is more precisely referred to as a period of repose. Note, *Medical Malpractice Statute of Repose:*

2. In 1979 the legislature repealed G.S. 1-15(b) and replaced it with G.S. 1-52(16), a discovery provision for personal injury or physical damage to property with a ten-year outer limit for accrual. Consequently, subsection (b) of G.S. 1-15 was replaced by G.S. 1-15(c) containing two discovery provisions for malpractice actions and G.S. 1-52(16) containing a discovery provision for injury, not resulting from malpractice.

An Unconstitutional Denial of Access to the Courts, 63 Neb. L. Rev. 150 (1983) (hereinafter cited as *Medical Malpractice*). Unlike an ordinary statute of limitations which begins running upon accrual of the claim (G.S. 1-15(a); *Flippin v. Jarrell*, 301 N.C. 108, 118, 270 S.E. 2d 482, 489 (1980)), the period contained in the statute of repose begins when a specific event occurs, regardless of whether a cause of action has accrued or whether any injury has resulted. *Medical Malpractice, supra*, at 153; *Bolick v. American Barmag Corp.*, 306 N.C. 364, 366, 293 S.E. 2d 415, 417-18 (1982); Prosser and Keaton on Torts, *supra* § 30. Thus, the repose serves as an unyielding and absolute barrier that prevents a plaintiff's right of action even before his cause of action may accrue, which is generally recognized as the point in time when the elements necessary for a legal wrong coalesce. *Raferty v. William C. Vick Construction Co.*, 291 N.C. 180, 186, 230 S.E. 2d 405, 408 (1976); *Developments in the Law—Statutes of Limitations*, 63 Harv. L. Rev. 1177, 1200 (1950); S. Speiser, C. Krause and A. Gans, I *The American Law of Torts* § 5:27 (1983) (hereinafter cited as *Law of Torts*).

The legislature's adoption of an outer limit or repose of four years from the last act of the defendant giving rise to the cause of action for non-apparent injuries contained in G.S. 1-15(c) and the ten-year period of repose for discovery of foreign objects clearly have the effect of granting the defendant an immunity to actions for malpractice after the applicable period of time has elapsed. *Medical Malpractice, supra*, at 154; J. Dooley, *Modern Tort Law* § 34.74-76 (1983); *see* Note, *Statutes of Limitations and the Discovery Rule in Latent Injury Claims: An Exception or the Law?* 43 U. Pitt. L. Rev. 501 (1982) (the author recognizes the tendencies of states to whittle away the discovery rule by coupling with it a statute of repose, creating an "outer cut-off date from the time of the wrongful act." *Id.* at 521). The enactment of an outer limit seems consistent with the purpose and spirit of the medical malpractice act, that is, to decrease the number and severity of medical malpractice claims in an effort to decrease the cost of medical malpractice insurance. Abraham, *supra* at 489; Insurance Study, *supra* at 3.

As enacted, G.S. 1-15(c) provides for a minimum three-year period from occurrence of the last act;[3] an additional one-year-from-discovery period for injuries "not readily apparent" subject to a four-year period of repose commencing with defendant's last act giving rise to the cause of action; and an additional one-year-from-discovery period for foreign objects subject to a ten-year period of repose again commencing with the last act of defendant giving rise to the cause of action. The enactment of the statute, providing for three distinct situations in which the time limitations can be applied in malpractice actions, also reflects the legislature's consideration for the conflicting policies of statutes of limitation in general:

> On the one hand, there are the policies of discouraging stale and fraudulent claims where the loss of evidence makes the case difficult, more costly, or impossible to prove, and of providing some absolute time limit (beyond which the plaintiff would be completely barred under all circumstances from bringing suit) so that the defendant can rest easy with the assurance that he will not be unexpectedly surprised by an old claim. On the other hand, there is also strong policy in favor of allowing a potential plaintiff, who has been as diligent as possible in discovering and bringing his meritorious claim to trial, to have access to the machinery of the courts so that he may seek redress for the wrongs committed against him.

Medical Malpractice, *supra*, at 163.

In gleaning the intent of the legislature from the purpose, spirit, and history of the legislation, we attach significance to the fact that our lawmakers chose to include two separate discovery provisions, contrary to one, as recommended by the Study Commission. These two discovery provisions tend to achieve the purpose of avoiding the obvious injustice and harshness of the

3. The case of *Wilcox v. Plummer*, 29 U.S. (4 Pet.) 172 (1830), which originated in North Carolina, is generally cited as authority for this rule. This case arose in the context of a legal malpractice action and stands for the proposition that regardless of when legal injury or damages arise, the occurrence of the negligent act by defendant triggers accrual of the statute of limitations. *See generally*, Ellis, *Malpractice Accrual: Adherence to the Common Law in Professional Negligence Actions*, 19 Idaho L. Rev. 63, 68 (1983) (contains a discussion of the impact of *Wilcox* and its misplaced application in the field of professional malpractice).

"occurrence" of the last act accrual period contained in the three-year period of limitation. *See* Note, *Statutes of Limitations—Medical Malpractice—When a Cause of Action Accrues for Limitations Purposes: A Discovery Rule*, 6 Wake Forest Intra. L. Rev. 532 (1970).[4] They also strike a delicate balance between the rights of the diligent plaintiff who should not be barred from pursuing a meritorious claim and the defendant who deserves protection from stale claims after a viable defense may be weakened because of dead witnesses or forgotten facts. In essence, the intended purpose of the statute is achieved by stimulating activity and punishing neglect. *Anderson v. Shook*, 333 N.W. 2d 708, 712 (N.D. 1983).

Although the statutory or judicial adoption of a discovery provision is the trend in most jurisdictions (Soneshein, *A Discovery Rule in Medical Malpractice: Massachusetts Joins the Fold*, 3 W. New Eng. L. Rev. 433 (1981)), the discovery rule for foreign objects is the only recognized exception in many jurisdictions. J. Dooley, *supra* § 34.80; Louisell and Williams, *supra*, ¶ 3.06-.07. This restrictive view has been criticized and explicitly rejected by some courts. For instance, in *Carson v. Maurer*, 424 A. 2d 825 (N.H. 1980), the statute of limitations for medical malpractice actions contained a discovery provision only for foreign objects. The Supreme Court of New Hampshire stated that the statute was constitutionally "invalid insofar as it makes the discovery rule unavailable to all medical malpractice plaintiffs except those whose actions are based upon discovery of a foreign object in the injured person's body." *Id.* at 833; *see* J. Dooley, *supra* § 34.80.

Thus, our statute affords plaintiffs two, not one, alternatives or exceptions to the "occurrence" of the last act accrual rule. This adherence to the discovery doctrine in both non-apparent injury and foreign object situations reflects an intent on the part of the General Assembly to preserve the plaintiff's cause of action in

4. The student author discusses G.S. §§ 1-52(5) and 1-15, the statutes of limitations applicable to malpractice claims in effect at that time, which required that actions be brought within three years after the last act of negligence by defendant. North Carolina had not at that time adopted any discovery provision. The author strongly advocated the merits of such a rule and argued for its adoption by the courts in the state. G.S. § 1-15(b) was subsequently enacted in 1971 and statutorily created such a discovery rule.

medical malpractice cases, particularly when the defendant's wrongdoing is not known to plaintiff at the time of defendant's last act. Another action on the part of the legislature that tends to reflect its intent is its rejection of the Commission's recommendation that the overall outer limit on the statutes of limitations be reduced to four years. Instead, the legislature chose to maintain a ten-year outer limit for discovery of foreign objects.

A plausible rationale for the General Assembly's actions that further tends to demonstrate its intent can perhaps be explained as follows:

> The reason that state after state has changed its basic law and policy as to limitation of actions, particularly in reference to malpractice cases, and adopted the discovery doctrine is that the former rule defining the time of accrual of the action as the date on which medical negligence occurred led frequently to harsh consequences for seriously injured plaintiffs, sometimes amounting to total deprivation of legal remedy. The obvious injustice that so often flowed from the application of the old rule disturbed the conscience and the sense of fairness in both legislators and the judiciary. And after a lengthy tug-of-war in several states as to who should take final and decisive action to make the needed change, the legislature in most states passed the necessary legislation—if they did not, the courts did so by expressly overruling older cases and setting forth the new doctrine. At present there remain only a few jurisdictions in which the date-of-negligent-act still constitutes the time of accrual of the action. And [it] is only in these jurisdictions that a patient severely injured by purported health care treatment is required, under penalty of losing all redress, to institute a malpractice action before he knows that he is a victim of negligence or indeed that he has been injured at all. Unless these unfortunate patients learn of their injury and its cause before the limitation period has expired, they find themselves, without any fault of their own, without a remedy. The opinions of courts in states that still apply the strict rule are often so worded as to show clearly that judges dislike and disapprove of enforcing the rule. They do so reluctantly, either on the theory that it is the duty of the legislature, not the courts to legislate, or on the theory that the fundamental

> purpose of all statutes of limitation is to achieve justice by preventing stale claims and by putting a final end to potential litigation, even though in individual cases this may lead to injustice. (footnote citations omitted).

Louisell and Williams, *supra*, ¶ 13.20- .22.

When the discovery rule within G.S. § 1-15(c) was coupled with an outer limit from the last act of defendant giving rise to the cause of action, the legislature wisely effectuated a compromise to balance the needs of the malpractice victims and those of health care providers and insurers. Thus, it seems contrary to the intent of the legislature to deny plaintiff a remedy for her alleged medical malpractice cause of action, if, as she contends, "plaintiff did not reasonably discover the availability of alternative treatment and therapies of which she alleged defendant negligently failed to advise her and which she alleged defendant negligently failed to utilize in her treatment until two or more years after the October 1, 1978, surgery, . . ." We conclude that the General Assembly, by including separate discovery provisions for both non-apparent injury and foreign objects and retaining the ten-year outer limit for discovery of foreign objects rather than reducing it to four years as recommended by the Commission, intended that claimants be given the maximum opportunity in delayed discovery situations to pursue their cause of action subject to the outer time limits in the statute. Thus, this Court's next task is to define plaintiff's "injury" and to determine whether it was readily apparent at the time of its origin.

III.

The question of whether plaintiff's cause of action for malpractice comes within the one-year-from-discovery provision for non-apparent injuries rests upon a judicial interpretation of the language contained in that provision. It states:

> Provided that whenever there is bodily injury to the person, economic or monetary loss, or a defect in or damage to property *which originates under circumstances making the injury*, loss, defect or damage *not readily apparent to the claimant at the time of its origin, and the injury*, loss, defect or damage *is discovered or should reasonably be discovered by the claimant* two or more years after the occurrence of

> the last act of the defendant giving rise to the cause of action, suit must be commenced within one year from the date discovery is made: Provided nothing herein shall be construed to reduce the statute of limitation in any such case below three years.

N.C. Gen. Stat. § 1-15(c) (emphasis added).

The pivotal language for purposes of this appeal is the term "injury." Plaintiff contends that her belated discovery (more than two years after the operation) of defendant's negligent failure to advise her of the availability of alternative treatments for her condition constitutes the discovery of her "injury." The Court of Appeals disagreed with this position. In rejecting plaintiff's contention, the Court of Appeals determined that "injury" meant latent injury where physical damage is not readily apparent and that "the discovery of injury" does not equate to "the discovery of negligence." We do not agree with the Court of Appeals' definition of injury.

While adhering to the same principles of statutory interpretation mentioned previously, we recognize certain additional principles that serve as guidelines for interpreting ambiguous language contained in a statute. Usually, words of a statute will be given their natural, approved, and recognized meaning. *In Re Appeal of Martin*, 286 N.C. 66, 209 S.E. 2d 766 (1974). To determine the intended meaning of the language, courts may resort to dictionaries to determine definitions of words within statutes. *State v. Martin*, 7 N.C. App. 532, 173 S.E. 2d 47 (1970). In Webster's Third New International Dictionary (1971) there are several definitions of injury. Defined within a legal context, which seems most appropriate for our purposes, injury means "a violation of another's rights for which the law allows an action to recover damages or specific property or both: an actionable wrong. . . ."

Standing alone, this definition seems to support plaintiff's position that at the time of her surgery it was not readily apparent to her that she had suffered any "actionable wrong" or violation of her rights. Not until more than two years after her hysterectomy did she actually discover that the defendant violated her rights. It was at this point that she became aware of her alleged cause of action or actionable wrong, that is, the

negligence of defendant in failing to advise her of possible alternatives to the drastic surgical procedure performed by defendant. At the very least, this definition seems to refute the Court of Appeals' interpretation that only latent injuries with non-apparent physical damage are covered within this proviso.

An additional principle of statutory construction recognizes that "when a term has long-standing legal significance, it is presumed that legislators intended the same significance to attach by use of that term, absent indications to the contrary, . . ." *Sheffield v. Consolidated Foods*, 302 N.C. 403, 276 S.E. 2d 422 (1981). Intertwined with this same principle is the general rule that "when technical terms or terms of art are used in a statute they are presumed to have been used with their technical meaning in mind, absent a legislative intent to the contrary." *In Re Appeal of Martin*, 286 N.C. at 77-78, 209 S.E. 2d at 744 (1974). Within the legal field, the term injury does indeed possess legal significance and is considered to be a term of art. *Larcher v. Wanless*, 18 Cal. 3d 646, 655-56, 135 Cal. Rptr. 75, 80, 557 P. 2d 507, 512 (1976); *see also Christ v. Lipsitz*, 99 Cal. App. 3rd 894, 160 Cal. Rptr. 498 (1979); *Tresemer v. Barke*, 86 Cal. App. 3d 656, 150 Cal. Rptr. 384 (1978). Within the Restatement (Second) of Torts, "injury" is described as the invasion of any legally protected interest of another. *Id.* § 7 comment a (1965). "Where there is an invasion of another's right, the cause of action is the wrong, technically called 'the injury,' which entitles [plaintiff] to at least nominal recompense to vindicate his right. The consequences which immediately flow from that injury, in the way of loss or damage, are but matters of aggravation." E. Hightower, *North Carolina—Law of Damages* § 1-5 (1981). Thus, plaintiff's injury is the wrong entitling plaintiff to commence a cause of action. Until plaintiff discovers the wrongful conduct of defendant, she is unaware that she has been injured in the legal sense.

Courts in other jurisdictions have adopted definitions of the term injury in the discovery provisions of their statutes, which generally comport with the view adopted herein, that is, a statute of limitations should not begin running against plaintiff until plaintiff has knowledge that a wrong has been inflicted upon him. The numerous interpretations of the term seem to possess at least one common denominator, that is, injury generally equates to negligence or breach of duty. *Jacob v. Kaiser Foundation*

Hospital, 622 P. 2d 613 (Hawaii Ct. App. 1981) (discovery of the injury occurs when plaintiff discovers damage, violation of duty, and the causal connection between the violation of the duty and the damage); *Lutes v. Farley*, 113 Ill. App. 3d 113, 68 Ill. Dec. 695, 446 N.E. 2d 866 (1983) (injury within the discovery provision means plaintiff knows of his injury and that it was wrongfully caused); *Carson v. Maurer*, 424 A. 2d 825 (N.H. 1980) (discovery rule requires that plaintiff discover both the fact he is injured and the cause thereof); *Hoffman v. Hospital Affiliates, Inc.*, 652 S.W. 2d 341 (Tenn. 1983) (injury discovered when plaintiff discovers he has a right of action); *Foil v. Ballinger*, 601 P. 2d 144 (Utah 1979) (injury within the discovery provision equates to "legal injury"); *Wood v. Gibbons*, 38 Wash. App. 343, 685 P. 2d 619 (1984) (discovery of injury equates to plaintiff's discovery of his cause of action).

The issue faced by this Court in interpreting the term injury in the discovery provision of G.S. 1-15(c) is not unique or novel. *See* 4 Am. Jur. Trials, *Statutes of Limitations* § 17 (1966). The determination of a certain factual situation that must be discovered before the discovery rule is triggered has caused courts to adopt one of several positions. Louisell and Williams, *supra* ¶ 13.07. It has been recognized, however, that in the discovery of injury situations the better reasoned cases have held that the period of limitation begins to run "only when the plaintiff is definitely aware of an injury which may form the basis for litigation." 4 Am. Jur. Trials, *supra* § 17.

The highest court of Illinois engaged in a similar interpretation of "injury" contained in that state's medical malpractice statute of limitations. In *Witherell v. Weimer*, 85 Ill. 2d 146, 421 N.E. 2d 869 (1981) plaintiff began experiencing physical pain and spasms in her left leg shortly after first taking Ortho-Novum, a brand of birth control pills, prescribed by one defendant doctor. Defendants continued to reassure her that the pills were not the cause of her symptoms and that there was nothing wrong with the veins in her legs. Plaintiff was hospitalized by defendants on three separate occasions, but the painful symptoms in her legs continued. Her last treatment by defendant doctors was in May 1976.

On 22 May 1976, plaintiff went to another doctor who diagnosed her condition as thrombophlebitis, which could have

been caused by the birth control pills. This doctor directed plaintiff to stop taking the pills. Plaintiff commenced her action on 4 January 1978, within two years after she learned that the birth control pills could have been the cause of her painful physical condition and clearly within four years of the last treatment by defendant doctors. In her complaint, plaintiff alleged *inter alia*, that defendants were negligent in failing to discontinue the prescriptions for birth control pills when they were the likely cause of her thrombophlebitis. Defendants' motions to dismiss the actions against them based upon the applicable statutes of limitations were granted by the trial court. On appeal, the supreme court concluded that plaintiff's cause of action against defendant doctors was not barred by the statute of limitations.

One of the issues to be resolved by that state's highest court was when the statute of limitations began running against plaintiff. The applicable statute of limitations for medical malpractice in Illinois required that plaintiff bring the action within two years after claimant "knew, or through the use of reasonable diligence should have known, . . . of the existence of the *injury* . . . , but in no event shall such action be brought more than 4 years after the date on which occurred the act or omission or occurrence alleged in such action to have been the cause of such injury or death." *Id.* at 153, 421 N.E. 2d at 271. The Court acknowledged that the legislature, in response to the medical malpractice crisis, amended the statute of limitations to include the discovery rule. It was also recognized that the term "injury" as used in the statute had been the subject of varying interpretations and that the supreme court had not resolved the question of "whether the statute is triggered by plaintiff's discovery of the injury or not until discovery of the negligence where, as alleged here, knowledge of the injury substantially precedes knowledge of its cause." *Id.* at 155, 421 N.E. 2d at 874. The court defined the term "injury" as used in the statute and how the plaintiff's awareness of an injury triggers the statute. "The statute starts to run when a person knows or reasonably should know of his injury and also knows or reasonably should know that it was wrongfully caused." *Id.* at 156, 421 N.E. 2d at 874. The court applied this rule by reviewing the facts to determine when plaintiff reasonably should have known that her injury was wrongfully caused.

The court's interpretation of the term "injury" in Illinois' medical malpractice statute of limitations indicates that a person's physical manifestations of painful symptoms can often precede any awareness by the plaintiff that negligence or wrongful conduct on the part of defendant may have been involved. In the case *sub judice*, plaintiff, although well aware of the removal of her reproductive organs and the physical trauma to her body, did not become aware that the defendant may have performed the surgery and inflicted such trauma unnecessarily. As the plaintiff in *Witherell* was aware of the physical symptoms in her legs shortly after defendant began prescribing birth control pills for her, so too did plaintiff in the instant case know of her physical symptoms when defendant treated her by performing surgery. However, in *Witherell* it was not until years later that plaintiff discovered that defendants may have wrongfully caused her physical symptoms by failing to discontinue the prescription for the birth control pills, thus equating to what can be described as wrongful conduct or negligence. Similarly, in the instant case, it was not until more than two years after the surgery that plaintiff discovered that defendant may have wrongfully subjected her to the physical trauma resulting from the surgery by failing to inform her of the availability of alternative drug therapy, thus equating to the same wrongful conduct or negligence as was present in *Witherell.*

The United States Supreme Court recognized that "[s]tatutes of limitation always have vexed the philosophical mind for it is difficult to fit them into a completely logical and symmetrical system of law." *Chase Securities Corporation v. Donaldson*, 325 U.S. 304, 313, *reh'g denied*, 325 U.S. 896 (1945). As Justice Holmes wisely observed, "A word is not a crystal, transparent and unchanged; it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used." *Towne v. Eisner*, 245 U.S. 418, 425 (1918). We view this Court's interpretation of the term injury within the discovery provision of our statute to be consistent with the intent of the legislature and also consistent with the general statement of the judicially created discovery rule, that is, the statute does not begin to run until plaintiff discovers, or in the exercise of reasonable care, should have discovered, that he was injured as a result of defendant's wrongdoing. *See, Lewey v. Frick Coke Co.*,

166 Pa. 536, 31 A. 261 (1895) (one of the earliest reported decisions judicially adopting the discovery rule); J. Dooley, *supra* § 34.80; Note, *Statutes of Limitations and the Discovery Rule in Latent Injury Claims: An Exception or the Law?* 43 Univ. Pitt. L. Rev. 501, 518 (1982).

Aside from the statutory interpretation of injury, the manner in which courts in other jurisdictions have interpreted their version of the discovery rule further persuades this Court that injury should be defined in a way that "avoid[s] the unfairness of interpreting a statute of limitations to accrue when the injury first occurs, if at the time plaintiff does not have enough information to bring suit." *Dawson v. Eli Lilly Co.*, 543 F. Supp. 1330, 1338 (D.D.C. 1982). In *Dawson*, the District of Columbia's discovery rule was interpreted and applied in plaintiff's product liability suit against the manufacturers of the drug diethylstilbestrol (DES).[5] Plaintiff's mother had taken DES during the time she was pregnant with plaintiff. In 1973, at the age of seventeen, plaintiff was diagnosed as having cervical adenosis and was aware at that time of a possible connection between DES and her condition. However, plaintiff was not aware until 1980 that defendants had marketed the drug without adequate testing as to its safety. Plaintiff commenced her suit in 1981.

The District of Columbia had a three-year statute of limitations for personal injury actions at the time plaintiff began her action. Defendants argued that when plaintiff reached the age of majority in 1976, the statute began to run because plaintiff knew of her injury and its connection to DES. Plaintiff argued that her knowledge of her injury and its cause was insufficient to commence the running of the limitations. She further argued that knowledge of defendant's wrongful conduct in 1980 was necessary to begin the statute running. The court responded as follows:

> [1] The parties agree, although they differ as to its requirements, that a "discovery" rule applies to this action under District of Columbia law. That is, the cause of action accrues for limitations purposes not when the injury first occurred, (here, in plaintiff's gestational period), but when plain-

5. We note that the District of Columbia did not have a statute of repose for product liability cases, *e.g.*, N.C. Gen. Stat. § 1-50(6) (creating an outer limit of six years after the date of initial purchase for use or consumption to file suit).

> tiff discovered, or by the exercise of due diligence should have discovered, the facts giving rise to her claim. (citations omitted).

Id. at 1333.

The court reviewed both products liability and medical malpractice cases from other jurisdictions in its attempt to define what it is precisely that plaintiff must discover before the time begins running for limitations purposes. The court stated:

> Although the question has not been precisely raised or addressed by the District of Columbia courts, several other jurisdictions have held that knowledge or imputed knowledge of wrongdoing, (although not necessarily legal liability), on the part of defendant is necessary to the accrual of an action under a discovery rule. Especially in the medical field, plaintiffs may lack the expertise to know whether the ill effects they have suffered are a result of someone's wrongdoing, or merely an unexpected result, or inevitable or unforeseeable risk of their treatment. Since the purpose of a discovery rule is to prevent the accrual of a cause of action before a plaintiff can reasonably be expected to know that he has a cause of action, the statute should not begin to run until he knows, or through the exercise of due diligence, should know, that his injury is the result of someone's wrongdoing.

Id. at 1334.

The court recognized that in many jurisdictions, some with statutes of limitations exclusively for medical malpractice, the discovery rule is applied in factual situations that involve plaintiff's discovery that an injury was the result of defendant's conduct or product. In those jurisdictions, the court surmised that the discovery rule requires that the plaintiff know of defendant's wrongdoing or actionable conduct in addition to the fact of his injury by defendant. After surveying the varying applications of the discovery rule by courts in other jurisdictions, the court concluded that the facts before it could fit within the application of the District of Columbia discovery rule. Respecting the application of the rule in distinguishable factual situations, the court observed:

> In general, discovery rules are adopted to avoid the unfairness of interpreting a statute of limitations to accrue when the injury first occurs, if at that time plaintiff does not have enough information to bring suit. This policy is applied to different factual situations as they arise. Where the injury is latent, the claim is held not to accrue until the plaintiff discovers the injury. Where causation of an injury is unknown, the action accrues when both the injury and its cause have been (or should have been) discovered. *Where the injury and causation are known, but not that there has been any wrongdoing, the action is held to accrue when the plaintiff discovered, or by due diligence should have discovered, the wrongdoing.* We believe the District of Columbia courts would follow this progression. While few courts have forthrightly rejected some or all of these interpretations of the discovery rule, most have at least phrased their discovery rules in a manner that could allow such interpretations should an appropriate case arise.

Id. at 1338 (emphasis added).

Following the reasoning of the court in *Dawson*, it seems evident that discovery rules are capable of being construed broadly to comport with the policy of fairness to plaintiffs who are unaware that they have been injured in a legal sense. Not wishing to narrowly construe our particular discovery provision, *Dawson* persuades us that plaintiff's case is an appropriate one to interpret the discovery rule in a manner that effectuates both the policy and purpose behind such a rule. The plaintiff in the instant case, as the plaintiff in *Dawson*, was well aware of her injury (if injury in a purely physical sense were the intended meaning). Plaintiff knew that the removal of her reproductive organs was caused by the defendant's performance of surgery, just as the plaintiff in *Dawson* knew that DES was the possible cause of her cervical adenosis. However, neither plaintiff was aware, until years after any physical symptoms had occurred, that any negligence or wrongdoing was involved. Therefore, the *ratio decidendi* of the *Dawson* court further supports our conclusion that the one-year-from-discovery provision in G.S. 1-15(c) can and should be interpreted to include an awareness by plaintiff that wrongful or negligent conduct was involved.

Additionally, the Court of Appeals rejected plaintiff's argument that her injury originated under circumstances making the injury not apparent at the time it occurred. The court set forth the following sentence to support its denial of plaintiff's contention: "At any point before or after her surgery, plaintiff through the use of reasonable diligence could have obtained a second medical opinion as to possible alternative treatments for her condition, and thus discovered the defendant's alleged negligence." *Black*, 67 N.C. App. at 213, 312 S.E. 2d at 911. This language implicitly indicates that the court determined that plaintiff was under an affirmative duty to act by seeking a second medical opinion and that her failure to do so caused the injury to be nonapparent at the time of the surgery. We disagree.

The relationship of patient and physician is generally considered a fiduciary one, imposing upon the physician the duty of good faith and fair dealing. 61 Am. Jur. 2d, *Physicians, Surgeons, and Other Health Healers* § 166 (1981). This special relationship envisions an expectation by both parties that the patient will rely upon the judgment and expertise of the doctor. *Witherell*, 85 Ill. 2d 146, 421 N.E. 2d 869. Furthermore, this relation is predicated on the fundamental proposition that the physician possesses "special knowledge and skill in diagnosing and treating diseases and injuries, which the patient lacks, and that the patient has sought and obtained the services of the physician because of such special knowledge and skill." 61 Am. Jur. 2d, *supra*, § 167.

Plaintiff, who stated in her affidavit that she was not aware of defendant's alleged wrongful conduct until more than two years after the surgery was performed, was not required as a matter of law to expedite her discovery of defendant's alleged negligence by seeking a second medical opinion before or after surgery. Therefore, her injury was not readily apparent until her subsequent discovery of defendant's wrongful conduct.

Accordingly, we hold that bodily "injury," as used in the one-year-from-discovery provision of G.S. 1-15(c) and as applied in the factual circumstances of this case, denotes bodily injury resulting from wrongful conduct in a legal sense. For the reasons stated above, we conclude that plaintiff's cause of action falls within the one-year-from-discovery provision of G.S. 1-15(c) because plaintiff was not aware of defendant's wrongful conduct or alleged

negligence in failing to inform her of alternative drug therapies, and that such wrongful conduct was not readily apparent at the time of surgery but was discovered more than two years thereafter. Since plaintiff timely filed her complaint within one year after discovering defendant's wrongful conduct or negligence, well within the four-year outer limit, her cause of action should not be dismissed.

The decision of the Court of Appeals is reversed and the cause is remanded to the Court of Appeals for remand to the Superior Court, Forsyth County, for proceedings consistent with this opinion.

Reversed and remanded.

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

STATE OF NORTH CAROLINA v. WILLIAM BERNARD PAYNE III

No. 557A83

(Filed 30 January 1985)

1. **Criminal Law § 87; Witnesses § 7— hypnotically refreshed testimony—harmless error**

In a prosecution for first degree murder where hypnotically refreshed testimony was introduced, there was no reasonable possibility that a different result would have been reached without the testimony because the hypnotized witness presented merely corroborative and cumulative testimony, did not add any matters of substance not presented through other witnesses, and did not prejudicially minimize the impact of a belt buckle found in a river because the belt played no important role in defendant's trial.

2. **Criminal Law § 76.2— no voir dire before admission of defendant's statements to jailmate—no request by defendant—no error**

The trial court did not err by failing to conduct *ex mero motu* a voir dire hearing as to the admissibility of testimony from defendant's jailmates where defendant moved before trial for an opportunity to be heard if the State attempted to introduce any evidence which could be subject to suppression, the trial court indicated that he would conduct a voir dire if he thought it necessary, and defendant did not subsequently request a voir dire. G.S. 15A-974.

3. **Criminal Law § 75.13— incriminating statements made to jailmates—admissible**

In a prosecution for first degree murder, incriminating statements made by defendant to and within the hearing of fellow jailmates were admissible where the evidence clearly showed that none of defendant's statements were induced by the witnesses; all of the witnesses approached the authorities about the statements, rather than vice versa; and there was no evidence tending to show that they had been placed in jail for the purpose of reporting statements or that any of the witnesses had been influenced in their actions prior to defendant making the statements to them.

4. **Constitutional Law § 63; Jury § 7.11— death qualified jury—no error**

The trial court did not err by death qualifying the jury.

5. **Criminal Law § 102.6— prosecutor's argument on the duty of prosecution versus duty of defense counsel—no error**

The trial court did not err by failing to interfere *ex mero motu* where the prosecutor commented during his closing argument that the prosecutor's duty is to see that the guilty are convicted and the innocent acquitted because defendant did not object during the argument, and the comment was within the wide latitude afforded counsel when considered with the State's opening argument and with the defense counsel's imputation of a lack of good faith in the investigation and prosecution of the defendant.

6. **Criminal Law § 181— motion for appropriate relief on appeal—no supporting affidavit—denied**

Defendant's motion for appropriate relief, filed in the Supreme Court, was denied where defendant failed to file supporting affidavits or other documentary evidence and the alleged fact on which the motion was based could not be ascertained from the record or transcript presented. G.S. 15A-1418, G.S. 15A-1420, Rule 37 N.C. Rules of Appellate Procedure.

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

BEFORE *Stevens, J.*, at the 8 August 1983 Session of Superior Court, ONSLOW County, defendant was convicted of first-degree murder. Pursuant to N.C.G.S. § 7A-27(a), he appeals from a judgment sentencing him to life imprisonment. Heard in the Supreme Court 13 December 1984.

Defendant was tried upon an indictment, proper in form, which alleged that he murdered William T. Whitehead on 28 May 1981. At that time, Whitehead was employed as a detective with the Jacksonville Police Department. Upon defendant's motion for a change of venue from Onslow County, the trial court ordered that a venire of jurors be drawn from Duplin County. The jury

was selected from this venire in proceedings held in the Superior Court, Duplin County. Defendant was thereafter tried and convicted of murder in the first degree in the Superior Court, Onslow County. Following a sentencing hearing conducted pursuant to N.C.G.S. § 15A-2000, the jury found that two aggravating circumstances existed: (1) the murder was committed to hinder the enforcement of the law and (2) the murder was committed against a law enforcement officer while he was engaged in the performance of his official duties. The jury also found the existence of certain mitigating circumstances. Although the jury found the aggravating circumstances to outweigh the mitigating circumstances, it concluded that these aggravating circumstances were not sufficiently substantial to call for the imposition of the death penalty. Upon the jury's recommendation of a life sentence, Judge Stevens sentenced defendant to a term of life imprisonment.

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

Adam Stein, Appellate Defender, by Assistant Appellate Defender Gordon Widenhouse and First Assistant Appellate Defender Malcom Ray Hunter, Jr., for the defendant-appellant.

MEYER, Justice.

Defendant has chosen to bring forward four assignments of error relating to the guilt-innocence phase of his trial. Chief among these is the assignment of error challenging the admission of testimony by a witness who underwent hypnosis prior to testifying. We find no prejudicial error in either the admission of this hypnotically refreshed testimony or in any other aspect of the defendant's trial.

I.

The State's evidence disclosed that on 28 May 1981, William T. Whitehead, a detective with the Jacksonville Police Department, was found dead in the New River in Jacksonville, North Carolina. Whitehead had been working undercover and when found, he was dressed in civilian clothes and his gun holster was empty. Whitehead's hands had been handcuffed behind his back. His unmarked patrol car had been found in the early morning

hours of 28 May, approximately 100 yards from the river, and his badge, radio and flashlight were discovered under a bridge which crossed the river. Later, his wallet was found under a bush near the USO Club. Whitehead was last seen alive at approximately 1:15 that morning by Reserve Officer James Brown, who had been watching a young white female (Naomi Kelly) going in and out of a bar called the Red Neck Saloon. Detective Whitehead had requested Brown to keep a watch on the Red Neck and on Ms. Kelly, whom Whitehead suspected of prostitution.

Whitehead had been primarily involved in narcotics investigations. The area near the bridge was known as a place where drug transactions and a rash of robberies occurred. It had rained heavily on 27-28 May and there was little physical evidence lifted from the scene of the crime.

Charles L. Garrett, the Onslow County Medical Examiner, testified that Detective Whitehead died from drowning, although he could not determine whether the victim was conscious when he drowned. Garrett also testified that he observed lacerations and bruises on Whitehead's face and head which were consistent with Whitehead's having been struck.

Zachary Beard, the State's chief prosecution witness, testified pursuant to a plea agreement with the prosecution whereby, upon his agreement to testify against defendant, he pled guilty to murder in the second degree in connection with Detective Whitehead's death, and received a fifteen year sentence.

Beard testified that he enlisted in the United States Marine Corps in 1976. He was absent without leave on several occasions, most notably from August 1980 to May 1981. Upon his return to Camp Lejeune in May 1981, he lived in the same barracks with defendant and they became good friends. They frequently traveled into Jacksonville together and were nearly always seen together there. One local tavern owner referred to the pair as "Mutt and Jeff." At this time, defendant began dating Naomi Kelly, whose mother was a waitress at the Red Neck Saloon. Beard dated Naomi's friend, Judy Mane (also known as "Pebbles"), who also worked at the Red Neck. Defendant and Beard frequently went to the Red Neck to drink beer and shoot pool.

Beard testified that just prior to 27 May, defendant came into the Red Neck Saloon and said that he had been busted by

Detective Whitehead for having marijuana. He testified further that late in the evening of 27 May 1981, he was playing pool and drinking beer in the Red Neck when defendant came into the bar, grabbed his girlfriend Naomi, and pulled her into a corner of the bar, hiding her. Beard asked defendant what was going on, and defendant replied, "Just get out of here and leave it go." Later, defendant pointed out Detective Whitehead to Beard and explained that he was trying to "bust" Naomi for prostitution. Beard described defendant as being aggravated and mad.

Beard stated that the Red Neck closed between 1:30 and 2:00 a.m. on 28 May. At that time, Beard, Naomi, Judy (Pebbles), Naomi's mother Connie, and defendant walked down the street to Tino's to eat breakfast. At 2:15 a.m., defendant left Tino's and went toward the Red Neck; Beard left shortly thereafter. Beard saw defendant arguing behind the bar in the Red Neck. Beard then went outside and was sitting on a pole behind the bar when he saw the defendant come outside, pace back and forth and slap the wall several times. Defendant then told Beard that he was going to the bridge. Since defendant seemed very upset, Beard waited a few minutes before following him toward the bridge.

As Beard approached the area, he saw Detective Whitehead looking under the bridge. He then observed defendant walk up behind Whitehead and strike him, causing Whitehead to fall to the ground. Initially, Beard walked away from the area after observing this act, but changed his mind and went to where defendant and Whitehead were. When he arrived, Beard observed defendant crouching over Whitehead's body, which was lying face down with the hands behind the back restrained by handcuffs. When Beard asked what was going on, defendant pulled a gun from the belt or waistband of his trousers and threatened to kill him if he did not assist defendant in placing the body in the river. Beard and defendant then pushed Whitehead's body into the water until the water level reached their knees. Defendant then grabbed the body by the ankles and pushed it under the water.

After placing Whitehead's body in the river, they proceeded toward Tino's, stopping along the way at the USO, where Beard observed defendant put the gun in his boot. This was near the area where Detective Whitehead's wallet was later found. The two returned to Tino's, having been gone for about thirty min-

utes. Defendant went inside, and came back out a few minutes later with Naomi, Connie and Pebbles. Beard and defendant walked the girls back to their apartment behind the Red Neck. Shortly thereafter, defendant and Beard went by taxi to Camp Lejeune, stopping at Camp Geiger on the way.

The following day, Naomi Kelly telephoned Beard and told him that Pebbles wanted him to come to town to talk with her. When Beard arrived in town, he found that defendant, rather than Pebbles, wanted to talk to him. Defendant warned Beard never to mention what had happened at the bridge the previous night.

In July 1981, Beard again deserted the Marine Corps. Law enforcement authorities found him in Iowa in February 1983. On cross-examination, Beard admitted being a suspect in the Whitehead murder because the police found his belt in the New River. Beard stated that he lost it while swimming alone a week before the murder. Beard further stated that he was not questioned by the police about the belt until February of 1983.

Connie Blackburn, Naomi Kelly's mother, testified that in May 1981, she was working as a waitress at the Red Neck Saloon and she was living in an apartment behind the bar with her husband Clarence and Naomi. At that time, Naomi was dating the defendant.

At about 1:45 a.m. on 28 May, defendant, Zack Beard, Pebbles and Naomi came into the bar and asked Ms. Blackburn if she wanted to go to Tino's with them to have coffee. Defendant stated that he was buying. After checking with her husband, they walked to Tino's. While enroute, Ms. Blackburn noticed some people standing near the Jazz Land Bar and a detective's car driving slowly toward them as if he were looking for someone in particular.

When the group arrived at Tino's they all went inside and sat down. After a while, defendant and Beard left, stating that they were going to get a cab, but returned approximately thirty minutes later. After that, defendant paid the bill and they all left Tino's.

Later that day, Ms. Blackburn was awakened by police officers who wanted to take her daughter Naomi for questioning.

She accompanied Naomi to the police station and then, upon returning to her apartment, overheard defendant ask her husband Clarence if he knew where defendant could get rid of a gun.

Naomi Kelly also testified and corroborated much of Beard's and her mother's testimony regarding the evening of 27 May. She stated that defendant told her Detective Whitehead was watching her and that defendant seemed angry. She also recounted how she, her mother, Pebbles, Beard and defendant went to Tino's after the Red Neck closed. Kelly stated that Beard and defendant left the others at Tino's and returned about thirty minutes later. According to Kelly, the two went to look for Beard's belt which he had left at the river while swimming. Kelly stated that Beard had lost the belt on 27 May when he dove into the water to retrieve a hairbrush, apparently after she, defendant and Pebbles dared him to go in the water after it.

Kelly also indicated that she had been questioned by the police on 28 May 1981. Later that afternoon, defendant asked her what she told them, stating, "Tell me what they asked you and what you said, so I'll know what to say." Kelly also testified that she saw defendant with a gun later that afternoon when he asked her stepfather if he knew anyone who might want to buy a gun. Present during both conversations were Kelly, Zachary Beard, Pebbles, defendant, Connie and Clarence Blackburn.

Barbara Bowman testified that in 1981, she owned a bar in Jacksonville called Barb's Place, and had known Detective Whitehead for some time. She stated that on various occasions, she talked with Detective Whitehead regarding prostitution and drugs in the area, and on one occasion had been asked by Whitehead if she knew Naomi Kelly. Ms. Bowman testified that in the latter part of April, or early part of May 1981, Detective Whitehead questioned her about activities in the Red Neck Saloon in particular. In addition, Ms. Bowman testified about ill will or animosity the defendant had toward Detective Whitehead and that defendant had called Whitehead a "mother f---er" after a confrontation between the two.

Four fellow jailhouse inmates of defendant and Beard testified for the prosecution. David Harris testified that he met the defendant for the first time when they became cellmates in the Onslow County jail. On 12 March 1983, he and defendant were ly-

ing on their bunks talking and defendant stated that he had handcuffed Mr. Whitehead and that Zachary Beard had hit Whitehead in the head. Harris did not question the defendant further about his involvement. Harris testified further that after he became a trustee, defendant asked Harris to do him a favor and go to Mr. Beard's cell and get information for him about the crime. When Harris said that he could not do that, defendant told Harris that if he did not, defendant would kill him "too."

Two other jailmates, Kenneth Tyler and Chad Hoppe, testified about an incident which occurred on 4 May 1983, at which time defendant went on a rampage and started yelling out loud that he had killed Detective Whitehead and that he had a "snitch" in Cellblock 3 (Zachary Beard) and that he should have killed Beard that night also and that he would kill Beard if he got "out of here."

The fourth jailmate witness, Robert Taylor, was also a cellmate of defendant at one time. Taylor testified that he and defendant talked frequently and that they had discussed defendant's involvement in the killing of Detective Whitehead. Defendant told Taylor that Whitehead had once busted him at the Red Neck Saloon for marijuana. On another occasion, defendant told Taylor that if he had killed Beard he would not have any witnesses against him.

The defendant testified on his own behalf. Defendant did not testify as to the events occurring on the evening of 27 May or the early morning hours of 28 May, except to testify that he did not kill Detective Whitehead. Defendant further denied having made any statement in the jail about his having killed Whitehead. In addition, defendant testified that on the afternoon of 27 May, Naomi and Beard had gone swimming together in the area near the bridge.

On cross-examination, defendant testified that he, Beard, Naomi and Pebbles went in and out of the Red Neck Saloon several times on the night Whitehead was killed. Defendant admitted having gone with Beard, Naomi and Pebbles to a trailer to purchase drugs and returning with them to the Red Neck. He stated that Beard left the bar around 12 o'clock and that he did not see Beard again until the next day. Defendant testified that he stayed at the Red Neck until it closed, left Naomi at the bar and went

toward Tino's to get a cab and then returned to the base. Defendant generally denied the other details of the events of that evening testified to by Beard, Naomi and Connie Blackburn.

Judy Mane (Pebbles) testified for the defendant. She indicated that neither defendant nor Beard went to Tino's with her, Naomi and Naomi's mother on the night that Detective Whitehead died. She also stated that Beard and Kelly had been swimming in the river late that afternoon without the defendant.

II.

Defendant, relying on the recent decision of this Court in *State v. Peoples*, 311 N.C. 515, 319 S.E. 2d 177 (1984), contends that he is entitled to a new trial because the testimony of prosecution witness Naomi Kelly had been hypnotically refreshed prior to defendant's trial and was therefore inadmissible. Defendant argues that the erroneous admission of this hypnotically refreshed testimony cannot be considered harmless in that Kelly's testimony was critical to the State's case in its "corroboration of the testimony of the accomplice turned-key-witness Beard." In addition, defendant maintains that because the jury knew Kelly had been hypnotized, the jury was likely to have accorded her testimony, which was corroborative of Beard's account, undue reliability and credibility, thereby enhancing the prejudicial impact of her testimony. We do not agree.

In *Peoples* this Court examined the scientific validity and acceptance of hypnosis with regard to its use for courtroom purposes and concluded that "hypnotically refreshed testimony is simply too unreliable to be used as evidence in a judicial setting." 311 N.C. at 532, 319 S.E. 2d at 187. In overruling our earlier decision which held that the fact that a witness had been hypnotized was a consideration relating only to the credibility rather than the admissibility of the evidence, *State v. McQueen*, 295 N.C. 96, 244 S.E. 2d 414 (1978), we identified several problems inherent in the hypnotic process. These flaws include the subject's enhanced suggestibility, his tendency to "confabulate"[1] when gaps exist in

1. In *Peoples* we noted that experts in the area of hypnosis generally agree that hypnotized subjects *confabulate*, that is, "invent details to supply unremembered events in order to make their account complete and logical, as well as acceptable to the hypnotist." 311 N.C. at 521, 319 S.E. 2d at 181, *citing* Diamond,

the pre-hypnotic memory, the subject's enhanced confidence in the truthfulness and accuracy of his post-hypnotic recall, a tendency which may preclude effective cross-examination, and the inability of either experts or the subject to distinguish between memory and confabulation. *Peoples*, 311 N.C. at 532, 319 S.E. 2d at 187. Given these difficulties associated with hypnosis, we articulated the rule that "[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." *Id.* at 533, 319 S.E. 2d at 187. The record in this case indicates that in May 1981 prior to undergoing hypnosis Kelly gave only a very brief statement to the police in which she generally denied any involvement with the Whitehead murder. Under *Peoples* most of her testimony would, on the basis of this record, appear to be inadmissible.

[1] However, although we held hypnotically refreshed testimony to be inadmissible in judicial proceedings in the *Peoples* decision, we further held that in applying this new rule retroactively to all cases which had not been finally determined on direct appeal as of the date on which *Peoples* was certified,[2] a defendant will not necessarily be entitled to a new trial where hypnotically refreshed testimony has been admitted. In so holding, this Court stated:

> [W]e 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 minimum adverse impact on the administration of justice.

311 N.C. at 534-35, 319 S.E. 2d at 189.

Based upon our careful examination of the record in this case, we conclude that no reasonable possibility exists that a dif-

"Inherent Problems in the Use of Pretrial Hypnosis of a Prospective Witness," 68 Cal. L. Rev. 313, 342 (1980).

2. The opinion in *State v. Peoples* was certified on 17 September 1984 and this case falls in the group designated for retroactive application of the *Peoples* rule.

ferent result would have been reached had Naomi Kelly's testimony not been admitted in defendant's trial.

Defendant grounds his argument that admission of Kelly's hypnotically refreshed testimony was prejudicial error on his contention that Kelly was the only material witness other than Beard (1) who testified as to the details of defendant's and Beard's actions on the evening immediately prior to the killing of Detective Whitehead, (2) who placed defendant with Detective Whitehead's gun after the killing, and (3) who showed defendant's anger toward Detective Whitehead. However, this contention is not supported by the evidence of record.

First, in sharp contrast to *State v. Peoples*, 311 N.C. 515, 319 S.E. 2d 177, where the State's key accomplice-witness was hypnotized prior to trial, in the instant case the hypnotized witness' testimony merely corroborated testimony presented by the State through a number of other witnesses, including Zachary Beard, all of whom gave testimony consistent with one another. Thus, the potential prejudicial impact of her testimony is greatly lessened in comparison to the erroneously admitted testimony in *Peoples*.

Secondly, Kelly's testimony did not add any additional matters of substance not presented through other witnesses. Furthermore, only Beard testified as to the actual killing of Detective Whitehead by the defendant during one of their unexplained absences from the company of Naomi, Pebbles and Connie Blackburn on the morning in question.

A review of the record shows that both Beard and Connie Blackburn, Kelly's mother, testified in detail as to defendant's actions during the evening of 27 May 1981, up to approximately 2:15 a.m. the following morning, when Beard and defendant went off by themselves. Both witnesses also testified that Beard and defendant returned approximately thirty minutes later and that the two men left together after all the others had returned to the Red Neck Saloon. Kelly's testimony added nothing of any substance to this version of the events.

Further, Kelly's testimony about the ill will or hate shown by defendant toward Detective Whitehead on that evening was merely corroborative and cumulative of testimony to that effect presented by Beard, Reserve Officer Brown, bar owner Barbara

Bowman and prison jailmate Robert Taylor. Each of these witnesses related either statements of the defendant regarding his arrest by Detective Whitehead for marijuana or statements by Whitehead concerning his suspicion that defendant's girlfriend Naomi Kelly was engaged in prostitution.

The only other matter of substance that Kelly testified to which tended to relate defendant to the murder concerned defendant's efforts to sell a gun the day following Detective Whitehead's death. However, this testimony too was only corroborative and cumulative of testimony by Beard and Connie Blackburn to the same effect.

The defendant's final contention regarding the prejudicial impact of Kelly's testimony is that it minimized the impact of Beard's belt being discovered in the river. The prosecution presented no direct testimony that a belt, let alone Beard's belt, had been found at the river near where Detective Whitehead was killed and his body found. Neither of the crime scene technicians mentioned a belt in connection with their investigation. The only mention of a belt being found was by the defendant himself, who stated that when being questioned by the police on 28 May, he was asked if he knew that they had found Beard's belt near the bridge, and Beard's statement that he had lost a belt buckle at the bridge three days before the killing. From the testimony presented, we conclude that the discovery of Zachary Beard's belt in the river played no part in the State's case-in-chief and played only a minimal role in defense counsel's presentation. Therefore, Kelly's testimony concerning the belt, which was elicited for the first time by defense counsel on cross-examination, cannot be said to have minimized the import of this fact, as it played no important part in the defendant's trial to begin with.

The foregoing review of the record demonstrates that Kelly's testimony was mostly cumulative to testimony presented through other witnesses in addition to Beard. Much other evidence was presented by the State which pointed to the defendant's guilt. Moreover, in his argument defendant ignores the testimony of the four jailmates concerning statements made by defendant while in custody in the Onslow County jail regarding his involvement in the crime.

Accordingly, we conclude that had any or all of Naomi Kelly's testimony as to the sequence of events, the discovery of Beard's belt in the river, the ill will of the defendant toward the victim or attempts by the defendant to sell the victim's gun been omitted from evidence, no reasonable possibility exists that the jury would have reached a different verdict as to defendant's guilt. Each of the witnesses presented by the State gave testimony which tended to corroborate the testimony of the other witnesses, independent of the testimony of Naomi Kelly. The total picture of the events of 27-28 May given by each of these witnesses is both internally consistent and consistent with the defendant's having killed Detective Whitehead in the early morning hours of 28 May 1981. In this context, any necessity for the prosecution to corroborate the testimony of the accomplice witness Zachary Beard with Naomi Kelly's testimony is considerably undercut. The erroneous admission of this evidence was harmless.

III.

[2] Prior to trial, defendant moved for an opportunity to be heard if the State attempted to introduce evidence which could be subjected to suppression. Defendant gave no legal or factual basis for suppression, nor did he put the court on notice as to what evidence might be subject to suppression. In response, the trial judge stated:

> THE COURT: I don't know of anything, but if it comes up, even in the future, even on the day of the trial, upon your objection, or even without it, I will assure you I will have a voir dire on the suppression *if I think it's necessary* whether either one of you moves for it or not. (Emphasis added.)

During the State's case-in-chief, David Harris, Kenneth Tyler, Robert Taylor and Chad Hoppe testified regarding inculpatory statements they heard defendant make during his pretrial incarceration in the Onslow County jail. At no time during or after the testimony of these witnesses did defendant object, request a voir dire or move to strike any part of their testimony. Nevertheless, defendant now contends that the trial court erred in failing to conduct, *ex mero motu*, a voir dire hearing on the admissibility of their testimony. Specifically, defendant maintains that such a hearing is necessary to determine whether these witnesses were operating at the behest of the State and whether

they elicited or heard the statements allegedly made by the defendant in violation of defendant's sixth amendment right to counsel. *See United States v. Henry*, 447 U.S. 264, 65 L.Ed. 2d 115 (1980); *Massiah v. United States*, 377 U.S. 201, 12 L.Ed. 2d 246 (1964).

Upon the trial judge's indication to defendant that a voir dire hearing would be conducted on the admission of evidence subject to suppression, when the *judge* felt it necessary ("If I think it's necessary."), defendant was put on notice of the need to object and request a voir dire hearing, when *deemed appropriate by defense counsel.* Nonetheless defendant failed to request a voir dire. The court's statement should not have been taken as an invitation by defense counsel to fail to object to testimony *he* considered inadmissible, thereby inviting error by the trial court.

Where no objection is lodged, the admission of incompetent evidence will not serve as grounds for a new trial, despite an assertion that the evidence was obtained in violation of a defendant's rights under either the constitution of the United States or of this State. *State v. Foddrell*, 291 N.C. 546, 231 S.E. 2d 618 (1977). Therefore, defendant waived his right to contest the admissibility of these statements into evidence on appeal.

Even were we to consider defense counsel's pretrial request to be heard during the trial as an objection to any testimony subject to suppression, defendant would not be entitled to the relief he now requests. At most, the request to be heard could be considered a general objection, in that defense counsel failed to specifically allege a legal or factual basis for suppression of his fellow jailmates' testimony. A general objection to testimony the admissibility of which could be challenged pursuant to a ground specified in N.C.G.S. § 15A-974 may be summarily denied at trial where the defendant's general objection fails to allege a specific legal or factual basis for his contention that the evidence objected to was obtained in violation of his constitutional rights. *See State v. Satterfield*, 300 N.C. 621, 268 S.E. 2d 510 (1980). Accordingly, the trial court did not err in failing to conduct, *ex mero motu*, a voir dire hearing as to the admissibility of the jailmates' testimony in this case.

[3] Even assuming *arguendo* that the admissibility of the questioned statements had been properly challenged below, contrary

to defendant's contentions, the record before us does sufficiently reveal the posture of the four jailmate witnesses vis-a-vis the prosecution. The record clearly demonstrates that the witnesses were not acting at the behest of the State when the statements were overheard and that the statements were not in any way improperly influenced or obtained and were therefore admissible.

David Harris testified that on 12 March 1983, he and defendant were talking about religion when defendant, of his own volition suddenly stated that he had handcuffed Detective Whitehead. Harris further testified that he did not question defendant about his statement and that the authorities had not approached him, but that he first approached his attorney, and then the authorities concerning these statements.

Robert Taylor testified that while he and the defendant were incarcerated together they talked frequently. Defendant told Taylor that Detective Whitehead had once "busted" him at the Red Neck Saloon for marijuana. On another occasion, defendant stated to Taylor that if he had killed Beard he would not have any witness against him.

On cross-examination, Taylor testified that defendant had initiated both statements and that at the time they were made to him, Taylor did not think these statements were any of his business. He told no one about them until he talked with the district attorney a week before defendant's trial.

Kenneth Tyler testified that on 4 May 1983, defendant went on a rampage concerning his involvement in the killing of Detective Whitehead. During this rampage Tyler overheard defendant yell "Yes, sir, I have a snitch down in Cell 3 with me. His name is Zack Beard," and "Yes, I killed—I killed Mr. Whitehead." At the time, Tyler was in Cellblock 4 and defendant in Cellblock 3. Later, after Tyler was placed in the same cellblock with the defendant, defendant told him that the only thing Beard had to do with the murder was that Beard helped him pull Whitehead into the water, and that he was not worried about anybody testifying against him because if they did, they would have to answer for it.

On cross-examination, Tyler testified that three or four days after defendant told him that he had killed Detective Whitehead, he reported the statement to a prison captain. Until Tyler was ap-

proached by the district attorney about a week before defendant's trial, he spoke to no one about the matter except jailmate Chad Hoppe. Tyler further testified that he, not Hoppe, brought up the subject of defendant and the statements while the two were engaged in a general conversation.

Chad Hoppe testified that on the evening of 4 May 1983, he was in Cellblock 8 and defendant in Cellblock 4 when defendant started yelling out that he had killed Detective Whitehead. At that time, another jailmate had said something about "swimming with handcuffs" when defendant apparently got mad and made a comment about snitches in Cellblock 3, Zack Beard's cellblock. After that, defendant indicated that he was referring to Zachary Beard, got quite angry and stated, "You damn right I killed him" and "I ought to killed that sorry mother f---er on the night on the bridge and I wouldn't have to worry about nobody snitching on me."

Hoppe testified on cross-examination that he later told Zachary Beard about overhearing defendant's statements after Hoppe overheard Beard discussing them with another jailmate. After that, Beard asked Hoppe if he would testify to what he heard and make a written statement for his attorney. Hoppe denied acting as a go-between for anyone.

In *State v. Perry*, 276 N.C. 339, 345-46, 172 S.E. 2d 541, 546 (1970), we stated:

> The defendant misinterprets the necessity for the voir dire examination to determine the voluntariness of his admission to his jailmate Pierce. As a general rule, voluntary admissions of guilt are admissible in evidence in a trial. To render them inadmissible, incriminating statements must be made under some sort of pressure. Here we quote from the Supreme Court of the United States in *Hoffa v. United States*, 385 U.S. 293, 17 L.Ed. 2d 374: "Neither this Court nor any member of it has ever expressed the view that the Fourth Amendment protects a wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it. . . . 'The risk of being overheard by an eavesdropper or betrayed by an informer or deceived as to the identity of one with whom one deals is probably inherent in the conditions of human society. It is the kind of risk we

> necessarily assume whenever we speak.' [A]ll have agreed that a necessary element of compulsory self-incrimination is some kind of compulsion." The court did not commit error in permitting the witness Pierce to repeat the incriminating admissions the defendant voluntarily made to him while both were prisoners.

See also State v. Monk, 291 N.C. 37, 47-48, 229 S.E. 2d 163, 170-71 (1976).

The evidence plainly shows that the incriminating statements made by defendant to, and within the hearing of, fellow jailmates Harris, Taylor, Tyler and Hoppe were volunteered by defendant and were not made under any compulsion or as a result of any impropriety on the part of the police or prosecution. While defense counsel cross-examined each of these witnesses extensively as to whether they were acting as government agents at the time these incriminating statements were made, their testimony demonstrates that they were not.

Their testimony clearly shows that none of defendant's statements were induced by these witnesses, but were initiated by the defendant himself. All of these witnesses testified that they approached the authorities first, and not vice-versa, concerning defendant's statements. Furthermore, no evidence was presented tending to show that they were either placed in the jail for purposes of reporting any statements made to them by defendant or that any of these witnesses were approached or influenced in their actions prior to defendant having made the statements to them.

Accordingly, this is not a situation like that presented in *United States v. Henry*, 447 U.S. 264, 65 L.Ed. 2d 115, relied upon by defendant, where a paid informant deliberately engaged the incarcerated defendant in conversation for purposes of producing incriminating statements, or like that presented in *Massiah v. United States*, 377 U.S. 201, 12 L.Ed. 2d 246, where a codefendant agreed to help the prosecution by allowing his car to be wired and then engaging the defendant in a lengthy conversation in order to elicit incriminating statements from him.

Rather, the challenged statements in this case were clearly voluntary statements made by the defendant to other jailmates

who had no prior arrangement with the authorities to elicit such statements. The trial court, therefore, did not err in permitting the incriminating admissions defendant voluntarily made to be admitted into evidence and defendant has failed to demonstrate the need for a further hearing on the question of admissibility. *State v. Monk*, 291 N.C. 37, 229 S.E. 2d 163; *State v. Perry*, 276 N.C. 339, 172 S.E. 2d 541. *See also State v. Barnett*, 307 N.C. 608, 300 S.E. 2d 340 (1983).

IV.

[4] Next, the defendant contends that the practice of "death qualifying" the jury before the guilt-innocence phase of his trial resulted in a jury biased in favor of the prosecution on the question of guilt or innocence and deprived him of a fair trial.

The defendant acknowledges that this question was decided against him in *State v. Avery*, 299 N.C. 126, 261 S.E. 2d 803 (1980), and that position has been consistently reaffirmed by this Court in *State v. Boyd*, 311 N.C. 408, 319 S.E. 2d 189 (1984); *State v. Pinch*, 306 N.C. 1, 292 S.E. 2d 203, *cert. denied*, 459 U.S. 1056, 74 L.Ed. 2d 622, *reh'g denied*, 459 U.S. 1189, 74 L.Ed. 2d 1031 (1982) and *State v. Hamlet*, No. 228A83 (slip opinion filed 6 November 1984). Nonetheless, defendant, without citing any new authority or advancing any new reasons, asks this Court to reconsider its holdings on this issue and grant the defendant a new trial. We decline to do so and once again reaffirm the decision reached in *State v. Avery*, 299 N.C. 126, 261 S.E. 2d 803.

V.

[5] In his concluding argument, defendant contends that the district attorney improperly commented in his closing argument upon the respective roles of the prosecution and defense counsel in the prosecution of a criminal case, thereby denying defendant a fair trial.

The portion of the prosecutor's argument to which defendant objects was made during the State's closing argument by District Attorney Andrews, who stated:

> [T]he defense attorneys—it's their duty to defend the man to the best of their ability. That's their sole duty in this case—to defend them to the best of their ability. That's not the

> Prosecutor's duty to defend anybody to the best of its ability. The Prosecutor's duty is to see that justice is done, to see the guilty are convicted and innocent are acquitted. They don't have that double duty, so to speak, like we prosecutors have. Their sole duty is to try to get that man off and to do it to the very best they can within the limits of the law.

Defendant maintains that the prosecutor's statement was equivalent to a personal guarantee to the jury that the defendant was guilty, "because it would be contrary to the prosecutor's duty to see that justice is done, to urge the jury to convict a person the prosecutor was not convinced was guilty." Defendant concludes that if the jury believed and accepted this unchallenged declaration by the prosecutor, "then defendant's right to a fair trial was surely destroyed." We do not agree with this contention.

First, the record reveals that no objections were made by defendant during the prosecutor's closing argument. Therefore, the only question for review is whether the prosecutor's remarks amounted to such gross impropriety as to warrant the trial judge's intervention, *ex mero motu*. *State v. Kirkley*, 308 N.C. 196, 302 S.E. 2d 144 (1983); *State v. Johnson*, 298 N.C. 355, 259 S.E. 2d 752 (1979).

Second, it is well settled that counsel are allowed wide latitude in arguments to the jury in contested cases. They are allowed to argue to the jury the law and facts in evidence and all the reasonable inferences to be drawn therefrom. *See, e.g., State v. Pinch*, 306 N.C. 1, 292 S.E. 2d 203 and *State v. Lynch*, 300 N.C. 534, 268 S.E. 2d 161 (1980). Counsel may also defend their own tactics, as well as those of the investigating authorities, when challenged. *See, e.g., State v. Moose*, 310 N.C. 482, 313 S.E. 2d 507 (1984) and *State v. Davis*, 305 N.C. 400, 290 S.E. 2d 574 (1982). However, counsel may not argue to the jury incompetent and prejudicial matters and may not travel outside the record by injecting facts and personal opinions not included in evidence. *State v. Lynch*, 300 N.C. 534, 68 S.E. 2d 161. Our review of the record reveals no such grossly improper statements by the district attorney in his closing argument which would require the trial judge to intervene, *ex mero motu*, to correct the argument.

When the prosecution's jury argument is considered as a whole, as it properly must be, the statement defendant now inter-

prets as a "personal guarantee" of defendant's guilt takes on its true meaning. In the State's opening argument, District Attorney Vatcher carefully reviewed for the jury the respective roles of the prosecution and defense counsel in a criminal proceeding:

> The prosecution of one charged with a criminal offense is, of course, an adversary proceeding. As a prosecuting attorney it is our duty to represent the State of North Carolina. As such, it's not only our right but duty to argue for and seek the State's objective in the proceeding at hand. *This objective is not conviction of the Defendant regardless of guilt*; nor is it punishment disproportionately [sic] to the circumstances. *But it's the conviction of the guilty; the acquittal of the innocent;* and punishment commensurate with the offense in the interest of future protection of our society. *And as the advocate for the State of North Carolina, I must represent that interest.* (Emphasis added.)

Against this background, it is unlikely that the jury attributed the meaning which defendant has to the district attorney's later reference to the role of defense counsel in the adversary system. Furthermore, in his closing argument, defense counsel suggested a lack of good faith on the part of the district attorney in the prosecution of defendant and further attacked the credibility and actions of the police officers investigating the case. For example, defense counsel argued:

> Now, if we take the State's case, and I've been practicing criminal law for fifteen years and I've never seen a case like this before. . . . I have never, ever seen a case with the kind of witnesses that they have produced ever and couldn't possibly imagine these kind of witnesses coming into court and couldn't possibly imagine the State asking you to believe these witnesses. I have never seen it before, and I hope I never see it again.

Additionally, defense counsel attempted to personalize the case and invited the jury to consider matters other than the guilt or innocence of the defendant, characterizing the case as follows:

> It's an appeal to your emotions and an appeal to your prejudice, and an attempt to get you to come back with a verdict of guilty with absolutely nothing but a bare accusation. It's

> unfair. It's not right. And it's not proper. And it shouldn't go on in a court of law. It should not. And you should not sanction it. And you should not say to the District Attorney we approve of this. This is the kind of drum we have been waiting to hear, the kind of tom-tom we wanted to hear. So we come back with a conviction. I say it was improper. And I say that they have no such statements. And I say that they know they have no such statements. And I say that it's one more attempt to bolster and make a case where none exists. . . .
>
> * * *
>
> [T]oday you decide not just the guilt or innocence of Billy Payne, but you decide something even more important than that. You decide whether or not you are going to condone prejudice, scare tactics, whether you are going to swing, go along with what everybody else thinks ought to be done.

These and other similar arguments on the part of defense counsel clearly suggest a lack of good faith in the investigation and prosecution of the defendant for the murder of Detective Whitehead. When the challenged portion of the district attorney's closing argument is read contextually, and in light of defense counsel's argument, it is clear that it was made in rebuttal to defense counsel's imputations of bad faith and not for the purpose of claiming the title of impartial champion of justice for the prosecution. As an attempt to rebut defense counsel's imputations of bad faith, the district attorney's argument was within the wide latitude allowed counsel in their jury arguments, particularly when their own tactics are challenged. The trial court did not, therefore, err in failing to interfere, *ex mero motu.*

VI.

Finally, both the State and the defendant have filed motions for appropriate relief, the State pursuant to N.C.G.S. § 15A-1416 (motion by the State for appropriate relief) and Rule 37 of the North Carolina Rules of Appellate Procedure and the defendant pursuant to N.C.G.S. § 15A-1418 (motion for appropriate relief in the appellate division). Both motions relate to testimony inadmissible under *State v. Peoples*, 311 N.C. 515, 319 S.E. 2d 177.

By its motion, the State requests that should this Court determine that the admission of Naomi Kelly's testimony, if error, would not have constituted harmless error, appropriate relief be granted the State in the form of a hearing upon remand to the trial tribunal for a determination on the question of whether Naomi Kelly's testimony was improperly tainted by her pretrial hypnotic session. In view of our determination that the admission of Kelly's testimony was harmless error, we deny the relief requested by the State in its motion.

[6] The defendant's motion relates to the admissibility of witness Zachary Beard's testimony under the retroactive application of the rule of *Peoples*. The motion contains the following statement:

> 4. In discussions with defendant's trial counsel and others associated with this case, the undersigned appellate counsel, who was not involved in the trial proceedings, is informed and believes that Zachary Beard, another witness in this case, was also hypnotized prior to testifying at defendant's trial. Beard allegedly was defendant's accomplice and testified pursuant to a plea agreement with the State, whereby he pled guilty to second degree murder and received the presumptive fifteen-year prison sentence.
>
> 5. Beard gave a number of recorded statements to law enforcement authorities. The fact of his hypnosis is not a part of the record. It is impossible, without an evidentiary hearing, to ascertain the date(s) of his hypnosis and to compare such date(s) with the dates of his prior recorded statements.

However, no supporting affidavits or other documentary evidence accompanies defendant's request for appropriate relief.

N.C.G.S. § 15A-1420, which governs the procedure for filing a motion for appropriate relief clearly requires supporting affidavits to accompany the motion in a case such as this. Subsection (c)(6) provides that a "defendant who seeks relief by motion for appropriate relief must show the existence of the asserted ground for relief. Relief must be denied unless prejudice appears, in accordance with G.S. 15A-1443." Subsection (b)(1), entitled "Supporting Affidavits" provides as follows:

A motion for appropriate relief made after the entry of judgment must be supported by affidavit or other documentary evidence if based upon the existence or occurrence of facts which are not ascertainable from the records and any transcript of the case or which are not within the knowledge of the judge who hears the motion.

Accordingly, because defendant submitted no supporting affidavits or other documentary evidence tending to show that Zachary Beard did in fact undergo hypnosis prior to defendant's trial and this alleged fact is not ascertainable from the record or transcripts submitted, we cannot address the merits of defendant's request for appropriate relief with regard thereto. Defendant's motion is therefore denied.

We have carefully reviewed the record, transcripts and briefs of the parties in this case and conclude that defendant received a fair trial, free from prejudicial error.

No error.

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

STATE OF NORTH CAROLINA v. PHILLIP LEE YOUNG

No. 307A83

(Filed 30 January 1985)

1. Homicide § 12; Indictment and Warrant § 13.1— aggravating circumstances used in seeking death penalty—no requirement of disclosure in indictment or bill of particulars

In a prosecution for first degree murder, first degree burglary, and robbery with a dangerous weapon, the State was not required to allege the aggravating factors on which it would rely in seeking the death penalty in either the indictment or in a bill of particulars. The indictment used adequately apprised defendant of the charge and the information necessary for the preparation of his defense, G.S. 15A-2000(e) sets forth the only aggravating factors on which the State may rely in seeking the death penalty, and aggravating factors do not constitute "factual information" which must be listed in a bill of particulars under G.S. 15A-925(b).

2. Indictment and Warrant § 13.1— denial of motion for bill of particulars—no error

The trial court did not err by denying defendant's motion for a bill of particulars stating the time and date of the deceased's death and the exact type of weapon used where defense counsel indicated in the hearing on the motion that he had access to autopsy reports revealing the time and date of death and that he had seen the knife which the State contended was the murder weapon.

3. Criminal Law § 98.2— denial of motion to sequester witnesses—no error

The trial court did not abuse its discretion by denying defendant's motion to sequester the State's chief witnesses so that they could not influence each other's testimony where defendant conceded that the testimony eventually presented included many discrepancies. G.S. 15A-1225.

4. Criminal Law § 99— denial of motion that officers dress in street clothes—no abuse of discretion

The trial court did not abuse its discretion by denying defendant's motion that officers wear street clothes while testifying.

5. Criminal Law § 87.1— admission of leading questions—no error

The trial court did not abuse its discretion by allowing the prosecutor to lead witnesses during direct examination where several of the questions complained of were not leading and others elicited testimony already received into evidence without objection or testimony not subject to reasonable dispute.

6. Criminal Law §§ 51, 52— expert witness properly qualified and allowed to answer hypothetical questions

There was no error in permitting a witness to respond to hypothetical questions as an expert in serology where there was ample evidence to support the trial judge's qualification of the witness as an expert.

7. Criminal Law § 43.4— photographs of knife with holes in victim's clothing—not prejudicial

There was no error in the admission of photographs showing the alleged murder weapon being fitted into holes in coveralls which belonged to the victim where the photographs illustrated the testimony of an S.B.I. agent about whether the weapon would have caused tears in the victim's coveralls.

8. Homicide § 21.5; Burglary and Unlawful Breakings § 5.11; Robbery § 4.3— evidence of each offense sufficient

The court properly denied defendant's motions to dismiss the charges of first degree murder, first degree burglary, and robbery with a dangerous weapon and to set aside the verdict as contrary to the weight of the evidence where the evidence showed that defendant suggested to two companions that they rob and kill the victim to obtain money; defendant and his companions gained entry to the victim's house by trick with the intention of committing armed robbery and murder; defendant pulled a knife from his pants and stabbed the victim twice in the chest and a companion stabbed the victim several times in the back; and defendant went through the victim's pockets, removed his wallet, and divided the money with his companions.

9. Criminal Law § 102.9— first degree murder—argument for death penalty as retribution—no error

In a prosecution for first degree murder, the State did not err in arguing for the death penalty on the basis of retribution. Defendant did not object at trial and any impropriety was not so gross that the court abused its discretion by failing to correct the prosecutor *ex mero motu*.

10. Criminal Law § 135.9— first degree murder—argument that jury should not consider youth a mitigating factor—no error

In a prosecution for first degree murder, the prosecutor did not improperly attempt to turn a statutory mitigating circumstance into an aggravating circumstance, but rather argued that in *this case* the jury should not find the defendant's age (19) as a mitigating circumstance.

11. Criminal Law § 135.7— court's instruction of jury—correction of misstatement—no error

In a prosecution for first degree murder, the trial court did not commit reversible error in the sentencing phase where it mistakenly instructed the jury that Issue Three was whether the mitigating circumstances were *sufficient*, rather than *insufficient*, to outweigh the aggravating circumstances. The jury was recalled and correctly instructed when the court reporter informed the court of the error, the jury took with it into the jury room an issues form with the correct wording, and the error was in defendant's favor.

12. Criminal Law § 135.4— death penalty—sentencing phase—instructions that sentence would be life imprisonment if jury not unanimous—not required

The court was not required to instruct the jury that it would impose a sentence of life imprisonment if the jury could not agree on a recommendation of punishment, and the North Carolina capital punishment scheme is not unconstitutional in that it permits subjective discretion and discrimination in imposing the death penalty.

13. Criminal Law § 135.4; Constitutional Law § 63— death penalty—aggravating circumstance that crime was especially heinous, atrocious and cruel—not unconstitutionally vague—death qualifying jury not unconstitutional

The issue of whether the aggravating circumstance that a murder was especially "heinous, atrocious, or cruel" was unconstitutionally vague and overbroad was not properly before the Court because defendant did not attack G.S. 15A-2000(e)(9) prior to or during trial and did not object to jury instructions relating to that factor, and the jury did not find that this aggravating circumstance existed. Moreover, both G.S. 15A-2000(e)(9) and the practice of death qualifying the jury have been held constitutional. North Carolina Rules of Appellate Procedure Rule 10(b)(2).

14. Criminal Law § 135.10— death sentence disproportionate

Although the evidence supported the aggravating factors found by the jury and there was nothing in the record suggesting that the sentence of death was influenced by passion, the death sentence was vacated as disproportionate to the penalty imposed in the pool of similar cases. G.S. 15A-2000(d)(2).

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

APPEAL by defendant from the judgment of *Davis, J.*, at the 2 May 1983 Special Session of Criminal Superior Court, WATAUGA County.

On 8 February 1983 defendant, Dwight Jackson and David Presnell met at the Big G Game Room, a recreation center and pool hall in Boone, North Carolina. At approximately 6:30 p.m. that day Jackson and Presnell hitchhiked from Boone to Blowing Rock to buy liquor. They hitchhiked back to the Big G Game Room, arriving at around 7:30 p.m. Presnell and Jackson stayed in the parking lot of the game room drinking the liquor they had purchased. At some point in the evening defendant, who had been shooting pool inside, left the pool hall and joined Presnell and Jackson in the parking lot.

A witness testified that the victim, J. O. Cooke, who regularly visited the Big G Game Room, was there that evening. The witness testified that Cooke left the game room between 9:30 and 10:00 p.m. as was his custom.

After finishing a bottle of vodka in the parking lot, defendant, Presnell, and Jackson began to talk about how they might obtain more liquor. Jackson suggested that they go to J. O. Cooke's house to get another pint. Since the men had no money, defendant suggested that the three men go to Cooke's house, rob and kill him, and take money. Presnell and Jackson testified that they thought defendant was joking since robbing Cooke was a common joke at the Big G Game Room. The three men left the Big G Game Room parking lot and began walking to Cooke's house. On the way defendant suggested that Jackson hold Cooke, defendant stab him, and Presnell "finish" him. When the men arrived at Cooke's house, Jackson knocked on the door and told Cooke that they wanted to buy liquor. Cooke let the men inside and went into the kitchen to get the liquor. When he returned with the vodka, defendant suddenly reached into his pants, pulled out a knife and stabbed Cooke twice in the chest. Cooke said "What are you doing?" and fell to the floor. Cooke was able to take the knife from his own chest, at which point defendant told Presnell to "finish him." Presnell stabbed the victim five or six times in the back.

Defendant searched through Cooke's pockets and wallet and divided the money he found among the three men. The men then searched the house for other valuables and found a coin collection which they divided. They left the house, and Jackson placed the knife in a nearby snowbank.

On the following day Elvin Hundley and his father, who owned the Big G Game Room, became suspicious when Cooke did not make an appearance at the game room. Elvin Hundley testified that he and a man named J. C. Trivette went to Cooke's house to look for him at around 4:00 or 4:30 p.m. When Hundley and Trivette arrived, they noticed Cooke's car in his garage. They knocked on the door at Cooke's house, but they heard no response. Upon looking into a window, they saw Cooke's body on the floor and immediately notified the police.

Dr. Evan H. Ashby, a medical examiner for Watauga County, testified that in his opinion Cooke had died before midnight on 8 February. Cooke received two stab wounds in the chest and six in the back, according to Dr. Ashby's testimony.

Dr. Modesto Sharyj, a pathologist at Bowman-Gray School of Medicine in Winston-Salem, testified that he had conducted an autopsy on the body of Cooke. He testified that in his opinion Cooke died shortly after being stabbed. In his opinion the cause of death was loss of blood resulting from a stab wound to the heart.

On 14 February 1983 Dwight Jackson led Officer Robert Kennedy of the Boone Police Department to the snowbank where the murder weapon had been placed. John Bendure, a forensic chemist with the North Carolina State Bureau of Investigation, testified that fibers found on the blade of the knife were consistent with fibers from the deceased's clothes. David Spittle, an S.B.I. serologist, testified that tests he had performed on the knife showed the presence of blood.

Scott Worsham, an S.B.I. specialist in hair identification and comparison, testified that a hair found on the deceased's clothing was consistent with a hair removed from the head of defendant.

On 8 February 1983 defendant was charged with first-degree murder, first-degree burglary, and robbery with a dangerous weapon. At trial defendant offered no evidence. The jury found

defendant guilty of first-degree murder, first-degree burglary, and robbery with a dangerous weapon.

In the sentencing phase of the trial, conducted pursuant to N.C.G.S. § 15A-2000(a)(1), the trial court submitted three aggravating circumstances: (1) whether the murder was committed while defendant was engaged in a commission of robbery with a dangerous weapon or first-degree burglary; (2) whether the murder was committed for pecuniary gain; and (3) whether the murder was especially heinous, atrocious, or cruel. The trial court submitted two mitigating circumstances for consideration by the jury: (1) the age (19) of defendant; and (2) any other circumstance deemed to have mitigating value. The jury found as aggravating circumstances that the murder was committed while in the commission of a robbery or burglary and that it was committed for pecuniary gain. The jury found evidence of one or more mitigating circumstances, but found them insufficient to outweigh the aggravating circumstances. The jury recommended that defendant be sentenced to death and the trial court entered judgment accordingly. Defendant appealed as a matter of right pursuant to N.C.G.S. § 7A-27(a).

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

Robert H. West for defendant-appellant.

BRANCH, Chief Justice.

[1] By his first assignment of error, defendant contends the trial court erred in failing to require the State to reveal upon which aggravating circumstances it intended to rely in seeking the death penalty. In particular, defendant challenges the sufficiency of the indictment to charge defendant with first-degree murder for which a penalty of death is sought by the prosecution. He also contends the trial court erred in denying defendant's pretrial motion for a bill of particulars to disclose the aggravating circumstances the State intended to prove in the sentencing phase of the trial. Defendant contends that his constitutional rights under the sixth, eighth and fourteenth amendments to the Constitution of the United States were violated by these alleged errors. We reject these contentions.

Defendant concedes that his bill of indictment was sufficient under our law to charge the offense of first-degree murder. He nonetheless contends that a charge of first-degree murder in which aggravating circumstances exist and the death penalty is sought is a more serious offense. He argues that the indictment must set forth the aggravating circumstances the State intends to prove to protect his right to be informed of the charges he must be prepared to meet.

We rejected defendant's argument in *State v. Williams*, 304 N.C. 394, 284 S.E. 2d 437 (1981), *cert. denied*, 456 U.S. 932 (1982). We held in *Williams* that the State need not set forth in an indictment the aggravating circumstances upon which it will rely in seeking a sentence of death. Defendant in this case was adequately apprised in his indictment of the charge of first-degree murder and provided with information necessary for the preparation of his defense. Furthermore, N.C.G.S. § 15A-2000(e) sets forth the only aggravating circumstances upon which the State may rely in seeking the death penalty. We held in *Williams* that the statutory notice provided by N.C.G.S. § 15A-2000(e) is sufficient to satisfy constitutional requirements of due process.

We have also rejected defendant's argument that the trial court erred in failing to require the State, upon defendant's motion for a bill of particulars, to allege upon which aggravating circumstances it intended to rely. *State v. Brown*, 306 N.C. 151, 293 S.E. 2d 569, *cert. denied*, 459 U.S. 1080 (1982); *State v. Taylor*, 304 N.C. 249, 283 S.E. 2d 761 (1981), *cert. denied*, 463 U.S. 1213 (1983).

The statute governing bills of particulars is N.C.G.S. § 15A-925 which provides in pertinent part:

> (a) Upon motion of a defendant under G.S. 15A-952, the court in which a charge is pending may order the State to file a bill of particulars with the court and to serve a copy upon the defendant.
>
> (b) A motion for a bill of particulars must request and specify items of factual information desired by the defendant which pertain to the charge and which are not recited in the pleading, and must allege that the defendant cannot adequately prepare or conduct his defense without such information.

(c) If 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.

We indicated in *Brown* that aggravating circumstances do not constitute "factual information" within the meaning of N.C.G.S. § 15A-925(b). The trial court did not err in failing to require the State to list in a bill of particulars aggravating circumstances it intended to prove.

[2] Defendant in his next two assignments of error contends that the trial court erred in denying his motion for a bill of particulars stating the time and date of deceased's death and the exact type of weapon used in the crime. These assignments of error are without merit.

The function of a bill of particulars is to inform defendant of specific occurrences intended to be investigated at trial and to limit the course of the evidence to a particular scope of inquiry. *State v. Williams*, 304 N.C. 394, 284 S.E. 2d 437 (1981); *State v. Detter*, 298 N.C. 604, 260 S.E. 2d 567 (1979). The granting or denial of motions for a bill of particulars is within the discretion of the trial court and is not subject to review except for palpable and gross abuse thereof. *State v. Detter*, 298 N.C. at 611, 260 S.E. 2d at 574.

In *Detter*, as in this case, defendant requested in a motion for a bill of particulars that the State provide information about, among other things, the identity of the murder weapon and date of death of the deceased. The trial court denied her motion on grounds that she had received the information she requested in discovery and already possessed the information she needed adequately to prepare and conduct her defense.

Our review of the record in this case similarly reveals that the counsel for defendant had before trial received the information sought in the bill of particulars. The counsel for defendant indicated in the hearing on the motion that he had access to autopsy reports revealing the time and date of defendant's death. He stated that he had actually seen the knife which the State con-

tended was the murder weapon. Since the defendant was apprised through his attorney of the "specific occurrences" intended to be investigated at trial, we hold that the trial court acted well within its discretion in denying defendant's motion for a bill of particulars. Defendant's assignments of error are overruled.

[3] Defendant next contends the trial court erred in denying his motion to sequester the chief witnesses in the State's case, the codefendants Presnell and Jackson. Defendant argues that since these witnesses provided crucial evidence linking him to the crimes charged, the trial court should have granted his motion to sequester them so that they would not influence each other's testimony. The guidelines governing the exclusion of witnesses are found in N.C.G.S. § 15A-1225 which provides:

> Upon motion of a party the judge may order all or some of the witnesses other than the defendant to remain outside of the courtroom until called to testify, except when a minor child is called as a witness the parent or guardian may be present while the child is testifying even though his parent or guardian is to be called subsequently.

A motion to sequester witnesses is addressed to the sound discretion of the trial judge and is not reviewable on appeal absent a showing of an abuse of discretion. *State v. Royal*, 300 N.C. 515, 268 S.E. 2d 517 (1980); *State v. Woods*, 307 N.C. 213, 297 S.E. 2d 574 (1982).

Defendant has made no showing of abuse of discretion on the part of the trial judge. In his argument defendant concedes that there were many discrepancies in the two witnesses' testimony. In fact the variance in the testimony of the witnesses has led defendant in a separate assignment of error to argue the trial court should have dismissed the murder charge because of insufficiency of the evidence. Defendant has not shown how the trial court's failure to sequester the witnesses resulted in the witnesses conforming their testimony to the prejudice of defendant. We overrule this assignment of error.

[4] By his next assignment of error defendant contends that the trial court erred in denying defendant's pretrial motion that the officers wear street clothes while testifying. In the hearing on the motion, defendant argued that the presence of officers in uni-

form unnecessarily prejudiced the jury against him. The trial judge denied the motion, stating, "Well, I'm not asking anybody to put on a uniform, but I'm not going to ask anyone to take theirs off, either, that is DENIED."

Defendant has cited no authority in support of his argument and has not preserved in the record any indication as to how the law enforcement officers who testified were dressed. In the absence of controlling statutory provisions or established rules, all matters relating to the orderly conduct of the trial or which involve the proper administration of justice in the courts are within the trial judge's discretion. *State v. Rhodes*, 290 N.C. 16, 224 S.E. 2d 631 (1976). The presiding judge is given large discretionary power as to the control of the trial. *Id.*

Defendant has shown neither an abuse of discretion on the part of the trial court nor any prejudice attributable to the court's denial of his motion. This assignment of error is without merit.

[5] Defendant next contends that the trial court erred in allowing the prosecutor to lead witnesses Presnell, Jackson and Kennedy during direct examination. We find no merit in these assignments of error. A leading question is usually defined as one which suggests the desired response, and may frequently be answered yes or no. *State v. Britt*, 291 N.C. 528, 231 S.E. 2d 644 (1977). Because a question may be answered yes or no, however, does not necessarily make it leading. *Id.* Rulings by the trial court on leading questions are discretionary and reversible only for abuse of discretion. *State v. Smith*, 290 N.C. 148, 226 S.E. 2d 10, *cert. denied*, 429 U.S. 932 (1976). Guidelines have evolved over the years to the effect that counsel should be allowed to lead witnesses on direct examination in certain circumstances. *State v. Greene*, 285 N.C. 482, 206 S.E. 2d 229 (1974). We have held that where leading questions elicit testimony already received without objection into evidence, where the import of the testimony is not subject to reasonable dispute, or where the questions are asked for the purpose of securing preliminary or introductory testimony, the trial court does not abuse its discretion in permitting the questions. *See* 1 *Brandis on North Carolina Evidence* § 31 (1982); *State v. Manuel*, 291 N.C. 705, 231 S.E. 2d 588 (1977).

We have examined the record and find no abuse of discretion. Several of the questions complained of are not leading. Others elicit testimony already received into evidence without objection or testimony not subject to reasonable dispute. We overrule this assignment of error.

[6] Defendant contends that the trial court erred in receiving David Spittle as an expert in serology and in permitting him to answer hypothetical questions. Defendant argues that Spittle had limited experience and education and that his testimony served only to mislead the jury. We disagree. An expert witness is one who is better qualified than the jury to draw appropriate inferences from the facts. *State v. Mitchell*, 283 N.C. 462, 196 S.E. 2d 736 (1973). The determination whether a witness is qualified as an expert is a question of fact and is ordinarily within the exclusive province of the trial judge. *State v. Fulton*, 299 N.C. 491, 263 S.E. 2d 608 (1980). To qualify as an expert, an individual need not be a specialist or be engaged in a particular profession or calling. It is enough that through study, experience, or both, he is better qualified than the jury to form an opinion on a particular subject. 1 *Brandis on North Carolina Evidence* § 133 (1982).

Where a judge finds a witness qualified as an expert, that finding will not be reversed unless there was no competent evidence to support the finding or unless the judge abused his discretion. *State v. Woods*, 286 N.C. 612, 213 S.E. 2d 214 (1975), *death sentence vacated*, 428 U.S. 903 (1976). We find ample evidence in the record to support the trial judge's qualification of Spittle as an expert.

Although defendant objects to the trial court's permitting Spittle to respond to hypothetical questions, it is well settled that an expert witness may express an opinion based on facts within his own knowledge or based on facts not within his knowledge but incorporated into hypothetical questions. *State v. David*, 222 N.C. 242, 22 S.E. 2d 633 (1942). The witness Spittle was properly allowed to testify as an expert in response to questions concerning blood which remained on the knife found in a snowbank. We reject this assignment of error.

[7] By his next assignment of error, defendant contends that the trial court erred in admitting into evidence certain photographs showing the alleged murder weapon being fitted into holes in the

material of coveralls which belonged to the victim. Defendant asserts that the photographs were offered merely to inflame the jury.

This Court has long held that photographs competent to illustrate the testimony of the witnesses are not rendered inadmissible because they tend to arouse prejudice. *State v. Young*, 287 N.C. 377, 214 S.E. 2d 763 (1975), *death sentence vacated*, 428 U.S. 903 (1976).

The photographs to which defendant objects clearly illustrated the testimony of S.B.I. Agent Scott Worsham on the issue whether the murder weapon could have caused tears in the victim's coveralls. The photographs were properly admitted into evidence and we overrule this assignment of error.

[8] Defendant contends the trial court erred in failing to dismiss at the close of the State's evidence the charges of first-degree murder, first-degree burglary and robbery with a dangerous weapon.

On a motion to dismiss on the ground of insufficiency of the evidence, the question for the court is whether there is substantial evidence of each element of the crime charged and of the defendant's perpetration of such crime. *State v. Earnhardt*, 307 N.C. 62, 296 S.E. 2d 649 (1982); *State v. Riddle*, 300 N.C. 744, 268 S.E. 2d 80 (1980). In evaluating the motion, the trial judge must consider the evidence in the light most favorable to the State, allowing every reasonable inference to be drawn therefrom. *State v. Thomas*, 296 N.C. 236, 250 S.E. 2d 204 (1978).

We first address defendant's argument that the first-degree murder charge should have been dismissed because "twelve reasonable men listening to this evidence could not possibly find the defendant guilty."

First-degree murder is the unlawful killing of a human being with malice and with premeditation and deliberation. *State v. Strickland*, 307 N.C. 274, 298 S.E. 2d 645 (1983). The evidence in this case, considered in the light most favorable to the State, tended to show that defendant suggested to two companions that they rob and kill the victim, John Oscar Cooke, for the purpose of obtaining money with which to purchase liquor. Defendant and his friends walked over to the victim's house and gained entry to the

dwelling by a ruse. Defendant pulled a knife from his pants and stabbed Cooke twice in the chest and David Presnell then stabbed the victim several times in the back. Cooke died as a result of the injuries inflicted by defendant and Presnell. Clearly, this brief summation of the evidence suffices to show that defendant's motion to dismiss the first-degree murder charge for insufficiency of the evidence was properly denied.

Defendant also contends the evidence presented by the State at trial was insufficient to prove the essential elements of the crime of first-degree burglary.

To warrant a conviction for first-degree burglary, the State's evidence must show that there was a breaking and entering during the nighttime of an occupied dwelling with the intent to commit a felony therein. *State v. Wells*, 290 N.C. 485, 226 S.E. 2d 325 (1976). A breaking may be actual or constructive. *State v. Wilson*, 289 N.C. 531, 223 S.E. 2d 311 (1976). A constructive breaking, as distinguished from actual forcible breaking, occurs when entrance to the dwelling is accomplished through fraud, deception or threatened violence. *Id.* at 539-40, 223 S.E. 2d at 316.

In the instant case, the State presented evidence that defendant and two others went to the victim's home on the night of 8 February 1983 intending to commit the felonies of armed robbery and murder. The victim was tricked into opening the door by Dwight Jackson's false statement that he and his friends had come to purchase liquor from the victim. This evidence supports the trial judge's refusal to dismiss the charge of first-degree burglary for insufficiency of the evidence.

Finally, we consider defendant's objection to the trial court's refusal to dismiss the charge of robbery with a dangerous weapon at the close of the State's evidence.

The elements constituting the offense of armed robbery are "(1) the unlawful taking or an attempt to take personal property from the person or in the presence of another (2) by use or threatened use of a firearm or other dangerous weapon (3) whereby the life of a person is endangered or threatened." *State v. Beaty*, 306 N.C. 491, 496, 293 S.E. 2d 760, 764 (1982).

To dispose of defendant's argument on this point it suffices to say that the evidence, taken in the light most favorable to the

State, revealed that Defendant Young and David Presnell each stabbed John Cooke with a knife. Defendant then went through Cooke's pockets, removed his wallet and divided the money among the three of them. This evidence is sufficient to withstand defendant's motion to dismiss the charge of armed robbery.

In conclusion, we hold that the State presented substantial evidence as to the essential elements of each of the crimes charged and as to the defendant's commission of each offense. These assignments of error are overruled.

Likewise, we hold that the trial judge did not err in denying defendant's motion to set aside the verdict as being contrary to the weight of the evidence. A motion to set aside the verdict is addressed to the discretion of the trial judge and is not reviewable on appeal in the absence of abuse of that discretion. *State v. Hill*, 294 N.C. 320, 240 S.E. 2d 794 (1978). Here, no abuse of discretion has been shown.

SENTENCING PHASE

We consider defendant's contentions relating to the prosecutor's jury argument during the penalty phase of the trial.

[9] Defendant's first argument under this assignment of error is that the district attorney was improperly permitted to argue for the death penalty on the basis of retribution. The portion of the prosecutor's argument to which defendant takes exception is as follows:

> I have never known any man, and I know this is true of Phillip Young as well, there is no man who has ever lived who does not have someone who loves him. And the first inclination on the part of anyone who was told of the death of one of their close loved ones is to say, I will take care of this myself. I have seen that as a prosecutor. And I can tell you that unless we tell them now don't do anything foolish, let the law take care of this, but I can tell you when the law consistently does not take care of it, there will come a time when good citizens themselves will go out and do that which the law has failed to do.
>
> *I'm talking about retribution.* And I know right now within this community there are any number of people who

> are just cringing to think that a prosecutor would stand up and argue retribution because we are not supposed to think like that. But the reality of it is, Ladies and Gentlemen, unless the law deals very terribly and very punitively to those people who have committed very terrible and very punitive crimes, there will be a time when the citizens will act without the law.

Defendant did not object to this argument at trial. Therefore we apply the standard of review set forth by this Court in *State v. Johnson*, 298 N.C. 355, 369, 259 S.E. 2d 752, 761 (1979).

> In capital cases . . . 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.

Assuming *arguendo* that the prosecutor's remarks were improper, the impropriety was not so gross that the trial judge abused his discretion in failing to correct the district attorney *ex mero motu*.

[10] By this same assignment of error, defendant contends that in his jury argument the prosecutor attempted to "turn a statutory mitigating factor, defendant's young age (19), into an aggravating factor."

We have carefully reviewed the prosecutor's remarks relating to defendant's age and find no impropriety. The district attorney did not, as defendant contends, attempt to turn a statutorily designated mitigating circumstance into an aggravating circumstance. Rather, the prosecutor argued that *in this case* the jury should not find that defendant's chronological age was a mitigating circumstance. His remark that the defendant's age should not be found to mitigate his punishment is not tantamount to a suggestion that the jury consider this circumstance as an *aggravating* one. This assignment is overruled.

[11] Defendant's next argument is that the trial court committed reversible error in its instructions to the jury during the sentencing phase of the trial.

The sole basis for this argument is that on one occasion the trial judge mistakenly used the word "sufficient" instead of "insufficient" when instructing on the third issue the jury must consider when determining the defendant's punishment in a capital case. Issue Three on the Issues and Recommendation as to Punishment Form reads as follows:

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

(Emphasis added.)

Despite defendant's failure to object to this misstatement at trial, we have considered his argument and find that this single instructional mistake does not constitute prejudicial error.

The record reveals that just as the jury left the courtroom to begin deliberations on the issues relating to defendant's punishment, the court reporter informed the trial judge of his error in substituting the word "sufficient" for "insufficient" in his explanation of Issue Three. The judge immediately recalled the jury and informed them that he had previously misread one of the words in the penalty phase instructions. He then correctly instructed the jury on Issue Three. Clearly, under these circumstances the one inadvertent misuse of the word "sufficient" is not prejudicial error entitling defendant to a new sentencing hearing. This is especially true since the jury carried with them into the jury room a copy of the Issues and Recommendation as to Punishment Form on which the third issue was correctly printed.

Furthermore, we note that it would seem any error in the trial judge's misuse of the word "sufficient" in his explanation of Issue Three would have been favorable to defendant. This is so because if the jury found that the mitigating circumstances were *sufficient* to outweigh the aggravating circumstances, a sentence of life imprisonment would have been mandated.

This assignment of error is without merit and is overruled.

[12] Defendant next contends the trial judge erred in failing to instruct the jury that the court would impose a sentence of life imprisonment if the jury could not unanimously agree on a recommendation of punishment.

We have repeatedly held that such an instruction is improper "because it would be of no assistance to the jury and would invite the jury to escape its responsibility to recommend the sentence to be imposed by the expedient of failing to reach a unanimous verdict." *State v. Williams*, 308 N.C. 47, 73, 301 S.E. 2d 335, 351-52, *cert. denied*, --- U.S. ---, 104 S.Ct. 202 (1983). *See also State v. Smith*, 305 N.C. 691, 292 S.E. 2d 264, *cert. denied*, 459 U.S. 1056 (1982); *State v. Hutchins*, 303 N.C. 321, 279 S.E. 2d 788 (1981). The trial judge therefore did not err in failing to give this instruction.

Defendant argues that the North Carolina capital punishment scheme embodied in N.C.G.S. § 15A-2000 is unconstitutional in that it permits subjective discretion and discrimination in imposing the death penalty. We summarily overrule this assignment of error on the basis of our numerous prior decisions rejecting this argument. *See, e.g., State v. Maynard*, 311 N.C. 1, 316 S.E. 2d 197 (1984); *State v. Oliver and Moore*, 309 N.C. 326, 307 S.E. 2d 304 (1983).

[13] Defendant's next contention is that N.C.G.S. § 15A-2000 (e)(9), which allows the sentencing jury to find as an aggravating circumstance that the murder was "especially heinous, atrocious, or cruel," is unconstitutionally vague and overbroad both on its face and in the manner in which it has been interpreted by this Court.

We note initially that this issue is not properly before us. Defendant made no motion prior to trial nor during the course of the trial proceedings attacking the constitutionality of this aggravating circumstance. Neither did defense counsel object to the jury instructions relating to this factor. *See* North Carolina Rule of Appellate Procedure 10(b)(2). Finally, this issue is not fairly presented in this case because the jury did not in fact find this aggravating circumstance to exist.

Even assuming this issue were properly before the Court, however, it is clearly without merit. We have repeatedly held that N.C.G.S. § 15A-2000(e)(9) is constitutional on its face. *See State v. Boyd*, 311 N.C. 408, 319 S.E. 2d 189 (1984); *State v. Oliver*, 302 N.C. 28, 274 S.E. 2d 183 (1981). Similarly, in the recent case of *State v. Maynard*, 311 N.C. 1, 34, 316 S.E. 2d 197, 215 (1984), this Court reviewed our interpretation of N.C.G.S. § 15A-2000(e)(9) in prior cases and concluded that it is entirely consist-

ent with the mandate of *Furman v. Georgia*, 408 U.S. 238 (1972) and *Godfrey v. Georgia*, 446 U.S. 420 (1980). This assignment of error is overruled.

Defendant also contends that the process used in "death qualifying" a jury prior to the guilt phase of the trial results in a "guilt prone" jury and violates his constitutional right to be tried by a jury comprised of a representative cross-section of the community. This Court, as well as the Fourth Circuit Court of Appeals, has consistently decided this issue adversely to defendant. *See Keeten v. Garrison*, 742 F. 2d 129 (4th Cir. 1984); *State v. Gardner*, 311 N.C. 489, 319 S.E. 2d 591 (1984); *State v. Bondurant*, 309 N.C. 674, 309 S.E. 2d 170 (1983). We decline to reconsider our prior decisions on this issue and therefore hold that the current jury selection process in this State in first-degree murder cases is constitutional.

PROPORTIONALITY

[14] As a final matter in every capital case, we are directed by N.C.G.S. § 15A-2000(d)(2) to review the record and determine (1) whether the record supports the jury's findings of any aggravating circumstance or circumstances upon which the sentencing court based its sentence of death; (2) whether the sentence was imposed under the influence of passion, prejudice or any other arbitrary factor; and (3) whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

After an exhaustive review of the transcript, record on appeal, briefs and oral arguments, we find that the evidence supports the two aggravating factors found by the jury. These were that the murder was committed while defendant was engaged in the commission of armed robbery (N.C.G.S. § 15A-2000(e)(5)) and that it was committed for pecuniary gain (N.C.G.S. § 15A-2000 (e)(6)). We also conclude that there is nothing in the record which suggests that the sentence of death was influenced by passion, prejudice or any other arbitrary factor. We thus turn to our final statutory duty of proportionality review.

In determining whether the death sentence in this case is disproportionate to the penalty imposed in similar cases, we first refer to the now familiar "pool" of cases established in *State v.*

Williams, 308 N.C. 47, 301 S.E. 2d 335, *cert. denied*, --- U.S. ---, 104 S.Ct. 202 (1983).

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

Id. at 79, 301 S.E. 2d at 355 (emphasis in original). The pool "includes only those cases which have been affirmed by this Court." *State v. Jackson*, 309 N.C. 26, 45, 305 S.E. 2d 703, 717 (1983).

We have held that our task on proportionality review is to compare the 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, 314 S.E. 2d 493 (1984).

> If, after making such a comparison, we find that juries have consistently been returning death sentences in the similar cases, then we will have a strong basis for concluding that a death sentence in the case under review is not excessive or disproportionate. On the other hand if we find that juries have consistently been returning life sentences in the similar cases, we will have a strong basis for concluding that a death sentence in the case under review is excessive or disproportionate.

Id. at 648, 314 S.E. 2d at 503.

In conducting our proportionality review in this case, we have reviewed the approximately twenty-eight robbery murder cases in the "pool." We note that in twenty-three of these cases, juries imposed sentences of life imprisonment rather than death.[1]

1. *State v. McDonald*, 312 N.C. 264, 321 S.E. 2d 849 (1984); *State v. Wilson*, 311 N.C. 117, 316 S.E. 2d 46 (1984); *State v. Murray*, 310 N.C. 541, 313 S.E. 2d 523 (1984); *State v. Martin*, 309 N.C. 465, 308 S.E. 2d 277 (1983); *State v. Abdullah*, 309 N.C. 63, 306 S.E. 2d 100 (1983); *State v. Whisenant*, 308 N.C. 791, 303 S.E. 2d 784 (1983); *State v. Hill*, 308 N.C. 382, 302 S.E. 2d 202 (1983); *State v. Ladd*, 308 N.C. 272, 302 S.E. 2d 164 (1983); *State v. Barnett*, 307 N.C. 608, 300 S.E. 2d 340

The death penalty was imposed in five cases.[2] While we wish to make it *abundantly clear* that we do not consider this numerical disparity dispositive of our proportionality review, our careful examination of these cases has led us to the conclusion that although 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*, 309 N.C. at 46, 305 S.E. 2d at 717. The facts presented by this appeal more closely resemble those cases in which the jury recommended life imprisonment than those in which the defendant was sentenced to death.

In this case, the evidence essentially reveals that defendant, a young man nineteen years of age, and two companions went to the victim's home on the night of 8 February 1983 intending to rob and murder him. They gained entry to Cooke's dwelling by trick. Defendant stabbed Cooke twice in the chest and his companion Presnell "finished him" by stabbing him several more times. Young and his two friends then stole the victim's money and some valuable coins and fled the scene. The pathologist testified that the victim died shortly after he was stabbed.

Although we have not in the past, and will not in the future "necessarily feel bound during [our] proportionality review to give a citation to every case in the pool of 'similar cases' used for comparison," *State v. Williams*, 308 N.C. 47, 81, 301 S.E. 2d 335, 356, *cert. denied*, --- U.S. ---, 104 S.Ct. 202 (1983), we find it instructive to discuss several cases which impelled our conclusion that the death penalty is disproportionate in this case.

(1983); *State v. Booker*, 306 N.C. 302, 293 S.E. 2d 78 (1982); *State v. Brock*, 305 N.C. 532, 290 S.E. 2d 566 (1982); *State v. Fox*, 305 N.C. 280, 287 S.E. 2d 887 (1982); *State v. Hunt*, 305 N.C. 238, 287 S.E. 2d 818 (1982); *State v. Adcox*, 303 N.C. 133, 277 S.E. 2d 398 (1981); *State v. Miller*, 302 N.C. 572, 276 S.E. 2d 417 (1981); *State v. Hawkins*, 302 N.C. 364, 275 S.E. 2d 172 (1981); *State v. Smith*, 301 N.C. 695, 272 S.E. 2d 852 (1981); *State v. Moore*, 301 N.C. 262, 271 S.E. 2d 242 (1980); *State v. Weimer*, 300 N.C. 642, 268 S.E. 2d 216 (1980); *State v. Easterling*, 300 N.C. 594, 268 S.E. 2d 800 (1980); *State v. Avery*, 299 N.C. 126, 261 S.E. 2d 803 (1980); *State v. Atkinson*, 298 N.C. 673, 259 S.E. 2d 858 (1979); *State v. Crews*, 296 N.C. 607, 252 S.E. 2d 745 (1979).

2. *State v. Gardner*, 311 N.C. 489, 319 S.E. 2d 591 (1984); *State v. Lawson*, 310 N.C. 632, 314 S.E. 2d 493 (1984); *State v. Oliver and Moore*, 309 N.C. 326, 307 S.E. 2d 304 (1983); *State v. Craig and Anthony*, 308 N.C. 446, 302 S.E. 2d 740, *cert. denied*, --- U.S. ---, 104 S.Ct. 263 (1983); *State v. Williams*, 305 N.C. 656, 292 S.E. 2d 243, *cert. denied*, 459 U.S. 1056 (1982).

A case with facts similar to the murder here under review is *State v. Whisenant*, 308 N.C. 791, 303 S.E. 2d 784 (1983). In *Whisenant*, the defendant, a forty-three-year-old male, discussed with several witnesses his intention to rob the Leonhardt home in Morganton, North Carolina. On 28 June 1981, he went to the Leonhardt residence and shot and killed the owner, a seventy-nine-year-old male, and the housekeeper, a sixty-six-year-old female. The jury found as aggravating circumstances that defendant had previously been convicted of a felony involving the use of violence against another person; the murder was committed while defendant was engaged in the commission of armed robbery; the murder was perpetrated for pecuniary gain; and the murder was committed while defendant was engaged in a course of conduct which included the commission of another crime of violence against another person. No mitigating circumstances were found. Despite the presence of four aggravating circumstances and the failure of the jury to find a single circumstance in mitigation of defendant's punishment, defendant was sentenced to consecutive life sentences after the jury was unable to agree upon the recommendation of punishment. *See* N.C.G.S. § 15A-2000(b) (1983).

State v. Hunt, 305 N.C. 238, 287 S.E. 2d 818 (1982) is another capital case in which the crime committed by the defendant was much worse than that committed by Phillip Young, yet the jury found the aggravating circumstances not sufficiently substantial to call for the imposition of the death penalty and a sentence of life imprisonment was imposed.

In *Hunt*, the deceased, Walter Ray, lived alone in a trailer in Henderson, North Carolina. Ray operated an illegal bar in his residence. As Ray was closing the bar one night, defendant put on gloves, walked up behind the victim, grabbed him and put a knife against his throat. Defendant then forced Ray back to the bedroom where defendant searched a closet and removed approximately $400.00 and a pistol from it. As defendant prepared to shoot Ray with the pistol, Ray begged him not to kill him that way. Defendant agreed to employ another method.

After forcing Ray to drink beer and a pint of liquor, defendant slashed one of Ray's forearms near the wrist with a knife. He slashed him again and waited while the victim slowly bled to death. Defendant then left the trailer carrying the pistol and the money with him.

The jury found six aggravating circumstances, but specified no mitigating circumstances since they found that the aggravating circumstances were insufficient to support the death penalty.

Finally,[3] we agree with defendant's contention that this case is very similar to *State v. Jackson*, 309 N.C. 26, 305 S.E. 2d 703 (1983) in which this Court overturned a death sentence as disproportionate to the penalty imposed in similar cases.

In *Jackson*, three men conspired to ambush and rob a seventy-one-year-old ailing man. The trio faked car trouble and the elderly victim, George McAulay, stopped to offer aid. One of the three men told McAulay that they needed jumper cables. McAulay replied that he did not have any with him, but would give one of the men a ride to town. Defendant got into the car with him. When the victim refused to give Jackson money, Jackson murdered McAulay by shooting him twice in the head. Jackson took the money, met his companions and reported to them that he had killed McAulay because he had refused to relinquish the money.

The jury found as an aggravating circumstance that the crime was committed for pecuniary gain. They found as the sole mitigating circumstance that defendant had no significant history of prior criminal activity. In the instant case, the jury found the two aggravating circumstances earlier mentioned, that is, that the murder was committed while defendant was engaged in the commission of armed robbery and that it was committed for pecuniary gain. The jury did not specify the mitigating circumstances they found.

In contrast to *Whisenant, Hunt, Jackson* and other cases contained in footnote 1 are those armed robbery cases in which this Court affirmed the jury's recommendation of the death penalty as an appropriate punishment. We do not deem it necessary to discuss each of these cases; suffice it to say that we have carefully

3. By singling out these few cases for discussion, we do not mean to imply that these were the only cases reviewed by this Court in conducting our proportionality review. We considered carefully each of the cases in the "pool" as defined by *State v. Williams*, 308 N.C. 47, 301 S.E. 2d 335, *cert. denied*, --- U.S. ---, 104 S.Ct. 202 (1983).

reviewed each of them and are convinced that defendant Young did not commit a crime as egregious as those committed by the defendants in *Gardner, Lawson, Oliver and Moore, Craig and Anthony* and *Williams*. In nearly all those cases, the jury found as an aggravating circumstance that the defendants were engaged in a course of conduct which included the commission of another crime of violence against another person. Furthermore, in *Oliver and Moore* and *Craig and Anthony*, the jury found that the murder was especially atrocious, heinous or cruel. In this case, however, the jury specifically found that this aggravating circumstance did *not* exist.

In conclusion, we hold as a matter of law that the death sentence imposed in this case is disproportionate within the meaning of N.C.G.S. § 15A-2000(d)(2). We are therefore required by the 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 this judgment.

Guilt-Innocence Phase: No error.

Sentencing Phase: Death sentence vacated, sentence of life imprisonment imposed.

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

Misenheimer v. Misenheimer

DONALD E. MISENHEIMER, EXECUTOR UNDER WILL OF ISAM R. MISENHEIMER v. JOHN E. MISENHEIMER; CAROLYN M. PRINCE; DONALD E. MISENHEIMER; THOMAS M. MISENHEIMER; SYLVIA M. GRUENDLER; SHARON M. MISENHEIMER; KENNETH R. MISENHEIMER; JOHN E. MISENHEIMER, JR.; AND SAMUEL MISENHEIMER, MINOR

No. 368PA83

(Filed 30 January 1985)

Descent and Distribution § 6; Wills § 66.1 — decedent murdered by son — residuary estate — slayer and anti-lapse statutes — right of slayer's children to take slayer's residuary share

Where decedent was murdered by one of his sons, decedent's will left his residuary estate to his eight surviving children, including the slayer, in equal shares, and decedent did not indicate any intent that a lapsed share would pass other than through the will's residuary clause, the slayer's share in decedent's estate was "otherwise disposed of by the will" within the meaning of the slayer statute, G.S. 31A-4(3), and since the slayer is conclusively presumed to have predeceased decedent for purposes of distribution of property under the will, section (a) of the anti-lapse statute, G.S. 31-42, applies so that the slayer's two children take the slayer's entire one-eighth interest in the residuary estate by substitution.

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

Justice EXUM dissenting.

Justice MEYER joins in this dissenting opinion.

ON discretionary review of the decision of the Court of Appeals, 62 N.C. App. 706, 303 S.E. 2d 415 (1983), affirming judgment entered by *Grist, J.*, at the 26 April 1982 session of Superior Court, MECKLENBURG County. Heard in the Supreme Court 10 April 1984.

Henderson & Shuford, by Robert E. Henderson, for plaintiff appellant.

Jo Hill Dobbins for defendant appellees.

MARTIN, Justice.

Isam R. Misenheimer was murdered by his son John.[1] After providing for payment of his debts, funeral and other expenses,

1. *See State v. Misenheimer*, 304 N.C. 108, 282 S.E. 2d 791 (1981) (affirming John's first degree murder conviction for which he received a life sentence).

Isam's will left his residuary estate to his eight surviving children, including John, in equal shares. John has two sons. The question presented by this action for a declaratory judgment is how to distribute John's share in light of the "slayer statute," article 3 of chapter 31A of the General Statutes of North Carolina, which bars one who "willfully and unlawfully" kills another as principal or accessory from sharing in the other's estate.

Articles I and II of Isam Misenheimer's will provide for the payment of debts, estate expenses, and taxes. Article IV appoints Isam's son Donald executor. Article V grants powers to the executor. The will's only remaining article, III, provides:

> DISPOSITION OF RESIDUE
>
> I will, devise and bequeath all the residue and remainder of the property which I may own at the time of my death, real or personal, tangible and intangible, of whatsoever nature and wheresoever situated, including all property which I may acquire or become entitled to after the execution of this Will, and including any property over or concerning which I may have any power of appointment unto the following named persons absolutely and in fee simple, share and share alike:
>
> 1. Carolyn M. Prince
> 2. Johny E. Misenheimer
> 3. Donald E. Misenheimer
> 4. Thomas M. Misenheimer
> 5. James C. Misenheimer
> 6. Sylvia M. Misenheimer
> 7. Sharon M. Misenheimer
> 8. Kenneth R. Misenheimer

The testator was survived by all eight children named in Article III, including John. John's two children, John E. and Samuel, are appellees herein.

None of the parties to this appeal dispute that John murdered the testator and is a "slayer" within the meaning of N.C.G.S. 31A-3:

> Definitions. As used in this Article, unless the context otherwise requires, the term—

. . . .

(3) "Slayer" means

a. Any person who by a court of competent jurisdiction shall have been convicted as a principal or accessory before the fact of the willful and unlawful killing of another person . . .

N.C.G.S. 31A-4 provides:

Slayer barred from testate or intestate succession and other rights. The slayer shall be deemed to have died immediately prior to the death of the decedent and the following rules shall apply:

. . . .

(3) Where the decedent dies testate as to property which would have passed to the slayer pursuant to the will, such property shall pass as if the decedent had died intestate with respect thereto, unless otherwise disposed of by the will.

The disagreements in the present case concern whether John's share is "otherwise disposed of by the will" as that phrase is used in the slayer statute and how N.C.G.S. 31-42, the anti-lapse statute, is to be applied.

The anti-lapse statute applies to all wills and provides means by which property is to be distributed in the event of "failure of devises and legacies by lapse or otherwise." In relevant part the statute provides:

§ 31-42. Failure of devises and legacies by lapse or otherwise; renunciation. (a) Devolution of Devise or Legacy to Person Predeceasing Testator.—Unless a contrary intent is indicated by the will, where a devise or legacy of any interest in property is given to a devisee or legatee who would have taken individually had he survived the testator, and he dies survived by issue before the testator, whether he dies before or after the making of the will, such devise or legacy shall pass by substitution to such issue of the devisee or legatee as survive the testator in all cases where such issue of the deceased devisee or legatee would have been an heir

of the testator under the provisions of the Intestate Succession Act had there been no will.

. . . .

(c) Devolution of void, revoked, or lapsed devises or legacies.—If subsections (a) and (b) above are not applicable and if a contrary intent is not indicated by the will:

(1) Where a devise or legacy of any interest in property is void, is revoked, or lapses or which for any other reason fails to take effect, such a devise or legacy shall pass:

a. Under the residuary clause of the will applicable to real property in case of such devise, or applicable to personal property in case of such legacy, or

b. As if the testator had died intestate with respect thereto when there is no such applicable residuary clause; and

(2) Where a residuary devise or legacy is void, revoked, lapsed or for any other reason fails to take effect with respect to any devisee or legatee named in the residuary clause itself or a member of a class described therein, then such devise or legacy shall continue as a part of the residue and shall pass to the other residuary devisees or legatees if any; or, if none, shall pass as if the testator had died intestate with respect thereto.

The parties to the instant appeal take the following positions. Plaintiff executor argues: (1) By the manner in which the testator structured his residuary clause, he "otherwise disposed of" John's share, which is now void because of the slayer statute, so that John's share is to be divided equally among the other named residuary beneficiaries. (2) Alternatively, if the anti-lapse statute applies, then section (c)(2) of that statute controls so as to reach the same result. John's children argue: (1) John's share is "otherwise disposed of by the will" within the meaning of the slayer statute. (2) The share must pass under section (a) of the anti-lapse statute because under the slayer statute John is conclusively

presumed to have predeceased his father. (3) Therefore, John's two children take John's entire one-eighth interest in the residuary estate by substitution. The Court of Appeals essentially followed the reasoning urged by John's children and reached the result dictated by it.

We agree with the Court of Appeals and therefore hold that under the slayer and anti-lapse statutes John's two children are entitled to divide the entire one-eighth share of decedent's estate which their father would have inherited had he not killed the decedent. It is elementary that the primary object in interpreting a will is to give effect to the intention of the testator. *Wilson v. Church*, 284 N.C. 284, 200 S.E. 2d 769 (1973). It is a long-standing policy of the State of North Carolina to construe a will with the presumption that the testator did not intend to die intestate with respect to any part of his property. *Quickel v. Quickel*, 261 N.C. 696, 136 S.E. 2d 52 (1964). We hold that Isam Misenheimer's will "otherwise disposed of" the slayer's interest in the decedent's estate within the meaning of N.C.G.S. 31A-4(3). The residuary clause of the will states that decedent:

> will[s], devise[s] and bequeath[es] *all* the residue and remainder of the property which I may own at the time of my death . . . unto the following named persons *absolutely and in fee simple, share and share alike*:
>
> 1. Carolyn M. Prince
> 2. Johny E. Misenheimer
> 3. Donald E. Misenheimer
> 4. Thomas M. Misenheimer
> 5. James C. Misenheimer
> 6. Sylvia M. Misenheimer
> 7. Sharon M. Misenheimer
> 8. Kenneth R. Misenheimer

(Emphases added.) As this Court stated in *Howell v. Mehegan*, 174 N.C. 64, 67, 93 S.E. 438, 440 (1917), "no contrary intent appearing [in the will], a void or lapsed legacy or devise passes under a general residuary clause . . . ." Isam Misenheimer did not indicate any intent that a lapsed share would pass otherwise than through the will's residuary clause. To the contrary, his expressed intent is that all remaining property should pass under the residuary clause.

N.C.G.S. 31A-4(3) mandates that the slayer, John E. Misenheimer, is conclusively presumed to have predeceased the testator for purposes of distribution of property under the will. Thus his legacy from decedent fails and must be distributed through the residuary clause of decedent's will. To determine specifically how John's share is to be divided, we must turn to the statute governing the disposition of failed legacies under a residuary clause.

As we stated earlier, the anti-lapse statute, N.C.G.S. 31-42, applies to all wills and provides means by which property is to be distributed in the event of "failure of devises and legacies by lapse *or otherwise*." (Emphasis added.) It is presumed that a will is executed in contemplation of applicable statutes. *Trust Co. v. Drug Co.*, 217 N.C. 502, 8 S.E. 2d 593 (1940). Because of the failure of John's legacy, the property that would have gone to him under the will had he not been convicted of killing his father must be distributed in accord with N.C.G.S. 31-42(a). In the present case, as John's two children are alive and would have been heirs of Isam Misenheimer had he died intestate, John's failed legacy must pass by substitution to them in accordance with this statute. Because of the conclusive presumption in N.C.G.S. 31A-4(3) that the slayer predeceased the testator, N.C.G.S. 31-42(a), not N.C.G.S. 31-42(c)(2), applies. It was the intent of the General Assembly that the presumption in 31A-4(3) be equivalent to actual death for all purposes of determining the disposition of property of the testator. *See* Special Report of the General Statutes Commission on an Act to be entitled "Acts Barring Property Rights" (1961).

If we were to hold that N.C.G.S. 31-42(c)(2) applies merely because the slayer does not, in fact, predecease the slain, we would be ignoring the legislative scheme intended by the statutory presumption of the slayer's death. Moreover, N.C.G.S. 31-42(c) expressly states that section (c) applies only if N.C.G.S. 31-42(a) is not applicable, thus making N.C.G.S. 31-42(a) the dominant or controlling statute.

Finally, were N.C.G.S. 31-42(c)(2) to apply, John's children would receive nothing under the testator's will, because this section of the statute provides that a lapsed devise or legacy "shall pass to the other residuary devisees or legatees." Surely, this is not what this testator or any slain testator would have intended

if he could have foreseen the means of his own demise. Any other holding would result in a much less equitable result as far as the innocent children of John are concerned. While it may be true that "the gods visit the sins of the fathers upon the children," Euripides, *Phrixus* (see also *Exodus* 20:5; Shakespeare, *Merchant of Venice* III v 1), this Court will not do so.[2]

2. Moreover, adoption of the argument of the dissent would render the slayer statute unconstitutional as applied. Long ago the common law required a felon convicted of a capital crime to forfeit all of his real and personal property to the Crown, and further provided that the attainted felon's heirs could inherit nothing from him because of his corrupt blood. 4 W. Blackstone, *Commentaries* *380-81. *See generally* Note, *Decedents' Estates—Forfeitures of Property Rights by Slayers*, 12 Wake Forest L. Rev. 448, 456 (1976).

However, these ancient common law doctrines were abolished in America under the Federal Constitution. Article I, section 10, clause 1 of the United States Constitution provides in pertinent part that "[n]o state shall . . . pass any bill of attainder . . . ." *See also* N.C. Const. art. I, § 19. In *Ex Parte Garland*, 71 U.S. 333, 18 L.Ed. 366 (1867), the United States Supreme Court noted that the enactment of a statute providing for corruption of the blood, *i.e.*, preventing a felon from receiving or transmitting property or other rights by inheritance, constitutes punishment for bill of attainder purposes. *See generally* Annot., 53 L.Ed. 2d 1273, 1287-88 (1978). Thus, any state law permitting corruption of the blood is an unconstitutional bill of attainder.

The interpretation of the slayer statute in the dissent would find that because of their father's corrupt blood John Misenheimer's children's inheritance from the testator is grossly reduced from the one-sixteenth share to which each is entitled under N.C.G.S. 31-42 to one one-hundred-twenty-eighth. This eight hundred percent reduction in their interest in decedent's estate is due solely, under the argument in the dissent, to the fact that their father killed their grandfather. It is thus due to nothing other than corruption of the blood. Such an interpretation of the slayer statute is unconstitutional as applied.

In *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 323, 18 L.Ed. 356, 363 (1867), the Supreme Court of the United States said:

> A bill of attainder is a legislative Act which inflicts punishment without a judicial trial.
>
> If the punishment be less than death, the act is termed a bill of pains and penalties. Within the meaning of the Constitution, bills of attainder include bills of pains and penalties.

Accord United States v. Lovett, 328 U.S. 303, 90 L.Ed. 1252 (1946). It is not necessary that *all* of the children's rights in their grandfather's estate be destroyed. "The deprivation of *any* rights, civil or political, previously enjoyed, may be punishment . . . ." *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 320, 18 L.Ed. 356, 362 (emphasis added). Under the dissenting opinion testator's grandchildren are being punished within the meaning of *Cummings*. Before their father killed Isam Misenheimer they had the right to inherit their father's share under Isam's

If John had died of natural causes before Isam, by reason of the terms of the residuary clause of the will and the anti-lapse statute John's two children would have taken the one-eighth share intended for John. By virtue of N.C.G.S. 31A-4, for the purposes of construing Isam's will John is legally deemed to have predeceased Isam. Therefore, the same disposition of Isam's property must follow under the residuary clause and the anti-lapse statute.

The decision of the Court of Appeals is

Affirmed.

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

Justice EXUM dissenting.

The majority strains to reach what it considers the preferable result that John Misenheimer's two children take his entire testamentary share, rather than the share which the slayer statute accords them. I, too, like this result. But I cannot get to it under the slayer statute. The majority's effort to do so has resulted in an opinion which is internally inconsistent, at odds with its own premises, and which, inexplicably, substitutes the provisions of the anti-lapse statute for those of the slayer statute. The opinion violates that well-established canon of statutory construction that when one of two different statutes might apply to the same situation, the statute which deals more directly and specifically with the situation must apply in preference to the statute of more general applicability. The majority opinion is also at odds with the intent of the General Assembly in enacting the slayer statute as that intent is so clearly expressed in the statute itself and its legislative history.

I am satisfied: (1) The anti-lapse statute has no application to the case. (2) John's share of the residuary estate passes "as if the decedent had died intestate with respect thereto" according to the terms of the slayer statute. (3) Therefore John's children each

will if the share lapsed. Under the dissenting opinion they have been deprived of this right solely because of their father's crime, rendering the slayer statute an unconstitutional bill of attainder.

take one-sixteenth and the testator's other seven children each take one-eighth of John's one-eighth share of the estate.

The majority's position seems to be that because the anti-lapse statute is deemed to be a part of every will (so, of course, is the slayer statute), this statute, thus included in Isam Misenheimer's will, has somehow "otherwise disposed of" (as that phrase is used in the slayer statute) John Misenheimer's share. More particularly, the majority says that the residuary clause in Isam Misenheimer's will together with the anti-lapse statute operate "to otherwise dispose of" John's legacy pursuant to subsection (a) of the anti-lapse statute.

This reasoning is patently specious. First, if the residuary clause controls disposition of John's legacy by way of the anti-lapse statute, it is subsection (c), not (a), of the statute that must be applied. Indeed, the majority *relies on* subsection (c), not (a), for the proposition that when a legacy fails "by lapse *or otherwise*," the anti-lapse statute applies. (Emphasis by majority.) The "or otherwise" language is, according to the majority, broad enough to include failure under the slayer statute. But subsection (c) of the anti-lapse statute passes lapsed bequests *under the residuary clause*. Only subsection (a) of the anti-lapse statute passes lapsed bequests to the issue of legatees whose bequests have lapsed. And subsection (a) takes effect only when the legatee "dies survived by issue before the testator." John Misenheimer did not die survived by the testator. If John's share is to pass under subsection (c) of the anti-lapse statute, as the majority's reasoning would seem to require, the other surviving residuary legatees would take all of John's share and John's children would take nothing. Indeed, the majority relies on *Howell v. Mehegan*, 174 N.C. 64, 67, 93 S.E. 438, 440 (1917), for the proposition that "no contrary intent appearing [in the will], a void or lapsed legacy or devise passes under a general residuary clause." It goes on to say that a specific legatee's lapsed share should pass under the residuary clause. If so, again John's share would all go to the other residuary legatees, not to his children.

Second, the majority, inexplicably, maintains that Isam Misenheimer's will somehow by implication "otherwise disposes of" John's legacy within the meaning of the slayer statute, yet the will has no such implied provisions to take the legacy out of

the operation of the anti-lapse statute. With respect to this will, both propositions cannot be true.

Both the slayer statute and the anti-lapse statute are deemed to be part of every will. This is the legal fiction by which the alternative disposition schemes of each statute take effect in the case of a slaying on the one hand or a lapsed bequest on the other. Neither statute, of course, applies to a will which itself by implication or otherwise provides for alternative disposition in the event a bequest cannot take effect as the testator desired. A will either makes alternative provision for disposition of a bequest that for some reason (either lapse or slaying of testator by legatee) cannot take effect as testator desired, or it does not make such a provision. A will should not be read to make by implication an alternative disposition under the slayer statute yet not make one under the anti-lapse statute unless the implications to this effect are considerably stronger than they are in Isam Misenheimer's will. Either the will controls, or the anti-lapse statute controls, or the slayer statute controls. But a will which by its terms is silent as to alternative disposition is no more effective to take a bequest out of the operation of the slayer statute than it is to take it out of the operation of the anti-lapse statute.

Suppose, for example, John Misenheimer had in fact predeceased the testator, leaving issue surviving. Under the majority's reasoning the anti-lapse statute would not operate because the will's residuary clause establishes the testator's intent to dispose of thereunder bequests which cannot otherwise take effect as the will provides. Therefore, the other named residuary legatees would take all of John's share.

The truth, of course, is that the will itself does not speak to the question of what happens to the bequest of a residuary legatee who predeceases the testator, leaving issue surviving. Therefore, had John in fact predeceased the testator with issue surviving, subsection (a) of the anti-lapse statute would apply. Neither does the will speak to the question of what happens should the bequest of a residuary legatee "otherwise" fail to take effect, *e.g.*, because of the provisions of the slayer statute. In this situation this Court's duty, even if the result is not particularly to its liking, is to apply the alternative dispositive provisions of the slayer statute, which the legislature enacted to cover precisely

the situation before the Court. Indeed, the legislature could not have made its intention any clearer than when it provided in the slayer statute itself:

> As to all acts specifically provided for in this [statute], the rules, the remedies, and procedures herein specified shall be exclusive, and as to all acts not specifically provided for in this [statute], all rules, remedies, and procedures, if any, which now exist or hereinafter may exist either by virtue of statute, or by virtue of the inherent powers of any court of competent jurisdiction, or otherwise, shall be applicable.

N.C.G.S. § 31A-15.

Stated simply, when a will, such as Isam Misenheimer's, is silent on alternative dispositions, the slayer statute provides one in the event of a slaying; the anti-lapse statute provides one in the event of a lapse. Here we have a slaying, not a lapse. Therefore the alternative disposition of the slayer statute controls.

It must be emphasized that both the anti-lapse statute and the slayer statute are, in effect, intent-effectuating. The anti-lapse statute purports to dispose of property that would otherwise lapse in a manner which, in the legislature's view, would most likely accord with what most testators would have done had they considered the possibility of lapsed legacies. If, however, an intent contrary to the provisions of the statute "is indicated by the will," this intent shall prevail over the statute.

The slayer statute also provides its own alternative method of distribution. In this respect it resembles the anti-lapse statute. As stated in the Special Report of the General Statutes Commission which recommended the slayer statute to the General Assembly:

> This statute not only prevents the slayer from taking from the decedent as heir or devisee, but provides an alternative disposition. By its terms the slayer is deemed to have died immediately prior to the intestate or testator, and the slayer's share of the decedent's estate passes to 'others' next entitled to succeed by intestacy law, e.g. to the other heirs of the decedent, including the issue of the slayer in their own right by representation of their 'deceased' parent [*Bates v. Wilson*, 313 Ky. 592 (1950)], but not to one who can claim only

> from the slayer, such as his spouse. [*Price v. Hitaffer*, 164 Md. 505 (1933)]. However, where the decedent leaves a will his other heirs take the slayer's devise or bequest only if it is not otherwise disposed by the will, e.g. to an alternative beneficiary or by way of residuary disposition.

Special Report of the General Statutes Commission on an Act to be entitled "Acts Barring Property Rights" pp. 13-14 (1961) (hereinafter referred to as Special Report). Professor Bolich, one of the drafters of the statute, commented similarly:

> [S]ubsections (2) and (3) specify what happens to property which would otherwise pass from the decedent to the slayer by testate or intestate succession. Intestate property goes to the other heirs of the decedent next in succession. Testate property passes to the decedent's heirs other than the slayer unless otherwise disposed of by the will—for example, to an alternative beneficiary or by way of residuary disposition to others than the slayer.

Bolich, *Acts Barring Property Rights*, 40 N.C. L. Rev. 175, 198 (1962).

Thus the slayer statute, like the anti-lapse statute, is designed to dispose of property that would otherwise have gone to the slayer in a manner which, in the legislature's view, would most likely accord with the testator's wish. If, however, the will otherwise disposes of the slayer's share, the will prevails.

The residuary clause in Isam Misenheimer's will, contrary to the majority's assertion, is not an alternative disposition of John's legacy. Except for provisions in Article I and II dealing with the payment of debts, expenses, and taxes, Article III is the will's only dispositive provision. There is no language, as the executor argues, suggesting that if one or more of the designated legatees for whatever reason does not or cannot take his or her share, then the other designated legatees shall take it. The will does not leave the residuary estate to the children of Isam Misenheimer jointly or as a class. Neither is there any language to indicate by implication or otherwise that a named beneficiary's heirs or issue should take in his place. The will itself, therefore, does not "otherwise dispose of" John Misenheimer's share either to the other named beneficiaries or to John's children.

The majority's holding in effect emasculates the alternative disposition scheme of the slayer statute. Under this holding the alternative disposition scheme of the anti-lapse statute rather than the alternative disposition scheme of the slayer statute will apply in all cases in which the testator has been slain by a legatee. This position is unsound for the following reasons.

Both the slayer statute and the anti-lapse statute have, as I have demonstrated, their own discrete dispositive schemes. Different dispositions of property could result if one of these statutes were applied as opposed to the other. The slayer statute treats the slayer as if he predeceased the testator but, in the absence of an alternative disposition in the will, provides that the slayer's share "shall pass as if the decedent had died intestate with respect thereto." The interest in the estate, if any, of those who take in lieu of the slayer is determined by their relation to the testator, not the slayer. Section (a) of the anti-lapse statute provides that "issue of a legatee who predeceases the testator substitute for the legatee and take what would have been the legatee's share if such issue survive and would have been heirs of the testator had testator died intestate." Thus under this section of the anti-lapse statute the interest in the estate, if any, of the issue of the predeceased legatee is determined by their relation to the predeceased legatee, not the testator.

Where one of two different statutes might apply to the same situation, the statute which deals more directly and specifically with the situation must take precedence over a statute of more general applicability. *Colonial Pipeline Co. v. Neill*, 296 N.C. 503, 251 S.E. 2d 457 (1979); *Seders v. Powell*, 298 N.C. 453, 259 S.E. 2d 544 (1979); *State Highway Commission v. Hemphill*, 269 N.C. 535, 153 S.E. 2d 22 (1967). Section (a) of the anti-lapse statute deals with the situation where a legatee in fact predeceases the testator. The remaining sections of this statute deal with other situations under which a legacy "is void, is revoked, is renounced, or lapses or which for any other reason fails to take effect. . . ." The slayer statute deals specifically and directly with the unusual situation in which one otherwise entitled to share in an estate has slain the decedent. Hence in these unusual cases the slayer statute's dispository scheme should control over that of the anti-lapse statute.

The legislative history of the slayer statute also supports the proposition that it controls to the exclusion of the anti-lapse statute in situations to which it applies. In commenting on this section when it was proposed to the General Assembly in 1961, the General Statutes Commission noted:

> This statute not only prevents the slayer from taking from the decedent as heir or devisee, but provides an alternative disposition. By its terms the slayer is deemed to have died immediately prior to the intestate or testator, and the slayer's share of the decedent's estate passes to 'others' next entitled to succeed by intestacy law, e.g. to the other heirs of the decedent, including issue of the slayer in their own right by representation of their 'deceased' parent but not to one who can claim only from the slayer, such as his spouse. However, where the decedent leaves a will his other heirs take the slayer's devise or bequest only if it is not otherwise disposed of by the will, e.g. to an alternative beneficiary or by way of residuary disposition.

Special Report at 13-14 (citations omitted). The Commission did not mention the anti-lapse statute as a potential method of fulfilling this provision.

When it enacted our slayer statute, the General Assembly "profited greatly from" a model statute drafted by Professor John W. Wade. Special Report at ii. Professor Wade expressed the sentiment that a slayer statute should expressly exclude the application of an anti-lapse statute to prevent the injustice which results from a person taking through a slayer who is not himself an heir of the deceased testator.[1] Wade, *Acquisition of Property by Willfully Killing Another—A Statutory Solution*, 49 Harv. L. Rev. 715, 727 (1936). Although the North Carolina legislature declined to adopt a provision expressly excluding application of the anti-lapse statute, it used another route designed to achieve the same result. That approach involved passing property bequeathed to the slayer as if the testator had died intestate with respect to it, thereby avoiding a lapse of the gift. This provision,

1. Professor Wade expressed this concern by wording his model act to bar not only the slayer but also "any person claiming through him. . . ." Wade, Acquisition of Property by Willfully Killing Another—A Statutory Solution, 49 Harv. L. Rev. 715, 724 (1936).

"should prevent possible application of an anti-lapse statute giving the decedent's property to a person not his heir—for example to issue of decedent's slayer-spouse." Bolich, *supra*, at 198.[2] Professor Wade had recognized this potential approach to preventing the operation of an anti-lapse statute.

> The anti-lapse statute might also have been avoided by providing that the property would pass as if the decedent had died intestate thereto, but this provision would probably not reach a satisfactory result if the will named an alternative or residuary devisee or legatee or if the slayer were named to take jointly with another person or as a member of a class.

Wade, *supra*, at 727. To avoid the unsatisfactory result of *automatically* passing the property by intestacy, *i.e.*, ignoring testator's intent to provide for an alternative beneficiary by way, for example, of an alternate residuary clause, joint or class gift, the legislature included in section 31A-4(3) the "unless otherwise disposed of" clause. A testator's alternative disposition will be thereby honored, and, if no alternative disposition is included in the will, the anti-lapse statute is nevertheless avoided by the slayer statute's own, discrete dispository scheme, *i.e.*, passing the property as if with respect to it the testator had died intestate.

The provisions of the statute itself, the applicable canon of statutory construction, the legislative history behind it, and the inclusion of a provision giving it exclusive application compel the conclusion that the slayer statute operates independently of and to the exclusion of the anti-lapse statute. Accordingly, section 31A-4(3) alone should control the disposition of slayer's share under testator's will.

Under section 31A-4(3) as applied to the facts here, the slayer's share—one-eighth of testator's residuary estate—should be distributed "as if the decedent had died intestate with respect thereto." N.C.G.S. § 31A-4(3). Under our intestacy laws, N.C.G.S. § 29-16(a)(1) and (2), John's two children (testator's grandchildren) should each take one-sixteenth share of John's one-eighth portion

2. This result would have been possible under the anti-lapse statutes as they existed when the slayer statute was enacted. *See* N.C.G.S. §§ 37-42 to -42.2 (Supp. 1959) (now revised).

of the residuary estate. Testator's seven other children should each take one-eighth of John's one-eighth share.

Finally I have no doubt that it is proper for John's children to share in what would have been John's portion of the estate. The slayer statute did not go so far as to exclude innocent persons who might otherwise take even though they were descendants of the slayer. *See Estate of Wolyniec v. Moe*, 94 N.J. Super. 43, 46, 226 A. 2d 743, 744-45 (1967) (holding it unconscionable to penalize an unborn child for the crime of his mother); *Bates v. Wilson*, 313 Ky. 572, 574, 232 S.W. 2d 837, 838 (1950) (expressing the notion that the legislature did not intend to penalize an innocent child for the acts of her father in killing deceased); Restatement of Restitution § 187 comment h at 768 (1937) ("the fact that the persons who would have been heirs . . . are the children of the murderer will not preclude them [from taking], if they would have inherited the property from the decedent if the murderer had predeceased him"). Under our slayer statute, John's children should take not by virtue of their relation to John, but by virtue of their relation to the testator.

Since the slayer statute permits John's children to take not as John's heirs but as heirs of the testator, I see no constitutional problem with enforcing the slayer statute as written. The majority's footnote on "corruption of the blood," "bills of attainder," and the slayer statute's constitutionality lacks depth. I fear the majority has violated Pope's admonition that "A little learning is a dangerous thing; Drink deep, or taste not the Pierian spring." Pope, A., *An Essay on Criticism*. The majority has not demonstrated that these doctrines have anything to do with the slayer statute.

The leading scholarly article on slayer statutes by Professor Wade, already cited above (to which then Harvard Law School Professor, later Dean, Erwin N. Griswold, made "numerous valuable suggestions," see acknowledgment, 49 Harv. L. Rev. at 752), suggests that such statutes provide that "heirs or next of kin of the slayer may claim the property if they are entitled to it in their own right, but they cannot claim through an ancestor who has disqualified himself by his wrong." 49 Harv. L. Rev. at 727. As to the constitutionality of such statutes, Professor Wade notes:

Objections to its constitutionality would be based mainly upon the provisions in most state constitutions forbidding forfeiture of estates or corruption of blood as the result of a conviction. Under these provisions it would normally be held unconstitutional to take away from the slayer any property interest which he already owns. For this reason many of the decisions adopting the view that title passes to the slayer give as an added reason that any other holding would constitute a forfeiture of estate. There may be substance to the argument when the statute law of the state provides that the property shall descend to the slayer and the court engrafts an exception. But even then it would appear that the proper rule is that there is no forfeiture of estate. The court is not taking away from the slayer an estate which he has already acquired, but 'is simply preventing him from acquiring property in an unauthorized and unlawful way, *i.e.*, by murder. It takes nothing from him but simply says you cannot acquire property in this way.' And if this course may be taken by a court, obviously the legislature may provide that property cannot be *acquired* through a wilful and unlawful slaying.

It is significant that although statutes bearing upon one or more branches of the general problem have been enacted in almost half of the states, no one of them has ever been held unconstitutional. The constitutionality of a statute has been directly attacked in only one case, in which it was easily upheld [*Hamblin v. Marchant*, 103 Kan. 508, 175 Pac. 678 (1918), *aff'd on rehearing*, 104 Kan. 689, 180 Pac. 811 (1919)]; but there are numerous cases in which its constitutionality was tacitly assumed.

The argument that the statute would work corruption of blood is hardly deserving of comment, since it does not prevent heirs of the slayer from inheriting from him property which he already owns, but merely keeps him from acquiring property in an illegal way. Furthermore, unless property is taken away from the slayer as a result of his crime, it seems impossible to say that the due process of law clause is violated. The conclusion is, therefore, that so long as a statute prevents merely the acquisition of property by an unlawful killing, it is constitutional.

49 Harv. L. Rev. at 720-21 (footnotes omitted). Likewise Professor Bolich, in his earlier cited article, has written:

> Fundamental to this area of law which seeks to prevent a killer from profiting by his crime is the distinction between taking a slayer's property because of his crime, and preventing him from so acquiring property. Whereas a slayer may not be deprived of his property because of his crime, he may be constitutionally prevented by statute from acquiring property thereby. Thus, this statute, which prevents unjust enrichment by providing that a slayer shall not thereby inherit from his victim or take by his will, takes nothing already owned but constitutionally prevents a wrongful acquisition. Its provision that such property when not otherwise willed by the decedent, shall pass to his other heirs next in succession prevents 'corruption of the blood' because the slayer's issue will generally take in their own right by representation of their 'deceased' parent the share he would have taken. And by specifying that he is deemed to have died immediately prior to the decedent it fixes a date of 'death.'

40 N.C. L. Rev. at 199-200 (footnotes omitted).

Our slayer statute does precisely this. It prevents the slayer from ever *acquiring* his testamentary share. Therefore, there can be no constitutional prohibition on preventing the slayer's children from acquiring that which their parent never acquired. They acquire only that to which they are entitled as heirs of the testator. They take the *intestate* share of the slayer by representation of the slayer as heirs of the testator, not the slayer. In this case the slayer's intestate share is one-eighth of his bequest to which his two children are jointly entitled.

Neither would I want to second-guess, as does the majority, the wisdom of Euripides, Shakespeare, and Holy Scripture on whether we should "visit the sins of the father upon the children." I am confident that it is within the legislature's prerogative to provide, as it has done, that when a legatee slays the testator, the legatee's share shall be distributed on the basis of the beneficiaries' relationship to the testator, not the slayer. There is indeed wisdom in this provision. For if the *slayer's* heirs are to take his *testate* share, this provides still another motive for slaying the testator. The majority apparently is unwilling to

allow the legislature to make such a determination; instead, it substitutes its own judgment for what ought to happen to the testamentary share of a legatee who slays the testator. The question, I believe, is best left to the legislature.

Justice MEYER joins in this dissenting opinion.

WILLIAM GERALD PLEASANT v. VICTOR LEE JOHNSON

No. 433A84

(Filed 30 January 1985)

Master and Servant § 89.1— workers' compensation—willful, wanton, and reckless conduct of co-employee—common law action allowed

A directed verdict should not have been granted for defendant in a common law negligence action arising from a prank played by defendant on plaintiff co-employee. The Workers' Compensation Act does not preclude a suit against a co-employee for intentional torts, and injury resulting from willful, wanton, and reckless negligence should be treated as an intentional tort for purposes of the Workers' Compensation Act. G.S. 97-9, G.S. 97-10.1.

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

Justice MEYER dissenting.

APPEAL of right under N.C.G.S. 7A-30(2) from the decision of a divided panel of the Court of Appeals, 69 N.C. App. 538, 317 S.E. 2d 104 (1984), affirming a directed verdict in favor of the defendant entered by *Judge A. Pilston Godwin, Jr.* on September 30, 1982 in Superior Court, DURHAM County. Heard in the Supreme Court November 15, 1984.

McCain & Essen, by Grover C. McCain, Jr., and Jeff Erick Essen for plaintiff appellant.

Bryant, Drew, Crill & Patterson, P.A., by Lee A. Patterson, II for defendant appellee.

MITCHELL, Justice.

The pivotal issue in this case is whether the North Carolina Workers' Compensation Act provides the exclusive remedy when

an employee is injured in the course of his employment by the willful, wanton and reckless conduct of a co-employee. We hold that it does not and that an employee may bring an action against the co-employee for injuries received as a result of such conduct. Accordingly, we reverse the decision of the Court of Appeals.

The facts in this case are not in dispute. The plaintiff and the defendant were employees of Electricon Incorporated. On May 13, 1980, the plaintiff returned from lunch to the construction site where he and the defendant were working. As the plaintiff walked across the parking lot toward the job site, a truck driven by the defendant struck the plaintiff, seriously injuring his right knee.

The plaintiff was awarded disability benefits under the Workers' Compensation Act. He then filed this action for damages, alleging in addition to simple negligence that:

> Defendant was willfully, recklessly and wantonly negligent in that he was operating the motor vehicle in such a fashion so as to see how close he could operate the said motor vehicle to the plaintiff without actually striking him but, misjudging his ability to accomplish such a prank, actually struck the plaintiff with the motor vehicle he was operating.

During his case in chief, the plaintiff called the defendant to the stand. The defendant testified that he had been joking or "horseplaying" at the time of the accident. He stated that he had intended to scare the plaintiff by blowing the horn and by operating the truck close to him. At the close of the plaintiff's evidence the defendant moved for and was granted a directed verdict.

This case involves the North Carolina Workers' Compensation Act. Before turning to those sections of the Act which are directly applicable here, we briefly review the background of workers' compensation legislation.

A tragic by-product of the Industrial Revolution was the vast number of workers who were injured in factories, mills, and mines. Yet the majority of injured workers who brought negligence actions against their employers found their claims defeated by the employer's "unholy trinity" of defenses: contributory negligence, assumption of risk, and the fellow-servant rule. S. Horovitz, *Injury and Death Under Workmen's Compensation*

Laws 2 (1944) (hereinafter cited as *Horovitz*). Some courts attempted to reduce the harsh impact of these defenses by adopting doctrines such as the vice-principal exception to the fellow-servant rule. Most workers, however, remained without an adequate remedy for work-related injuries. *Id.*, p. 3.

In the mid-1880's Germany responded to the problem by enacting the first workers' compensation legislation. The German plan was compulsory and relied in large part upon employee contributions. 1 A. Larson, *The Law of Workmen's Compensation* § 5.10 (1984) (hereinafter cited as *Larson*). England established a workers' compensation plan in 1897. *Horovitz*, p. 5. In 1913 New York became the first state to enact workers' compensation legislation,[1] and the remaining states followed over the next several years. *Larson*, § 5.20. North Carolina adopted its Workers' Compensation Act in 1929.

The social policy behind workers' compensation is that injured workers should be provided with dignified, efficient and certain benefits for work-related injuries and that the consumers of the product are the most appropriate group to bear the burden of the payments. *Larson*, § 2.20. The most important feature of the typical workers' compensation scheme is that the employee and his dependents give up their common law right to sue the employer for negligence in exchange for limited but assured benefits. Consequently the negligence and fault of the injured worker ordinarily is irrelevant. *Id.*, § 1.10.

The provisions of the North Carolina Workers' Compensation Act with which we are primarily concerned here are N.C.G.S. 97-9 and 97-10.1. N.C.G.S. 97-9 provides:

> Every employer subject to the compensation provisions of this Article shall secure the payment of compensation to his employees in the manner hereinafter provided; and while such security remains in force, he or those conducting his business shall only be liable to any employee for personal injury or death by accident to the extent and in the manner herein specified.

1. New York adopted an earlier compensation scheme in 1910. It was ruled unconstitutional by the New York Court of Appeals in *Ives v. South Buffalo Ry.*, 201 N.Y. 271, 94 N.E. 431 (1911), on the ground that imposing liability without fault upon the employer constituted a taking of property without due process of law.

N.C.G.S. 97-10.1 states:

> 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.

We have held that these provisions bar a worker from maintaining a common law negligence action against his employer. *See, e.g., Hicks v. Guilford County*, 267 N.C. 364, 148 S.E. 2d 240 (1966). We also have interpreted the Act as foreclosing a worker who is injured in the course of his employment from suing a co-employee whose negligence caused the injury. N.C.G.S. 97-9; N.C.G.S. 97-10.1 (and its predecessor 97-10); *Strickland v. King*, 293 N.C. 731, 239 S.E. 2d 243 (1977); *Altman v. Sanders*, 267 N.C. 158, 148 S.E. 2d 21 (1966); *Warner v. Leder*, 234 N.C. 727, 69 S.E. 2d 6 (1952). Provisions of the Act relative to an injured worker bringing an action against a third party for negligence causing injury have been held to apply only to third parties who were "strangers to the employment." *Jackson v. Bobbitt*, 253 N.C. 670, 117 S.E. 2d 806 (1961); *Warner v. Leder*, 234 N.C. 727, 69 S.E. 2d 6 (1952).

We have recognized that, in cases involving intentional injury by the employer, the employee cannot be relegated to the limited recovery afforded by the Act, but may bring a common law tort action against the employer. *See Warner v. Leder*, 234 N.C. 727, 69 S.E. 2d 6 (1952); *Essick v. Lexington*, 232 N.C. 200, 60 S.E. 2d 106 (1950). We also have said that an injured worker may maintain a tort action against a co-employee for intentional injury. *See, e.g., Wesley v. Lea*, 252 N.C. 540, 114 S.E. 2d 350 (1960).

In a recent opinion by Judge (now Justice) Vaughn, our Court of Appeals expressly held that the Workers' Compensation Act does not preclude a suit against a co-employee for intentional torts. *Andrews v. Peters*, 55 N.C. App. 124, 284 S.E. 2d 748 (1981), *disc. rev. denied*, 305 N.C. 395, 290 S.E. 2d 364 (1982). This holding rested upon the common-sense conclusion that the legislature did not intend to insulate a co-employee from liability for intentional torts inflicted upon a fellow worker. *Id.* at 127, 284 S.E. 2d at 750.

The Court of Appeals also noted that in many of the jurisdictions granting co-employee immunity, an exception for intentional acts causing injury had been either expressly set out in the statutes or judicially grafted upon them. *Id.*

In his complaint in the present case, the plaintiff alleged that his injury occurred because the defendant was "willfully, recklessly and wantonly negligent." The defendant contends that such allegations are insufficient to allege an intentional tort which would support the plaintiff's action. We disagree.

The concept of willful, reckless and wanton negligence inhabits a twilight zone which exists somewhere between ordinary negligence and intentional injury. The state of mind of the perpetrator of such conduct lies within the penumbra of what has been referred to as "quasi intent." W. Prosser and W. Keeton, *The Law of Torts* § 34 (5th ed. 1984). Though the terms "willful," "reckless" and "wanton" are often used in conjunction, we have endeavored in prior cases to differentiate between them.

We have described "wanton" conduct as an act manifesting a reckless disregard for the rights and safety of others. *Brewer v. Harris*, 279 N.C. 288, 182 S.E. 2d 345 (1971); *Givens v. Sellars*, 273 N.C. 44, 159 S.E. 2d 530 (1968); *Wagoner v. R.R.*, 238 N.C. 162, 77 S.E. 2d 701 (1953); *Foster v. Hyman*, 197 N.C. 189, 148 S.E. 36 (1929). The term "reckless," as used in this context, appears to be merely a synonym for "wanton" and has been used in conjunction with it for many years. *See Bailey v. R.R.*, 149 N.C. 169, 62 S.E. 912 (1908).

Defining "willful negligence" has been more difficult. At first glance the phrase appears to be a contradiction in terms. The term "willful negligence" has been defined as the intentional failure to carry out some duty imposed by law or contract which is necessary to the safety of the person or property to which it is owed. *Brewer v. Harris*, 279 N.C. 288, 182 S.E. 2d 345 (1971); *Foster v. Hyman*, 197 N.C. 189, 148 S.E. 36 (1929); *Bailey v. R.R.*, 149 N.C. 169, 62 S.E. 912 (1908). A breach of duty may be willful while the resulting injury is still negligent. Only when the injury is intentional does the concept of negligence cease to play a part. *Foster v. Hyman*, 197 N.C. 189, 148 S.E. 36 (1929); *Ballew v. R.R.*, 186 N.C. 704, 120 S.E. 334 (1923). We have noted the distinction between the willfulness which refers to a breach of duty and the

willfulness which refers to the injury. In the former only the negligence is willful, while in the latter the injury is intentional. *Foster v. Hyman*, 197 N.C. 189, 148 S.E. 36 (1929).

Even in cases involving "willful injury," however, the intent to inflict injury need not be actual. Constructive intent to injure may also provide the mental state necessary for an intentional tort. *Id.*; *Ballew v. R.R.*, 186 N.C. 704, 120 S.E. 334 (1923). Constructive intent to injure exists where conduct threatens the safety of others and is so reckless or manifestly indifferent to the consequences that a finding of willfulness and wantonness equivalent in spirit to actual intent is justified. *Foster v. Hyman*, 197 N.C. 189, 148 S.E. 36 (1929). Wanton and reckless negligence gives rise to constructive intent.

We have previously acknowledged that wanton and reckless behavior may be equated with an intentional act for certain purposes. Punitive damages may be recovered in an action for an intentional tort, though not in suits for ordinary negligence. By allowing recovery of punitive damages in cases involving wanton negligence, we have implicitly treated such cases as actions for intentional torts. *E.g.*, *Hinson v. Dawson*, 244 N.C. 23, 92 S.E. 2d 393 (1956); *Binder v. Acceptance Corp.*, 222 N.C. 512, 23 S.E. 2d 894 (1943). We have also held that wanton and reckless conduct can supply the malice necessary to support a second degree murder conviction against a defendant who killed another when driving while intoxicated. *State v. Snyder*, 311 N.C. 391, 317 S.E. 2d 394 (1984). *See State v. Trott*, 190 N.C. 674, 130 S.E. 627 (1925) (malice when one drunk allowed another to drive). We conclude that injury to another resulting from willful, wanton and reckless negligence should also be treated as an intentional injury for purposes of our Workers' Compensation Act.

Of the jurisdictions which provide co-employees with immunity from common law tort actions in situations covered by workers' compensation acts, sixteen appear to recognize an exception to such immunity in cases involving intentional torts. 2A A. Larson, *The Law of Workmen's Compensation* § 72.21 (1983 & Cum. Supp. 1984). Only four states, however, Florida, Hawaii, Iowa and Wyoming, have statutory schemes which treat willful, wanton and reckless conduct (or its equivalent) as an intentional

tort and exclude it from co-employee immunity.[2] Our research reveals no state which has explicity judicially adopted the willful, wanton and reckless exception to co-employee immunity. *But see, Mandolidis v. Elkins Industries, Inc.*, 246 S.E. 2d 907 (W. Va. 1978) (West Virginia Supreme Court permitted employees to sue for injuries caused by the *employer's* willful, wanton and reckless conduct and appeared to recognize that the reasoning could be applied to suits against co-employees).

In the past this Court has expressly rejected the argument that reckless and wanton conduct by a co-employee defeats the exclusive original jurisdiction of the Industrial Commission under the Workers' Compensation Act and thereby makes such co-employee subject to a common law tort action. *Wesley v. Lea*, 252 N.C. 540, 114 S.E. 2d 350 (1960). Other jurisdictions have also rejected this argument. *See, e.g., Bryan v. Jeffers*, 103 N.J. Super. 522, 248 A. 2d 129 (1968), *cert. denied*, 53 N.J. 581, 252 A. 2d 157 (1969). Despite such authority to the contrary and the lack of an express statutory provision, however, we now hold that the Workers' Compensation Act does not shield a co-employee from common law liability for willful, wanton and reckless negligence.

Our holding is consistent with the distinction which has previously been made in such cases between ordinary negligence and intentional torts. As was noted by the Court of Appeals in *Andrews v. Peters*, 55 N.C. App. 124, 284 S.E. 2d 748 (1981), accidents are unavoidable in today's industrial environment. By accepting employment a worker increases the risk of injury to himself and others. One commentator has suggested that a rationale supporting co-employee immunity is that immunity from common law suit for ordinary negligence is part of that which an employee receives for forfeiting his own right to bring a negligence action. 2A *Larson*, § 72.22. Furthermore, since negligence connotes unconscious inadvertence, allowing injured workers to sue co-employees would not reduce injuries caused by ordinary negligence. The same cannot be said in cases involving intentional torts.

2. Fla. Stat. Ann. § 440.11(1) (West 1981) ("willful and wanton disregard" or "gross negligence"); Hawaii Rev. Stat. § 386-8 (1976) ("wilful and wanton misconduct"); Iowa Code Ann. § 85.20 (West 1984) ("gross negligence amounting to such lack of care as to amount to wanton neglect for the safety of another"); Wyo. Stat. § 27-12-103(a) (1983) ("culpably negligent").

Permitting an injured worker to bring an action against a co-employee for an intentional tort places responsibility upon the tortfeasor where it belongs. Since the commission of an intentional tort includes a constructive or actual intent to injure, allowing an injured co-worker to sue the tortfeasor serves as a deterrent against future misconduct. By allowing wanton negligence to support awards of punitive damages, *see Hinson v. Dawson*, 244 N.C. 23, 92 S.E. 2d 393 (1956), we have recognized that such conduct can be deterred and should be treated as an intentional tort. Therefore, we hold that the Workers' Compensation Act does not shield a co-employee from liability for injury caused by his willful, wanton and reckless negligence.

The fact that the plaintiff has received benefits under the Workers' Compensation Act does not foreclose him from bringing an action for the defendant's willful and wanton negligence. In *Andrews* the Court of Appeals reasoned that where a co-employee had committed an intentional tort the injured worker could receive benefits under the Act and also recover damages from his co-employee. The same should hold true for injury caused by the co-employee's willful, reckless and wanton misconduct. Since the negligent co-employee is neither required to participate in the defense of the compensation claim nor contribute to the award, he is not unduly prejudiced by permitting the injured employee to sue him after receiving benefits under the Act. Furthermore, when an employee who receives benefits under the Act is awarded a judgment against a co-worker, any amount obtained will be disbursed according to the provisions of N.C.G.S. 97-10.2 and may reduce the burden otherwise placed upon an innocent employer or insurer.

The issue in this case is whether an injured worker may maintain a common law tort action against a *co-employee* whose willful, wanton and reckless negligence caused the worker's injury. We need not consider and do not decide whether an *employer* may be sued for similar conduct.

In conclusion we hold that the North Carolina Workers' Compensation Act does not insulate a co-employee from the effects of his willful, wanton and reckless negligence. An injured worker in such situations may receive benefits under the Act and also maintain a common law action against the co-employee. We believe

that this result will help to deter such conduct in the future. It would be a travesty of justice and logic to permit a worker to injure a co-employee through such conduct, and then compel the injured co-employee to accept moderate benefits under the Act. *See Horovitz*, p. 336. To the extent that they conflict with this decision, *Wesley v. Lea*, 252 N.C. 540, 114 S.E. 2d 350 (1960) and *Warner v. Leder*, 234 N.C. 727, 69 S.E. 2d 6 (1952) are overruled. Since the plaintiff's complaint did allege that the defendant had been willfully, wantonly and recklessly negligent, the decision of the Court of Appeals affirming a directed verdict in favor of the defendant is reversed. This case is remanded to the Court of Appeals for further remand to the Superior Court, Durham County, for further proceedings not inconsistent with this opinion.

Reversed and remanded.

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

Justice MEYER dissenting.

Contrary to the impression conveyed by the majority opinion, the facts of this case do not reveal a malicious attempt by Johnson to come as close to Pleasant as possible without actually striking him. This was playful, although admittedly dangerous, *horseplay*—an attempt to scare Pleasant by driving close to him and scaring him by blowing the horn. These were good friends, no malice was intended and certainly no injury. The following are excerpts from the testimony of defendant Johnson:

> Mr. Johnson, you were operating the van at the time Mr. Pleasants [sic] was struck, were you not?
>
> Yes, sir.
>
> At the time of that occurrence, were you trying to see how close you could operate the vehicle to Mr. Pleasant without actually striking him?
>
> No, sir.

* * *

It is true though, is it not Mr. Johnson, that at the time the van struck Mr. Pleasants [sic] you were trying to put a fright or a scare into him by operating the van close to him?

Yes, sir.

* * *

And when Mr. Woods came and asked you about what happened, you told him that you had been horseplaying with the van, or messing around with it, did you not?

Yes, sir.

* * *

You could have operated your vehicle in such a manner that it would not have even come close to Mr. Pleasants [sic]?

Yes, sir.

Did you just misjudge your ability to come close to him?

I won't trying to hit him.

I understand. You didn't mean to hit him, but I am saying did you misjudge your ability to drive the vehicle close to him and actually hit him?

No, sir.

You did hit him?

Yes, sir.

* * *

You meant to come close, but you missed?

Yes, sir.

* * *

Now, Mr. Johnson, did you honk the horn, toot the horn?

Yes, sir.

Is it correct you were about 20 to 30 feet from those folks when you honked the horn?

Yes, sir.

COURT: How far?

About 20 feet.

* * *

When I tooted the horn and Jessie moved and Bill didn't, I put on the brakes and cut the wheels the opposite way and then that is when I struck Bill.

* * *

And Billy didn't move?

Yes, sir.

Then you slammed on the brakes?

Yes.

And turned the van to the left as shown in that picture?

* * *

Why did you turn the van to the left after you honked the horn?

I seen I was fixing to hit him, so I tried to avoid it.

All right, did you then get out of the van?

Yes, sir.

And did you go over to Billy?

Yes, sir.

What if anything did you tell him?

Told him I was sorry, didn't mean to do it, I said—joking or horseplaying, I reckon.

Joking?

Yes, sir.

Did you intend to hit him?

No, sir.

Was in fact your intent to scare him with the toot of the horn?

Yes, sir.

What if anything did he say to you at that time when you got out of the van?

Told me not to worry about it.

Did he say anything else?

Not at that time until we got to the building.

What did he say up at the building?

Told me not to worry about it again, he would tell the people that he fell off the ladder.

Were you and Billy at that time friends?

Yes, sir.

Injuries incurred in the employer's parking lot while arriving at or departing from work have frequently been held to arise out of and in the course of employment because the risk of injury in such lots is different in kind and greater in degree than that experienced by the general public. *See, e.g., Bass v. Mecklenburg County*, 258 N.C. 226, 128 S.E. 2d 570 (1962); *Harless v. Flynn*, 1 N.C. App. 448, 162 S.E. 2d 47 (1968). As this plaintiff neither initiated nor participated in the horseplay resulting in his injury his claim is covered by our Act. The only question before this Court is whether the individual defendant co-employee is subject to this civil action for damages. The majority has found that the co-employee is subject to suit.

Believing that the majority has, contrary to the established law of this State, contrary to weight of judicial authority in other jurisdictions and, in fact, without precedent in this nation, expanded the exclusion from coverage under our Workers' Compensation Act, I respectfully dissent. It appears that this is the first case in the nation to extend the exclusion from the exclusivity of the Workers' Compensation Act to negligent acts of co-employees. I believe this broad extension is unwise and will result in a proliferation of suits by employees against fellow employees anytime there is insurance coverage available or the negligent employee can satisfy a judgment and there is the slightest possibility that a jury might find that acts of horseplay were willfully or recklessly committed. Because of the limited benefits available to the work-

er under the Act, employees will find themselves subject to suit and personal liability for money judgments the responsibility for which ought rightfully to be absorbed by industry and not by the worker.

Our Workers' Compensation Act was a statutory compromise. The benefits to employers are not pertinent here. The employee is assured that if he sustains injury arising out of and in the course of his employment he will be compensated without having to prove negligence on the part of the employer. Also, as a part of the trade-off for the employer's loss of common law defenses, the employee gave up his right to bring common law suits and to recover judgments against the employer *and his fellow employees. See* 2 A. Larson, The Law of Workmen's Compensation § 72.20 (1983) (hereafter cited as Larson); *Smith v. Liberty Mut. Ins. Co.*, 409 F. Supp. 1211 (M.D.N.C. 1976). The employee's loss of his right to common law suits against the employer is expressed in the exclusivity section of the Act, which states in pertinent part:

> 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 . . . shall exclude all other rights and remedies of the employee . . . as against the employer at common law otherwise on account of such injury or death.

N.C.G.S. § 97-10.1. This Court has recognized and enforced this exclusivity. *Wesley v. Lea*, 252 N.C. 540, 114 S.E. 2d 350 (1960); *Lovette v. Lloyd*, 236 N.C. 663, 73 S.E. 2d 886 (1953). N.C.G.S. § 97-9 provides in pertinent part:

> Every employer subject to the compensation provisions of this Article shall secure the payment of compensation to his employees . . . and while such security remains in force, he or *those conducting his business* shall only be liable to any employee for personal injury or death . . . in the manner herein specified. (Emphasis added.)

In *Altman v. Sanders*, 267 N.C. 158, 148 S.E. 2d 21 (1966) we interpreted the phrase "those conducting his business" to include fellow employees. The courts of North Carolina have interpreted N.C.G.S. § 97-10.1, together with N.C.G.S. § 97-9, to be a

statutory abrogation of the employee's right to sue his fellow employee. Fellow employees are excluded from common law negligence liability. *Wesley v. Lea*, 252 N.C. 540, 114 S.E. 2d 350. *See also Smith v. Liberty Mut. Ins. Co.*, 409 F. Supp. 1211. N.C.G.S. § 97-10.2, relating to actions against third parties, has been held inapplicable to the negligent co-employee. *Warner v. Leder*, 234 N.C. 727, 69 S.E. 2d 6 (1951).

This Court has recognized that an intentional *assault* by an *employer* removes the *employer* from his common law immunity to common law suits.

> "Where the employer is guilty of felonious or willful assault on an employee he cannot relegate him to the compensation act for recovery. It would be against sound reason to allow the employer deliberately to batter his helper, and then compel the worker to accept moderate workmen's compensation benefits, either from his insurance carrier or from himself as self-insurer. The weight of authority gives the employee the choice of suing the employer at common law or accepting compensation."

Warner v. Leder, 234 N.C. at 733-34, 69 S.E. 2d at 10, *quoting* Horovitz, "Injury and Death Under Workmen's Compensation Laws," page 336; *Essick v. Lexington*, 232 N.C. 200, 60 S.E. 2d 106 (1950).

This Court has never held that even an *intentional* tort by a co-employee removes the co-employee from his immunity to common law actions, although it has *intimated* that it might so hold. *Wesley v. Lea*, 252 N.C. 540, 114 S.E. 2d 350; *Warner v. Leder*, 234 N.C. 727, 69 S.E. 2d 6. The Court of Appeals case of *Andrews v. Peters*, 55 N.C. App. 124, 284 S.E. 2d 748 (1981), *disc. rev. denied*, 305 N.C. 395, 290 S.E. 2d 364 (1982) is the only case in this State that has held that an intentional tort amounting to *assaultive misconduct* by a co-employee removes his immunity.

I would have no difficulty if we were merely extending the exclusion from the exclusivity of the Act to co-employees who engage in intentional, willful assaults where *injury is intended* to a fellow employee. I would, however, adhere to the prior rulings of this Court that the Act is the exclusive remedy for negligently caused injuries. I will not vote to extend the exclusion to situa-

tions where the co-employee is merely negligent. Where the employee, as here, intends only to *do the act* and clearly does not intend to *do the injury*, negligence is not eliminated. "[T]he idea of *negligence* is eliminated only when the *injury* or damage *is intentional.*" *Foster v. Hyman*, 197 N.C. 189, 191, 148 S.E. 36, 38 (1929); *Ballew v. R.R.*, 186 N.C. 704, 120 S.E. 334 (1923).

The statement that "We also have said that an injured worker may maintain a tort against a co-employee for intentional injury" for which the majority cites *Wesley v. Lea*, 252 N.C. 540, 114 S.E. 2d 350 is completely misleading. That case did not involve an intentional tort but involved a one car upset resulting from the ordinary negligence of the employee-driver which injured the co-employee-passenger. The paragraph of the *Wesley* opinion from which the majority takes its statement is as follows:

> Plaintiff contends that the conduct of defendant in the operation of the car was not merely negligent, but was reckless and wanton. But to take the case out of the Workmen's Compensation Act the injury to an employee by a co-employee must be intentional. *Warren v. Leder, supra*, at page 733. There is no evidence of any intention on the part of defendant *to injure* plaintiff.

252 N.C. at 545, 114 S.E. 2d at 354. The emphasis points out the distinction I have alluded to in the difference between the intent to do the act as opposed to the intent to actually injure.

The majority opinion will not hurt the employer—he can only gain by recovery of amounts already paid out in benefits. It will harm the employee by subjecting him to civil actions to which he is not now exposed.

Besides overruling established precedent to the contrary without reasons satisfactory to me, the ruling emasculates the exclusivity provision of our Workers' Compensation Act as to co-employees. If such is required by sound public policy that is for the legislature and not for this Court.

MILDRED JONES v. ALL AMERICAN LIFE INSURANCE COMPANY

No. 372A84

(Filed 30 January 1985)

1. **Insurance § 35— life insurance proceeds—beneficiary killing or procuring killing of insured—recovery barred under common law principles**

A beneficiary of a life insurance policy who intentionally and feloniously killed or procured the killing of the insured is barred from recovery of the policy proceeds under common law principles even though the beneficiary is not a "slayer" under G.S. 31A-3(3) because she has not been convicted of killing the insured.

2. **Insurance § 35— life insurance proceeds—issue as to whether plaintiff killed or procured killing of insured—sufficient evidence**

In an action to recover on a life insurance policy, the evidence was sufficient to create an issue of fact as to whether plaintiff killed or procured the killing of the insured so as to preclude plaintiff from recovering the life insurance proceeds where it tended to show: plaintiff and the insured had previously lived together in plaintiff's house; the insured was last seen alive at about 4:45 p.m. on 17 June when a fellow employee left him at plaintiff's house; insured's body was found on the morning of 18 June some eight miles from plaintiff's house dressed only in shorts with work clothing, shoes with socks in them and a hard hat lying beside him; the cause of death was a .22 or a .25 caliber bullet which had gone through the jaw in an upward and backward direction; the insured's body contained some lineal scrape-like abrasions up and down his back and a tire or grease mark on his lower right leg, which suggested that the body had been dragged out of a car trunk; plaintiff steam cleaned the carpet in her bedroom and washed the bed sheets on the morning the body was found; luminol tests conducted in plaintiff's house revealed the presence of human blood on carpet around the bed in plaintiff's bedroom and continuing out the door and down the hallway; the floor mat of the trunk of plaintiff's car had been removed and was burning in a drum in plaintiff's back yard; the trunk of plaintiff's car was being cleaned by plaintiff's two sons when officers went to plaintiff's house with a search warrant on 19 June; a clot of blood on the rear bumper guard of plaintiff's car matched the insured's blood type; plaintiff worked the evening of 17 June and returned home shortly before midnight; plaintiff had her car with her at work and her .25 caliber pistol was locked in the glove compartment when she returned home; and plaintiff testified that her two sons were the only other persons at her home during the evening of 17 June and neither one of them had the keys to her car.

3. **Insurance § 35— life insurance—beneficiary killing or procuring killing of insured—standard of proof**

The standard of proof applicable to show that plaintiff killed or procured the killing of insured so as to disqualify plaintiff from recovering life insurance proceeds is proof by the preponderance of the evidence.

4. **Insurance § 35— life insurance—procurement of killing of insured—identity of principal not required**

The burden on defendant insurance company seeking to disqualify the plaintiff beneficiary from recovery of life insurance proceeds under the common law theory that the beneficiary procured the killing of the insured is not to identify the principal in the killing but is only to produce evidence from which the jury can find from the greater weight of the evidence that plaintiff procured the death of the insured under circumstances amounting to a felony.

5. **Insurance § 35— disjunctive issue of whether plaintiff killed or procured killing of insured**

The submission of a disjunctive issue of whether plaintiff killed *or* procured the killing of the insured in an action on a life insurance policy did not prevent a unanimous verdict and was proper since plaintiff's participation in the killing of the insured by either of the two alternatives bars her from recovering the proceeds of the insurance policy, and the requirement of unanimity is met so long as all twelve jurors find that she participated in one way or the other although six may have found that plaintiff "killed" the insured and six may have found that she "procured the killing."

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

APPEAL by plaintiff, pursuant to N.C.G.S. § 7A-30(2), from the decision of a divided panel of the Court of Appeals reported at 68 N.C. App. 582, 316 S.E. 2d 122 (1984). The Court of Appeals affirmed the judgment of *Strickland, J.*, entered in favor of defendant during the 15 November 1982 Civil Session of Superior Court, HALIFAX County. Heard in the Supreme Court 11 October 1984.

The plaintiff instituted this action on 19 November 1981 to compel payment of death benefits under an insurance policy on the life of Felbert Hilliard wherein plaintiff was named as beneficiary. Hilliard died of a gunshot wound between 6:00 p.m. on 17 June and 2:00 a.m. on 18 June 1981. Although plaintiff had not been charged in a criminal action in connection with Hilliard's death, the defendant insurance company answered contending that the beneficiary of the policy had murdered or procured the murder of the insured, and was therefore disqualified from recovering the proceeds of his life insurance policy.

The case was tried before a jury, which found in response to an issue submitted to it that Mildred Jones, the plaintiff and beneficiary under the policy, willfully and unlawfully killed or procured the killing of Felbert Hilliard, the insured. Upon this ver-

dict, judgment was entered for defendant, barring any recovery by plaintiff of proceeds under the policy. A majority of the panel of the Court of Appeals affirmed the judgment with one judge dissenting on the grounds (1) that the evidence was insufficient to establish that plaintiff either killed or procured the killing of the decedent Hilliard and (2) that the submission of an issue phrased in the disjunctive deprived plaintiff of her right to a unanimous verdict. Pursuant to Rule 16(b) of the Rules of Appellate Procedure, only these two issues are before this Court for review.

Frank W. Ballance, Jr. for plaintiff appellant.

Allsbrook, Benton & Knott, by J. E. Knott, Jr., and Battle, Winslow, Scott & Wiley, P.A., by J. Brian Scott, for the defendant appellee.

MEYER, Justice.

[1] The Court of Appeals held that although the plaintiff did not fit the statutory definition of "slayer" under N.C.G.S. § 31A-3(3), because she had not been convicted of killing Hilliard, the defendant's evidence to the effect that plaintiff killed or procured the killing of the insured nevertheless gave rise to a common law defense to plaintiff's claim for life insurance proceeds. This common law defense was held to survive the enactment of N.C.G.S. § 31A, Article 3 and to apply to appropriate cases outside the purview of the slayer statute. *Quick v. Insurance Co.*, 287 N.C. 47, 54-56, 213 S.E. 2d 563, 568-69 (1975); N.C.G.S. § 31A-15. On the basis of the vast amount of circumstantial evidence produced by the defendant on this defense, the Court of Appeals further held that the issue of whether plaintiff either killed or procured the killing of Hilliard was properly submitted to the jury. We agree.

In *Quick v. Insurance Co.*, 287 N.C. 47, 213 S.E. 2d 563, we held that N.C.G.S. § 31A-15[1] preserved the common law principle,

1. That statute provides as follows: "This chapter shall not be considered penal in nature, but shall be construed broadly in order to effect the policy of this State that no person shall be allowed to profit by his own wrong. As to all acts specifically provided for in this chapter, the rules, remedies, and procedures herein specified shall be exclusive, and as to all acts not specifically provided for in this chapter, all rules, remedies, and procedures, if any, which now exist or hereafter may exist either by virtue of statute, or by virtue of the inherent powers of any court of competent jurisdiction, or otherwise, shall be applicable."

theretofore recognized by this Court, that one should not be allowed to profit by his wrong, as to all acts not specifically provided for in N.C.G.S. Chapter 31A. In *Quick* itself, this Court held that a beneficiary in a policy of life insurance whose culpable negligence caused the death of the insured may be disqualified under common law principles from receiving any insurance proceeds from the policy insuring her deceased husband's life. Similarly, in the earlier case of *Anderson v. Parker*, 152 N.C. 1, 2, 67 S.E. 53 (1910), this Court clearly stated:

> It is a principle very generally accepted that a *beneficiary who has caused or procured the death of the insured under circumstances amounting to a felony will be allowed no recovery on the policy.* Vance on Insurance, 392-393; Cooley's Insurance Briefs, 3153; 25 Cyc., 153, 3 A&E (2 Ed.), 1021.
>
> This wholesome doctrine, referred by most of the cases to the maxim, *Nullus commodum capere potest de injuria sua propria*, has been uniformly upheld, so far as we are aware, except in certain cases where the interest involved was conferred by statute, and the statute itself does not recognize any exception.

See also Bullock v. Insurance Co., 234 N.C. 254, 67 S.E. 2d 71 (1951). *See generally* Annot., 27 A.L.R. 3d 794 (1969). It is the beneficiary's participation in the death of the insured by either of the two alternative means (causing or procuring the death) which bars recovery on the policy. The *fact* of the participation in the death, and not the *method* of participation is the critical issue which must be resolved. Therefore, the Court of Appeals correctly determined that a beneficiary who intentionally and feloniously killed *or* procured the killing of the insured is barred from recovery of the policy proceeds under common law principles recognized in this jurisdiction prior to the enactment of N.C.G.S. Chapter 31A.

[2] We turn first to the question of the sufficiency of the defendant's evidence to take the case to the jury on this issue. The evidence pertinent to this question may be summarized as follows: The plaintiff, Mildred Jones and the decedent, Felbert Hilliard had lived together in her house in Enfield, North Carolina from September 1978 until April 1981. At that time, Hilliard left the plaintiff's house and began living with his father in Bricks,

North Carolina. Plaintiff was the beneficiary of Hilliard's life insurance policy. Shortly before his death, Hilliard stated to a number of his friends and relatives that he intended to change the beneficiary of his life insurance policy. Hilliard's insurance policies were kept in a shoebox under the bed that he and plaintiff slept in while they lived together in plaintiff's house. Under the policy, plaintiff stood to gain approximately $61,000.00.

On the morning of 18 June 1981 the body of Felbert Hilliard was discovered on a Nash County roadside about one-tenth of a mile from the Halifax County line and about eight to ten miles from plaintiff's Halifax County house. Hilliard was dressed only in jockey shorts, which were quite bloody, with some work clothing, shoes with socks in them, and a hard hat lying beside him. Blood was observable in the shoes. The investigating officer observed tire tracks coming from the Halifax County bridge about 500 feet from the body, making a U-turn and going back toward Halifax County. An autopsy was performed that morning. Hilliard had a small bullet wound with powder burns under his jaw, which was determined to be the cause of death. The bullet had gone through the jaw in an upward and backward direction from right to left. His body also contained some lineal scrape-like abrasions up and down his back and a tire or grease mark on his lower right leg, which suggested that the body had been dragged out of a car trunk. The doctor who performed the autopsy testified that Hilliard died within minutes of receiving the wound and that death occurred between 6:00 p.m. on 17 June and 2:00 a.m. on 18 June, the date of the autopsy.

The bullet that had penetrated Hilliard's jaw was determined to be a small caliber bullet, either a .22 or .25. Plaintiff owned a .25 caliber automatic pistol which she kept in the glove compartment of her car.

Hilliard was last seen alive at about 4:45 p.m. on the afternoon of 17 June when a fellow employee left him off at plaintiff's house. Earlier that week, Hilliard had indicated to the plaintiff that he was going out to her house on the 17th to do some gardening and plaintiff told Hilliard that she would take him home if he finished after dark.

At about 9:00 a.m. on the morning of 18 June, plaintiff rented a steam carpet cleaner and rug shampooer from Meyer's Super-

market in Enfield. Later that morning, at about 10:30 a.m., plaintiff was observed in the office of Hilliard's employer near Enfield, inquiring as to how to go about collecting his insurance as she was the named beneficiary. Later that day, the investigating officer, Deputy Sheriff M. M. Reams met plaintiff at Hilliard's parents' home. Upon learning that plaintiff had been Hilliard's girlfriend, Reams asked her a few general questions and learned that plaintiff had spent the day shampooing the carpet at her residence. Plaintiff consented to let the officers look over her residence and accompanied them to her house.

There the officers discovered that the carpet in plaintiff's bedroom was quite damp from a recent steam cleaning and that the bed sheets had just been taken off and washed. The side of the carpet next to the door was wetter than the other side of the carpet. The only room in the house that had been cleaned was the plaintiff's bedroom. When asked, plaintiff told the officers that she owned a .25 caliber pistol and retrieved it from the glove compartment of her car. With the plaintiff's consent, the officers examined the trunk of her car and found that the trunk floormat had been removed. They noticed that the trunk was clean under where the floormat had been, with dirty marks visible around the edges of the clean area.

Plaintiff explained that she had thrown the floormat away about a year before when a battery turned over in the car and spilled acid on it. The officers then walked around the back yard and examined a 55-gallon drum in the back yard with smoke coming from it. A piece of smoldering carpet which had some reddish rust material on it was pulled from the drum. Upon re-examination, the officers found traces of a reddish rust material in the trunk of plaintiff's car.

The next evening, the officers returned with a search warrant for plaintiff's car and house. The plaintiff was not at home, but her two sons and a female were there and they did not want to let the police into the house. The officers testified that the sons were uncooperative, but that they entered anyway and began looking around. A serologist employed by the SBI performed a luminol test in plaintiff's bedroom. The agent observed intense luminescence from the presence of blood on the left side of the bed and alongside the bed leading to the doorway. Evidence of lu-

mination from blood was also found along the hallway and samples of the carpet were taken for later analysis. One of the investigating officers stated that while plaintiff's bedroom was very clean, the rest of the house was filthy. While the SBI agent was running the luminol test, the officers looked around outside and observed the trunk lid of plaintiff's car up and some Clorox bottles, a water hose and a vacuum cleaner beside the car. At this time the inside of the car's trunk had been completely washed out and cleaned with some water standing in the edges. However, the officers did observe a clot of blood on the rear bumper guard, which was removed by the SBI agent and later matched with Hilliard's blood type. The blood sample from the bedroom carpet indicated human blood, but was insufficient in volume to permit further testing.

The plaintiff's testimony established that she was employed as a registered nurse at Nash General Hospital. At the time in question, two of her four children were staying at her house, her 18-year-old son Antonio and her 19-year-old son, Nicholas. Plaintiff stated that she had last seen Hilliard alive early in the morning of 16 June, when she took him to work. According to the plaintiff, she first learned of Hilliard's death when his sister telephoned at about 11:00 a.m. on the morning of the 18th and told plaintiff the news. Upon learning of the death, plaintiff stopped her house cleaning and went to the Hilliard house. At the behest of Hilliard's father, she left there at once to see about getting the insurance proceeds so that burial arrangements could be made, but otherwise remained there until the police arrived.

Plaintiff worked a 2:45 p.m. to 11:15 p.m. shift at the hospital. She testified that on the evening of the 17th she left work at 11:15 p.m. and drove directly home, arriving shortly before midnight. Plaintiff parked her car in front of her house and went inside. According to the plaintiff, her two sons were the only ones at home that evening.

Plaintiff normally kept her handgun in the glove compartment of her car and stated that it was in the car on the evening of the 17th. She testified that upon arriving home, she locked the car, went in the house, went to bed at about 12:30 a.m. and did not get up until about 8 o'clock that morning, which was her day off. Plaintiff plainly stated that her car was locked and the only

persons who had keys to her car and its trunk were herself and her son Charles, who lived in Baltimore; neither of the two sons who were staying with her had keys to her car. Moreover, plaintiff stated that she was the only one who drove her car; she would not let her sons drive it "because they abused it so much."

In her response to defendant's pretrial interrogatories and upon direct examination, plaintiff denied that there had been any blood on the floor or carpet beside her bed or in the hallway on the night of the 17th and denied that she had made any effort or attempt to clean blood from her house on the 18th of June. Plaintiff explained that she had rented the carpet cleaning machine on the 18th to clean her bedroom because her son's girlfriend was coming to visit and she planned to put her in there, rather than put her in the unused third bedroom of the house. Although plaintiff denied knowing before Hilliard died that she was named as the beneficiary of Hilliard's life insurance policy, plaintiff stated that she found the policy with other personal papers of Hilliard's in a shoebox under her bed on the morning of the 18th and that the premiums on the policy were paid by draft on a joint account at Peoples Bank & Trust Company in the name of Felbert Hilliard and Mildred Jones. Thereafter, plaintiff directed her attorney to claim the death benefits through Peoples Bank. Neither of plaintiff's two sons testified as witnesses and they were not present in court during the trial.

The Court of Appeals determined that the circumstantial evidence produced at trial sufficed to create an issue of fact for the jury as to whether plaintiff killed or procured the killing of Hilliard; the dissent disagreed with the conclusion that the evidence was sufficient as to either issue, stating that:

> The evidence leads only to surmise and speculation; the greater likelihood that it suggests to me being that he was killed spontaneously in a brawl or fight by one or both of the boys during the six hours that plaintiff was at work and not there, and that her only involvement was in trying to conceal what one or both of the boys had done.

68 N.C. App. at 587, 316 S.E. 2d at 126.

We have little trouble in concluding that the massive amount of circumstantial evidence adduced in this case sufficed to both take the case to the jury on the issue of whether plaintiff either

killed or procured the killing of Felbert Hilliard and to support the verdict entered thereon.

[3] At the outset it must be remembered that the standard of proof applicable to ordinary civil actions such as this is proof by the preponderance of the evidence. *In re Wilkins*, 294 N.C. 528, 242 S.E. 2d 829 (1978); *Wyatt v. Coach Co.; White v. Coach Co.*, 229 N.C. 340, 49 S.E. 2d 650 (1948). As the Court of Appeals correctly observed, the required degree of proof is not changed by the fact that the conduct with which the party is charged amounts to a crime. *See* 2 Brandis on North Carolina Evidence, § 212 (2d ed. 1982).

Next, we note that the plaintiff did not object, except, or assign error to the submission to the jury of the issue of whether the plaintiff herself killed the insured decedent, Felbert Hilliard. Plaintiff excepted and assigned error to the trial court's submission to the jury of the issue as to whether plaintiff procured the killing of the insured, and only that question is presented by her appeal.

Although both the plaintiff and the dissenting opinion below maintain that the evidence of procurement was inconclusive and speculative, we find ample circumstantial evidence on this issue in the trial transcript.

The plaintiff's uncontroverted evidence established that she had her car with her at work during the afternoon and evening of 17 June. Plaintiff normally kept her .25 caliber automatic pistol in the glove compartment of her car and this handgun was in her car when she returned home from work at about five minutes before midnight. Plaintiff stated that she locked the car that night, went into the house and went to bed within 30 minutes, remaining asleep until about 8 o'clock the following morning.

In all of the evidence presented, the only gun mentioned as being on or about the Jones premises on the night of the killing was the .25 automatic pistol contained in the glove compartment of plaintiff's car at the time she arrived home near midnight. Plaintiff was quite clear in stating that only her two sons Antonio and Nicholas were at home when she arrived that night and that neither of them had keys to her car; she had the only set in the house. Deputy Sheriff Reams testified that the bullet fragments taken from the deceased were of a small caliber, either .22 or .25.

Based upon the foregoing evidence and if the jury concluded that plaintiff's .25 caliber pistol was most likely the weapon used upon the deceased, then the jury necessarily concluded that the deceased was killed after plaintiff returned home at about midnight. There was no evidence of record suggesting either that the car had been broken into or that plaintiff's sons had been engaged in a "brawl" with the deceased at any time, as suggested by the dissent below.

[4] The plaintiff strongly contends that notwithstanding these factual circumstances, the defendant must identify the principal in the killing in order to disqualify her from recovering the life insurance proceeds under Hilliard's policy on a theory of procurement. Accordingly, plaintiff argues that because the evidence failed to indicate which of her two sons she "procured" to kill Hilliard, the jury was erroneously allowed "to speculate and surmise that one or more of the sons of plaintiff was somehow procured." We do not agree.

In this civil action, the burden on the defendant insurance company seeking to disqualify the plaintiff beneficiary from recovery of the life insurance proceeds under the common law rule of *Anderson v. Parker*, 152 N.C. 1, 67 S.E. 53, is not to identify the principal, but only to produce evidence from which the jury can find from the greater weight of the evidence that plaintiff caused or procured the death of the insured under circumstances amounting to a felony.

In this context, the terms "cause" and "procure" are nearly synonymous. In Black's Law Dictionary, 5th Ed., "Procure" is defined as follows:

> To initiate a proceeding; to cause a thing to be done; to instigate; to contrive, bring about, effect or cause.

See also Marcus v. Bernstein, 117 N.C. 31, 34, 23 S.E. 38, 39 (1895) ("Procure" means "to contrive, to bring about, to effect, to cause"). The evidence in this case suggested that of the three family members present in the Jones residence on the night in question, only the plaintiff herself had a motive to kill Hilliard. The uncontroverted evidence showed that Hilliard's body was discovered on a roadside, some ten miles from the Jones house, clothed only in a pair of bloody jockey shorts, with his work

clothes, hat and shoes piled nearby. No reference to blood on the clothes appears in the transcript. The reasonable inference arising on this evidence is not that the half-naked Hilliard was killed in the course of a fight, but rather that he was shot while in, or preparing for, bed.

The tests conducted in plaintiff's home revealed the presence of human blood on the carpet around the bed in plaintiff's bedroom and continuing out the door and down the hallway, as if something had been dragged along the floor. The fatal bullet penetrated Hilliard's head under the jaw and traveled in an upward and backward direction toward the top of his head. This permits an inference that Hilliard had undressed down to his shorts, folded up his clothes in a pile, removed his shoes, tucked his socks inside his shoes, went to sleep in plaintiff's bed and was more than likely asleep when someone in that house put the gun under his chin and fired—a gun which was not brought home until plaintiff returned from work. Plaintiff testified that she went to bed within 30 minutes after she returned home from work on the night of the 17th.

It is clear from the plaintiff's own unqualified testimony that she locked the car containing the gun and that she was the only one at home with a set of keys. Under these circumstances, the reasonable inferences which may be drawn are that either plaintiff herself shot the deceased when she returned from work and found him in her bed, or that she gave either or both of her sons the keys to her car in order to obtain the pistol and shoot Hilliard.

For the purposes of this civil action, defendant need not produce evidence of a specific agreement between the plaintiff and her sons regarding Hilliard's death, but need only show that plaintiff caused, instigated or brought about the killing. On the evidence presented, the jury could reasonably find that plaintiff was present in her home at the time the decedent was killed. "'When the bystander [to a criminal act] is a friend of the perpetrator and knows that his presence will be regarded by the perpetrator as an encouragement and protection, presence alone may be regarded as an encouragement'." *State v. Rankin*, 284 N.C. 219, 223, 200 S.E. 2d 182, 185 (1973), *quoting* Wharton, Criminal Law, 12th Ed., § 246. Therefore, if the jury found that Hilliard was shot in plaintiff's bedroom; that her .25 caliber

automatic pistol was most likely the death weapon; that plaintiff controlled access to the weapon in her car and was present at the scene at the time Hilliard was killed; and if the jury subscribed to the theory that either or both of her sons were the actual perpetrators, plaintiff's presence and her "*relation* to the actual perpetrator(s)," *id.* at 223, 200 S.E. 2d at 185, would support a finding that she aided in, encouraged or "procured" the killing of the deceased. Additionally, there was evidence indicating that Hilliard's body had been transported to the Nash County roadside, where it was later found, in the trunk of plaintiff's car and that plaintiff's sons were engaged in cleaning out the trunk of the car when the police officers returned to her home with the search warrant on 19 June 1981. Moreover, the sons were described as being uncooperative with the police investigators despite their being informed that the officers had a warrant to search the premises.

Thus, ample circumstantial evidence was presented from which the jury could find, and did find, that plaintiff either killed or procured the killing of Felbert Hilliard. Accordingly, the trial judge properly submitted the issue of procurement to the jury and properly denied all of plaintiff's motions with regard thereto.

[5] Plaintiff also alleges error in the trial court's instructions to the jury on the common law "slayer" defense raised by defendant's evidence. Plaintiff contends that the submission of the disjunctive issue of whether plaintiff *killed or procured the killing* of Felbert Hilliard was ambiguous and prevented the jury from reaching an unanimous verdict. In other words, that submission of the disjunctive issue left open the possibility that less than all the jurors could agree on whether plaintiff herself killed Hilliard, or had him killed by her sons or some other party.

We are not persuaded that the instruction in the alternative resulted in a nonunanimous verdict in this case. The pertinent portion of the judge's instruction setting out the issue to be answered by the jury is as follows:

> Now, ladies and gentlemen of the jury, as I have already indicated, your verdict will take the form of an answer to a certain question or issue, and this issue reads as follows:
>
> * * *

Did Mildred Jones, the plaintiff, willfully and unlawfully *kill* Felbert Hilliard *or procure his killing*?

The pertinent portions of his instructions relating to the elements to be found in order to answer the issue are as follows:

> Now, I charge that for you to find that the plaintiff, Mildred Jones, willfully and unlawfully *killed* Felbert Hilliard *or procured his killing*, the defendant, All American Life Insurance Company, must prove the following things by the greater weight of the evidence:
>
> First, that the plaintiff intentionally, willfully and unlawfully killed Felbert Hilliard by shooting him. [There follows instructions regarding the requisite intent, willfulness and proximate cause.]
>
> * * *
>
> Or that *the killing was* willfully and unlawfully committed by some other person by that person shooting Felbert Hilliard, and the shooting was a proximate cause of Felbert Hilliard's death. And that before the killing was committed, the plaintiff *procured* that other person to commit that killing.
>
> So finally, I charge that if you find that . . . *Mildred Jones*, the plaintiff, intentionally, . . . *killed Felbert Hilliard* by shooting him, . . . *or that* . . . some other person intentionally, . . . by shooting him, and the shooting was the proximate cause of Felbert Hilliard's death; and that, before the killing was committed, *Mildred Jones procured that other person to commit the killing*, it would be your duty to answer the issue "Yes" in favor of the defendant All American Life Insurance Company.
>
> * * *
>
> *I instruct you that a verdict is not a verdict until all twelve jurors agree unanimously as to what your decision shall be. You may not render a verdict by majority vote.*
>
> You all have a duty to consult with one another. . . . But none of you should surrender your honest conviction solely because of the opinion of your fellow jurors or for the mere

purpose of returning a verdict, *and when you have reached a unanimous verdict as to the issue,* have your foreman write the answer on the issue form which will be sent back to you in just a moment after you enter your jury room. (Emphasis added.)

The trial judge specifically instructed the jury that defendant had the burden to prove to the jury that plaintiff either killed Hilliard or, alternatively, that she procured the killing of Hilliard. It is clear from the instruction that all twelve jurors had to find the existence of plaintiff's participation in Hilliard's death by one or the other alternative means by which the plaintiff would be barred from recovery of the insurance proceeds under the common law rule of *Anderson v. Parker,* 152 N.C. 1, 67 S.E. 53 ("caused or procured the death of the insured under circumstances amounting to a felony"). Because plaintiff's participation in the killing of the insured by either of the two alternatives bars her from recovering the proceeds of the insurance policy, it is only necessary that the jury agree unanimously that she so participated. That is, so long as all twelve jurors find that she participated in one way or the other the requirement of unanimity is met although six may have found that plaintiff "killed" Hilliard and six may have found that she "procured the killing."

On the record before us, we find no error in the judgment entered in favor of the defendant insurance company. The decision of the Court of Appeals is

Affirmed.

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

RUDOLPH C. STONE AND AUDREY L. STONE v. MARK G. LYNCH, SECRETARY OF THE DEPARTMENT OF REVENUE

No. 340PA84

(Filed 30 January 1985)

Taxation § 28— union strike benefits—gift rather than income

Union strike benefits constituted a gift to the recipient under North Carolina income taxation law and were thus properly excludable from the recipient's taxable income where the union assistance was voluntary and without consideration. G.S. 105-141(b)(3).

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

Justice MEYER dissenting.

Chief Justice BRANCH joins in this dissent.

ON discretionary review of a decision of the Court of Appeals reported at 68 N.C. App. 441, 315 S.E. 2d 350 (1984), reversing judgment filed by *Farmer, J.*, 20 December 1982. Heard in the Supreme Court 12 December 1984.

The state is seeking to tax as income certain payments made by the Communications Workers of America (CWA), a labor union representing employees in the communications industry, to Rudolph Stone, a plaintiff herein. During 1979 Mr. Stone was employed by Carolina Telephone and Telegraph Company (CTT). In February 1979, CWA organized Local 3685, with members at the CTT plant in Manteo at which Mr. Stone worked. Mr. Stone joined the union in early September 1979, although he paid no dues until sometime after 29 November 1979. On 30 September 1979 the union voted to strike CTT. Mr. Stone participated in the strike by picketing and serving as a strike counsellor for the union. The strike ended 29 November 1979, at which time Mr. Stone returned to work.

During the strike the union established the CWA Local 3685 Defense Fund to reimburse members of the union for direct expenses incurred in connection with the strike and to make assistance payments to strikers. Individuals seeking assistance payments were required to complete an application form in which they had to set forth, inter alia, the extent of their financial assets and obligations and the specific items for which assistance

was requested. On the basis of the information set forth on the application the union determined the extent of the applicant's need for assistance. Defense Fund rules provided that assistance was available for shelter, utilities, and fuel if necessary to prevent eviction, foreclosure, or utility service termination where deferral of payments could not be arranged. Assistance was also available after the first sixty days of a strike to prevent repossession of furniture, household appliances, and automobiles in the event that deferral of payments could not be arranged. Assistance was not available and was denied for payments on luxury items such as color televisions and stereo sets. Assistance was available for food and for payment of certain medical expenses.

After the strike began Mr. Stone applied to the Defense Fund for strike benefits to pay a number of bills. Over several weeks he received funds for groceries, utilities and telephone, medical expenses, mortgage payments, and loan payments. The total sum Mr. Stone received was $1,879.95.

In filling out his 1979 North Carolina income tax return, Mr. Stone reported the $1,879.95 as nontaxable income. The North Carolina Department of Revenue subsequently sent Mr. Stone an adjustment statement notifying him that the Department considered the $1,879.95 to be taxable income. Mr. Stone paid tax, a penalty, and interest on the sum and then timely filed for a refund, claiming that the $1,879.95 of strike benefits was not taxable income. When the ensuing dispute was not resolved administratively, Mr. and Mrs. Stone began this litigation to recover the tax and interest paid on the strike benefits. The trial court concluded that the strike benefits Mr. Stone received were includable in his gross income pursuant to N.C.G.S. 105-141(a). The Court of Appeals reversed, holding that the benefits had been gifts from the union to Mr. Stone and thus were exempt from income taxation under N.C.G.S. 105-141(b)(3). This Court granted the Secretary of the Department of Revenue's petition for discretionary review 28 August 1984.

Smith, Patterson, Follin, Curtis, James & Harkavy, by J. David James, for plaintiff appellees.

Rufus L. Edmisten, Attorney General, by Myron C. Banks, Special Deputy Attorney General, for defendant appellant.

MARTIN, Justice.

The question dispositive of this appeal is whether the strike benefits Mr. Stone received were gifts under N.C.G.S. 105-141 (b)(3). This statute provides in part:

> (b) The words "gross income" do not include the following items, which shall be exempt from taxation under this Division, but shall be reported in such form and manner as may be prescribed by the Secretary of Revenue:
>
> . . . .
>
> (3) The value of property acquired by gift, bequest, devise or descent . . . .

We find no definition of "gift" in either the income taxation Article or the gift taxation statute, N.C.G.S. 105-188. The only reported case citing N.C.G.S. 105-141(b)(3) to date is *Manufacturing Co. v. Johnson, Comr. of Revenue*, 261 N.C. 504, 135 S.E. 2d 205 (1964). This case concerned whether the forgiveness of debt owed by a corporation to an officer/stockholder constituted income to the corporation or a contribution to its capital. In discussing the transfer of property from a stockholder to a corporation, this Court stated:

> The value of property acquired by gift is excluded from both State and Federal income tax. G.S. 105-141(b)(3); Int. Rev. Code of 1954 § 102. A gift is usually defined as a voluntary transfer of property by one to another without any consideration therefor. Theoretically, a contribution by a stockholder increases the resources of the corporation and the value of all the stock, including his own, proportionately. This business aspect removes such a transaction from the concept of a pure gift. However, such a gift to a corporation necessarily constitutes a gift to the other stockholders.
>
> In *American Dental Co.* [318 U.S. 322, 87 L.Ed. 785], the Supreme Court held that the gratuitous release by creditors of accrued rent and interest on merchandise purchased constituted a gift to the corporation which was not subject to income tax. The court said: "The fact that the motives leading to the cancellation were those of business or even selfish, if it be true, is not significant. The forgiveness was gratuitous, a

> release of something to the debtor for nothing, and sufficient to make the cancellation here gifts within the statute." (Section 22(b)(3) of the Revenue Code of 1939). The creditor-donors in *American Dental Co.* were not stockholders. When a creditor who is a stranger to the corporation forgives its debt to him, the forgiveness is exempt from income tax under the exclusion of gifts. When a stockholder gratuitously cancels the debt the corporation owes him, the transaction is denominated a contribution to capital. *See George Hall Corp. v. Commissioner*, 2 T. Ct. 146; *Pacific Magnesium, Inc. v. Westover*, 86 F. Supp. 644, 649 (S.D. Cal. 1949). Subject to Int. Rev. Code of 1954, § 1017, the tax result is the same. However, neither constitutes income under state or federal law.
>
> We hold that the forgiveness of the debt in question constituted a contribution to the capital of the plaintiff corporation and was therefore not taxable income.

Id. at 507, 135 S.E. 2d at 208.

The definition of "gift" stated in *Manufacturing Co.* is broader than the definition used for federal income taxation purposes which was first enunciated in *Commissioner v. Duberstein*, 363 U.S. 278, 4 L.Ed. 2d 1218 (1960). Under *Duberstein*, if a transfer "proceeds primarily from 'the constraining force of any moral or legal duty,' or from 'the incentive of anticipated benefit' of an economic nature . . ., it is not a gift. . . . A gift in the statutory sense, on the other hand, proceeds from a 'detached and disinterested generosity' . . . 'out of affection, respect, admiration, charity or like impulses.'" *Id.* at 285, 4 L.Ed. 2d at 1225 (citations omitted). By quoting and relying on *Helvering v. Amer. Dental Co.*, 318 U.S. 322, 87 L.Ed. 785 (1943), and its similarly broad characterization of gift for income tax purposes, in *Manufacturing Co. v. Johnson, Comr. of Revenue*, 261 N.C. 504, 135 S.E. 2d 205, this Court tacitly rejected the *Duberstein* definition of gift. *Manufacturing Co.* is strong precedent to apply the common law definition of gift for income taxation purposes. An analysis of the facts in the instant case compels the holding that the strike benefits paid to Mr. Stone were gifts under our income taxation law.

As stated in *Manufacturing Co.*, a gift is a "voluntary transfer of property by one to another without any consideration therefor." Thus, there must be a transfer, the transfer must be voluntary, and the transfer must be without consideration. There is no question in this case that there were transfers. Money passed from the Defense Fund to Mr. Stone on numerous occasions. The money was not loaned but was transferred to Mr. Stone permanently and absolutely. There is no evidence that the union was in any way coerced into making the payments, nor does anything in the record lead to any conclusion other than that the union made the payments voluntarily. The remaining question, therefore, is whether the union's payment of strike benefits to Mr. Stone was without consideration.

The record is clear that the union did not demand or require that Mr. Stone perform any services for it in order to be eligible to receive strike benefits. He did not perform any services for the union prior to the inception of the strike. Not all strikers received benefits. Assuming that the trial court's findings of fact that "Union assistance was based [merely] on moral obligation" and "plaintiff was morally obligated to perform strike duties" are adequately supported by evidence of record, the trial court's conclusion that the benefits are taxable is erroneous. As the Court of Appeals aptly stated:

> It is firmly settled . . . that except in cases of consanguinity or similar relationship, or when there is some antecedent debt or legal obligation, a moral obligation alone does not constitute consideration. *See Carolina Helicopter Corp. v. Cutter Realty Co.*, 263 N.C. 139, 139 S.E. 2d 362 (1964); *Cruthis v. Steele*, 259 N.C. 701, 131 S.E. 2d 344 (1963); *Exum v. Lynch*, 188 N.C. 392, 125 S.E. 15 (1924); *see also* Restatement (Second) of Contracts §§ 71-73 (1981); 17 C.J.S. *Contracts* § 90 (1963); 38 C.J.S. *Gifts* § 7 (1943); 17 Am. Jur. 2d *Contracts* §§ 130-133 (1964); 38 Am. Jur. 2d *Gifts* §§ 1-2 (1968).

68 N.C. App. at 446, 315 S.E. 2d at 354. We further agree with the Court of Appeals that the record in the instant case reveals no special relationship between the union and Mr. Stone, nor is there any evidence that Mr. Stone was party to any antecedent obligation or agreement with the union which would cause the moral

obligation to constitute legal consideration. Because the voluntary transfers of strike benefits from the union to Mr. Stone were made without consideration, they were gifts and therefore excludable from plaintiffs' taxable income pursuant to N.C.G.S. 105-141(b)(3).

Although our holding rests on state law, we find it in accord with the federal law as expressed in *United States v. Kaiser*, 363 U.S. 299, 4 L.Ed. 2d 1233 (1960). The strike benefits in the present case would also be considered gifts under the *Kaiser* decision. *Kaiser* was concerned with the question whether strike benefits were gifts under 26 U.S.C. § 102(a). In *Kaiser* a plurality of the Court held that whether strike benefits constituted a gift under the definition set forth in *Duberstein*, 363 U.S. 278, 4 L.Ed. 2d 1218 (heard with *Kaiser*), was a question of fact for the fact finder. The Court held that in Mr. Kaiser's case the jury appropriately found that strike benefits had been a gift:

> [The jury] had the power to conclude, on the record, taking into account such factors as the form and amount of the assistance and the conditions of personal need, of lack of other sources of income, compensation, or public assistance, and of dependency status, which surrounded the program under which it was rendered, that while the assistance was furnished only to strikers, it was not a recompense for striking. They could have concluded that the very general language of the Union's constitution, when considered with the nature of the Union as an entity and with the factors to which we have just referred, did not indicate that basically the assistance proceeded from any constraint of moral or legal obligation, of a nature that would preclude it from being a gift. And on all these circumstances, the jury could have concluded that assistance, rendered as it was to a class of persons in the community in economic need, proceeded primarily from generosity or charity, rather than from the incentive of anticipated economic benefit. We can hardly say that, as a matter of law, the fact that these transfers were made to one having a sympathetic interest with the giver prevents them from being a gift. This is present in many cases of the most unquestionable charity.

363 U.S. at 304, 4 L.Ed. 2d at 1236. Such factors were also present in the instant case, and thus under *Kaiser* the benefits Mr. Stone received would also be considered gifts.

Because the strike benefits in the instant case are gifts under our interpretation of both state and federal law, we do not reach the question of whether principles of federal taxation law must or must not be followed when a state taxation statute is identical or substantially similar to a federal taxation statute. We note, however, that generally it is preferable that state taxation statutes be interpreted consistently with their federal counterparts. *See, e.g., Ward v. Clayton, Comr. of Revenue*, 276 N.C. 411, 172 S.E. 2d 531 (1970); N.C. Gen. Stat. §§ 105-141(b)(9), (10), (17), (19), (23), -144(b), -145(e), -147(8), (16), (20) (Supp. 1983). This is especially important when the statute involved is one of technical taxation law or procedure not involving a common law issue, such as presented in this appeal.

Plaintiffs also seek to raise the issues of whether taxation of strike benefits by the State of North Carolina violates the supremacy clause of the Constitution of the United States and whether such taxation is preempted by federal labor legislation. As these issues were neither raised nor decided by the trial court, they are not properly before this Court for review. *E.g., Wilcox v. Highway Comm.*, 279 N.C. 185, 181 S.E. 2d 435 (1971).

The decision of the Court of Appeals is

Affirmed.

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

Justice MEYER dissenting.

Believing that the strike benefits paid to Mr. Stone under the facts of this case do not constitute a "gift," I respectfully dissent. I am convinced that the strike benefits paid here are taxable income under both state and federal law. The trial court correctly concluded from the evidence that the payments to Mr. Stone were *not* gifts, and were therefore taxable income.

G.S. § 105-141(a) defines "gross income" as "all income in whatever form and from whatever source derived." "Net income"

is "gross income less deductions" N.C.G.S. § 105-140, and the individual income tax is imposed upon the basis of "net income." N.C.G.S. § 105-136. "Gross income" is so potentially broad and all-inclusive a term that the legislature has seen fit to expressly remove many items from its reach which otherwise would be encompassed by it. N.C.G.S. § 105-141(b) provides that "the words 'gross income' do not include the following items: . . . (3) the value of property acquired by gift. . . ."

N.C.G.S. § 105-141(b)(3) did not spring from our General Assembly full-grown and unrelated to anything that had occurred before. The language first appeared in the North Carolina income tax laws in 1921, when Section 301 of the Revenue Act was enacted, as one of the exemptions listed in Section 301. 1921 N.C. Sess. Laws Ch. 34, § 301. Subparagraph 2 thereof provided that "the words 'gross income' do not include . . . (c) the value of property acquired by gift. . . ." The source of this language is the federal income tax law of 1913, 28 Stat. (Part 1) 167 (1913), which finds its current expression in 26 U.S.C. § 102(a), providing that "gross income does not include the value of property acquired by gift. . . ."

Thus we have an identical exclusion of "gifts" from gross income under both federal and state income tax law; the state law obviously having been drawn from the earlier federal law. This being so, it stands to reason that determination of what constitutes a "gift" under such laws ought, as a matter of common sense, to follow identical tracks for the sake of simplicity, ease of administration, and fairness to taxpayers and tax practitioners who must, in cases of divergence, keep track of separate results from separate tax systems.

I believe it is extremely important that our state taxation statutes be interpreted in a manner which is consistent with their federal counterparts. While paying lip service to this principle, the majority has gone far out of its way to avoid following it here. The majority reaches an erroneous and unwise result, first through the misinterpretation of the North Carolina case of *Manufacturing Co. v. Johnson, Comr. of Revenue*, 261 N.C. 504, 135 S.E. 2d 205 (1964) and then by misinterpreting the holding of the United States Supreme Court in *United States v. Kaiser*, 363 U.S. 299, 4 L.Ed. 2d 1233 (1960).

In my opinion, the majority has completely misinterpreted the holding in *Manufacturing Co.* As indicated in the majority opinion, *Manufacturing* involved the forgiveness of a debt owed by a corporation to an officer/stockholder. The officer/stockholder forgave the debt and the court held that the forgiveness of the debt was a *contribution to capital.* The language of the court in that regard is as follows:

> Theoretically, a contribution by a stockholder increases the resources of the corporation and the value of all the stock, including his own, proportionately. This business aspect removes such a transaction from the concept of a pure gift.
>
> When a creditor who is a stranger to the corporation forgives its debt to him the forgiveness is exempt from income tax under the exclusion of gifts. When a stockholder gratuitously cancels the debt the corporation owed him, the transaction is denominated a contribution to capital.
>
> We hold that the forgiveness of the debt in question constituted a contribution to the capital of the plaintiff corporation and was therefore not taxable income.

Id. at 507, 135 S.E. 2d at 208.

Thus it is clear that although the court said that neither a gift nor a contribution to income is considered taxable income, *Manufacturing Co.* did not hold that the forgiveness of the debt was a "gift." My point is that it is not reasonable to apply the definition of "gift" from *Manufacturing Co.* to all situations, and in particular the situation presented by the case now before us. Under our statute, N.C.G.S. § 105-141(b)(3), it is necessary that the benefits actually constitute a "gift."

When, as here, we have no appropriate State precedent, we should look to the federal decisions for a definition of the term "gift." In *Commissioner v. Duberstein*, 363 U.S. 278, 4 L.Ed. 2d 1218 (1960), the United States Supreme Court was called upon to determine the meaning of "gift" in the context of the federal income tax statute which is nearly identical to G.S. § 105-141(a) and (b). The Court stated:

> The course of decision here makes it plain that the statute does not use the term "gift" in the common-law sense, but in

> a more colloquial sense. This Court has indicated that a voluntary executed transfer of his property by one to another, without any consideration or compensation therefore, though a common-law gift, is not necessarily a "gift" within the meaning of the statute. For the Court has shown that *the mere absence of a legal or moral obligation to make such a payment does not establish that it is a gift. . . . And, importantly, if the payment proceeds primarily from "the constraining force of any legal or moral duty," or from "the incentive of anticipated benefit" of an economic nature . . . it is not a gift.* And, conversely, "[w]here the payment is in return for services rendered, it is irrelevant that the donor derives no economic benefit from it." . . . . A gift in the statutory sense, on the other hand, proceeds from a "detached and disinterested generosity," . . . "out of affection, respect, admiration, charity or like impulses. . . ." (Citations omitted.) (Emphasis added.)

Id. at 285, 4 L.Ed. 2d at 1224-25.

The majority errs in concluding that *Manufacturing Co.* "tacitly rejected the *Duberstein* definition of a gift."

I also believe that the majority has misconstrued the holding in *United States v. Kaiser*, 363 U.S. 299, 4 L.Ed. 2d 1233. Nevertheless, that very case upon which the majority relies (*Kaiser*) cites *Duberstein* with approval. *Duberstein* and *Kaiser* both make it clear that whether a transaction amounts to a "gift" in the context of taxation statutes is essentially a question of fact to be determined by the trier of fact. The burden of proving "gift" is upon the party claiming it. If that party fails in its burden the transaction is presumed taxable and the assessment is presumed correct. This case was tried on the facts and the trial judge made appropriate findings of fact fully supported by the evidence and made conclusions of law fully supported by the findings of fact. The process resulted in a judgment favorable to the Secretary of Revenue.

The Court in *Kaiser* held that the evidence in that case was sufficient *to permit* (but not require) a jury to find that the transaction was a "gift." It is noteworthy that in *Kaiser* the recipient of the strike benefits was *not* a member of the Union for much of the time that he received benefits. I hardly see how the *Kaiser*

court could have avoided affirmation of the jury's finding of a "gift" under the circumstances before it.

Even if I believed, as does the majority, that *Kaiser* is apposite to the facts at hand, I would not find the benefits paid to Mr. Stone to be a "gift" in this case. With the single exception of *Kaiser*, every case (including each jury case) to have considered the matter that I am aware of has found strike benefits *not* to be gifts from the Union to the recipient. *See, e.g., Woody v. United States*, 368 F. 2d 668 (CA 9, 1966); *Halsor v. Lethert*, 240 F. Supp. 738 (D.C. Minn. 1965); *Placko v. Commissioner*, 74 T.C. 452 (1980); *Colwell v. Commissioner*, 64 T.C. 584 (1975); *Brown v. Commissioner*, 47 T.C. 391 (1967); *Hagar v. Commissioner*, 43 T.C. 468 (1965); *see also Jernigan v. Commissioner*, T.C. Memo. 1968-18 (1968) and *Phillips v. Commissioner*, T.C. Memo. 1965-268 (1965).

A holding that the benefits here were income and therefore taxable in addition to being the correct legal result, would do equity. Those fellow employees of Mr. Stone who did not participate in the strike, including those who were Union members, continued to pay state income tax on their earnings. Mr. Stone's right to join in the strike is an important right but the mere fact that an individual chooses to join in a strike should not provide him with a tax shelter.

Chief Justice BRANCH joins in this dissent.

EDD W. DEARMON, JR., ADMINISTRATOR OF THE ESTATE OF WILLIAM AMARILLO v. B. MEARS CORPORATION, A FLORIDA CORPORATION, RICHARD HENSEL AND MARILYN HENSEL, D/B/A HENSEL & SONS, AND ALLEN F. CANADY

No. 253PA84

(Filed 30 January 1985)

1. **Process § 9.1— automobile accident involving truck owned by foreign defendant but driven by agent of lessee—jurisdiction over owner**

In an action arising from an accident involving a tractor trailer, the trial court did not make sufficient findings to support its conclusions that it had personal jurisdiction over defendant Florida corporation, to which the truck was registered, where plaintiff relied entirely on the registration of the truck

to defendant under G.S. 20-71.1(b) and G.S. 1-75.4(3), and defendant produced evidence that the truck had been leased with the lessee having full control over the truck, including the authority to choose and hire its own drivers. The credibility of defendant's evidence tending to show the absence of agency was for the trial court to decide, and the agency issue was not properly resolved.

2. Automobiles and Other Vehicles § 105.2— genuine issue of material fact as to agency between truck owner and third-party driver

In an action arising from an accident involving a tractor trailer, the trial court properly denied defendant's Rule 12(b)(6) motion, heard with evidence and therefore considered as a motion for summary judgment, where plaintiff relied on the presumption of agency arising under G.S. 20-71.1(b) from registration of a motor vehicle, and defendant presented evidence of the absence of agency. A *prima facie* showing of agency under G.S. 20-71.1(b) is a rule of evidence rather than of substantive law, and does not remain in the case to be considered after defendant offers positive evidence which, if believed, demonstrates the absence of agency.

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

ON discretionary review of the decision of the Court of Appeals, 67 N.C. App. 640, 314 S.E. 2d 124 (1984), affirming the order of *Judge Frank W. Snepp*, entered at the 22 September 1982 Civil Session of MECKLENBURG County Superior Court.

DeLaney, Millette & McKnight by Steven A. Hockfield for plaintiff appellee.

Parker, Poe, Thompson, Bernstein, Gage & Preston by William E. Poe and Irvin W. Hankins III for defendant appellant B. Mears Corporation.

EXUM, Justice.

This appeal presents two questions. The first is whether the trial court made sufficient findings of fact to support its conclusions that it had personal jurisdiction over defendant B. Mears Corporation. We conclude that it did not. The second is whether the trial court correctly denied this defendant's motion to dismiss under Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. We conclude that it did. We therefore reverse and remand in part and affirm in part.

I.

This is a wrongful death action arising out of an accident which occurred on Interstate 95 in Robeson County on 23 Decem-

ber 1979. According to the complaint, plaintiff's intestate was killed when he was struck by a 1971 Peterbilt tractor truck being operated by defendant Allen F. Canady. Plaintiff filed summons without complaint on 22 December 1981, which he followed with an unverified complaint on 31 December 1981 in which he alleged Canady's negligence and that Canady was the agent of defendant B. Mears Corporation (hereinafter Mears).

On 1 March 1982 Mears moved to dismiss for lack of personal jurisdiction and failure to state a claim upon which relief can be granted under Civil Procedure Rules 12(b)(2) and 12(b)(6), respectively. In support of these motions, Mears submitted an affidavit stating that the tractor on the date of the collision was leased to Richard and Marilyn Hensel doing business as Hensel & Sons, and that Canady was not and had never been Mears' employee. A copy of the lease was attached to the affidavit. On 11 March 1982 plaintiff filed an amended complaint in which he joined Richard and Marilyn Hensel as additional defendants and alleged "on information and belief" that at the time of the collision the Hensels were leasing the tractor from Mears and that Canady was operating the truck as agent "of the Hensels."

On 14 April 1982 defendant filed answers to plaintiff's interrogatories which, in substance, were as follows: Mears did not carry liability insurance on the Peterbilt tractor at the time of the accident because the tractor "was leased to Richard and Marilyn Hensel, d/b/a Hensel & Sons who were to provide insurance as lessees under the lease." The Hensels did carry liability insurance covering the tractor with Firemens Mutual, but the policy number, amount of coverage, and effective date of the policy was unknown. Mears had no knowledge as to the whereabouts or address of the driver, Allen Canady. At the time of the accident Mears did not own or operate the Peterbilt tractor "under any motor carrier certificate or license of the Interstate Commerce Commission."

On 3 September 1982 plaintiff's counsel filed an affidavit stating that Mears was the registered owner in Florida of the Peterbilt tractor involved in the accident. He attached a certified copy of the Florida vehicle registration certificate in support of the affidavit.

Mears' motion to dismiss came on for hearing before the trial court on 22 September 1982. After considering all of the above evidence, the trial court denied the motion to dismiss on both grounds asserted, making the following findings of fact and conclusions of law in support of its ruling:

1. Summons with Order Extending Time was issued in this action on December 22, 1981.

2. The defendant B. Mears Corp. was served by certified mail, return receipt requested, on January 4, 1982 in accord with the North Carolina Rules of Civil Procedure.

3. A Complaint was filed and Delayed Service of Complaint and the Complaint was issued on December 31, 1981 and served by certified mail, return receipt requested on January 15, 1982.

4. The acts complained of occurred in the State of North Carolina on December 23, 1979.

5. That on December 23, 1979, the 1972 Peterbilt tractor referred to in plaintiff's Complaint and alleged to have been involved in the accident, forming the basis of this action, was registered in the State of Florida and was titled in the name of B. Mears Corp. on December 23, 1979.

Based on the foregoing findings of fact, the Court makes the following conclusions of law:

1. Sufficient grounds exist for the exercise of personal jurisdiction by this Court over the defendant B. Mears Corp.

2. Plaintiff's Complaint stated a claim upon which relief can be granted and, as there exists a genuine issue of material fact, the defendant B. Mears Corp. is not entitled to judgment as a matter of law.

The Court of Appeals affirmed. We allowed Mears' petition for further review on 6 July 1984.

II.

[1, 2] The only basis asserted by plaintiff for the exercise of personal jurisdiction over Mears is that the operator of the tractor at the time of the accident was acting as Mears' agent. Plaintiff

relies entirely on N.C.G.S. § 1-75.4(3) which gives jurisdiction to the courts of this state over persons properly served "in any action claiming injury to person or property or for wrongful death within or without this state arising out of an act or omission within this state by the defendant." Plaintiff argues that Mears committed an act within this state through its alleged agent Canady, operator of the tractor.

In order to establish the agency relationship plaintiff relies entirely on N.C.G.S. § 20-71.1(b) which provides that in an action such as this one:

> Proof of the registration of a motor vehicle in the name of any person, firm or corporation, shall . . . be prima facie evidence of ownership and that such motor vehicle was then being operated by and under the control of a person for whose conduct the owner was legally responsible, for the owner's benefit, and within the course and scope of his employment.

Mears, on the other hand, relies entirely on its evidence that Canady was not and never has been its employee or agent and that the tractor Canady was operating was under lease to a third party under the terms of which that party had full, exclusive control over its operation.

Mears' evidence, if believed, establishes the absence of any agency relationship between it and the driver Canady at the time of the accident. Generally the bailor of equipment either gratuitously or for hire is not responsible to third parties for the bailee's negligent use of the bailed equipment where all control of the equipment has been relinquished to the bailee by the bailor. *Shapiro v. Winston-Salem*, 212 N.C. 751, 194 S.E. 479 (1937) (truck and driver loaned by city to third party; held city not liable for death caused by driver of truck). "It is accepted law that the relationship of lessor and lessee is not that of principal and agent." *Brown v. Ward*, 221 N.C. 344, 347, 20 S.E. 2d 324, 326 (1942).

Even when an owner of a truck leases both the truck *and driver* to another, the operator of the truck is not thereafter the agent of the owner if by the terms of the lease itself or other circumstances the owner relinquishes all right to control the truck's operation. *Peterson v. McLean Trucking Company*, 248 N.C. 439, 103 S.E. 2d 479 (1958), and cases therein cited.

Weaver v. Bennett, 259 N.C. 16, 129 S.E. 2d 610 (1963), did not, as the Court of Appeals intimated in the opinion below and as plaintiff now argues, limit this rule to situations where the lessee of the truck was operating under an Interstate Commerce Commission franchise. This was one important circumstance which led the Court to conclude in these cases that the driver was the agent of the lessee-interstate franchisee, but the Court also emphasized the terms of the leases themselves in reaching this conclusion. In *Roth v. McCord*, 232 N.C. 678, 680, 62 S.E. 2d 64, 66 (1950), the Court noted, in addition to the fact that the lessee was an interstate franchisee:

> (2) It is stipulated in the lease contract that while they are in the service of the Motor Lines, the vehicle and its driver shall be under the exclusive supervision, control, and direction of the lessee. The all-inclusive extent of this right of control is spelled out in the lease in detail. As the Motor Lines has contracted, so is it bound.

The basis for decision was repeated in the *Weaver* Court's analysis of *Roth*. In *Peterson*, moreover, the Court emphasized the terms of the lease agreement in concluding the driver was not the agent of the owner-lessor. It referred expressly to provisions:

> (1) Whereby lessor-owner leased truck and drivers to lessee; (2) Provisions whereby lessee took complete control of truck for the particular trip involved; (3) Stipulation that the lessee would attach its identification mark on the truck, and (4) specifying the above with particularity.

248 N.C. at 442, 104 S.E. 2d at 483. That the lessee of truck and driver operates under an interstate franchise is simply one circumstance, among many other possible circumstances, including the lease terms themselves, which may tend to show an agency relationship exclusively between the lessee and driver.

In cases where the owner of equipment leases both the equipment and operator to another under circumstances wherein the owner retains control over the manner in which the equipment is to be operated, this Court has concluded that the operator may be the agent of the owner-lessor. *See, e.g., Weaver v. Bennett*, 259 N.C. 16, 129 S.E. 2d 610 (lessor leased both backhoe and skilled operator for construction job; lessor agreed to maintain insurance

to protect against claims for damage caused by backhoe); *Leonard v. Tatum and Dalton Transfer Co.*, 218 N.C. 667, 12 S.E. 2d 729 (1940) (truck and driver leased; lessee had no authority to discharge driver and no control over manner of driving; lessee could only direct driver to various destinations).

In the case at bar, of course, Mears' evidence is that it leased *only* the tractor, not the driver, Canady, to the Hensels; that Canady had never been in its employ; and that under the lease all control of the tractor had been relinquished to the Hensels. The lease provides for rental of the tractor and trailer only at a minimum payment of $1,000 per month, with an option to purchase should payments aggregate $30,000. Lessee is obligated to maintain, repair and insure the truck and to provide all necessary licenses. Lessee is given the right to display on the equipment its own logos, is obligated to permit only "safe, careful, licensed authorized drivers" to operate the equipment and agrees to hold lessor harmless from any damages arising from use of the truck in violation of any laws, rules or regulations. Under this lease only the lessee has authority to choose and hire its own drivers. All control over and financial responsibility for the tractor rested with lessee.

We are satisfied, therefore, that if the trial court believes Mears' evidence, then it must find that the truck was not being operated under Mears' direction or control, and it must conclude that Canady was not Mears' agent.

The Court of Appeals reasoned that despite Mears' evidence, which if believed would establish that the driver Canady was not its agent at the time of the accident, the prima facie case for agency created by N.C.G.S. § 20-71.1 upon a showing of registered ownership in Mears was sufficient to support the trial court's conclusion that jurisdiction existed under the provisions of N.C.G.S. § 1-75.4(3). The Court of Appeals did not address whether the trial court's findings of fact were sufficient to support its conclusion that jurisdiction existed. Believing that the findings were clearly insufficient, we reverse the Court of Appeals and remand the matter to the trial court for further proceedings consistent with this opinion.

The prima facie showing of agency under N.C.G.S. § 20-71.1(b) is a rule of evidence and not one of substantive law.

Duckworth v. Metcalf, 268 N.C. 340, 150 S.E. 2d 485 (1966); *Mitchell v. White*, 256 N.C. 437, 124 S.E. 2d 137 (1962). The rule shifts the burden of going forward with evidence to those persons better able to establish the facts than are plaintiffs. *Manning v. State Farm Mutual Auto Insurance Co.*, 243 F. Supp. 619 (W.D. N.C. 1965). Its sole purpose is to facilitate proof of ownership and agency where a vehicle is operated by one other than the owner. *Branch v. Dempsey*, 265 N.C. 733, 145 S.E. 2d 395 (1965). The statute makes out a prima facie case which, nothing else appearing, permits but does not compel a finding for plaintiff on the issue of agency. *Chappell v. Dean*, 258 N.C. 412, 128 S.E. 2d 830 (1963); *Brothers v. Jernigan*, 244 N.C. 441, 94 S.E. 2d 316 (1956).

More importantly, if plaintiff relies solely upon the statute, presenting no other evidence of agency, and defendant presents positive, contradicting evidence which, if believed, establishes the non-existence of an agency relationship between owner and operator, defendant is entitled to a peremptory instruction on the agency issue, or in a non-jury hearing, to a conclusion, based on proper findings, that no agency relationship exists. *Belmany v. Overton*, 270 N.C. 400, 154 S.E. 2d 538 (1967); *Chappell v. Dean*, 258 N.C. 412, 128 S.E. 2d 830; *Skinner v. Jernigan*, 250 N.C. 657, 110 S.E. 2d 301 (1959); *Whiteside v. McCarson*, 250 N.C. 673, 110 S.E. 2d 295 (1959). The statutory presumption is not weighed against defendant's evidence by the trier of facts. *Id.*

Under these rules where a trial judge is presented only with a prima facie showing of agency mandated by N.C.G.S. § 20-21.1 (b) on the one hand, and defendant's evidence establishing the absence of agency on the other, the only issue becomes whether the judge believes defendant's evidence. If the judge does, then plaintiff's prima facie showing disappears and the judge must conclude that no agency relationship exists. If he does not believe defendant's evidence, then he may conclude for plaintiff on the agency issue. Either conclusion must be based on proper findings.

This was the state of the evidence before the trial court in this case; yet nowhere in the trial court's findings is the question of agency resolved. Finding No. 5 does not resolve it. This so-called "finding" is nothing more than a recitation of the fact of the tractor's registration in the name of Mears, a fact which is sufficient to permit but not to compel a finding that Mears con-

trolled the operation of the tractor in the event the trial court did not believe Mears' evidence to the contrary.

Howard v. Sasso, 253 N.C. 185, 116 S.E. 2d 341 (1960), is instructive. In *Howard* plaintiff sued for damages allegedly caused by the negligent operation by James Coady of a 1957 Ford automobile registered in New York to defendant, Sasso. Plaintiff obtained service on Sasso, a New York resident, pursuant to N.C. G.S. § 1-105 which, when *Howard* was decided, provided for service upon a nonresident in any action against the nonresident "growing out of any accident or collision in which said nonresident may be involved by reason of the operation by him, for him, or under his control or direction, express or implied, of a motor vehicle . . . in this state." Defendant Sasso specially appeared and moved to dismiss for lack of personal jurisdiction on the ground that although she was the registered owner of the automobile, it was not being operated at the time of the collision by her agent.

When the motion was heard, plaintiff relied entirely on N.C. G.S. § 20-71.1 to establish agency. Defendant offered affidavits tending to show that she had given possession of her automobile to her son who was stationed at Camp Lejeune. Her son had allowed one Foster, also stationed there, to have possession of the car and to use it. In violation of specific instructions that no one except Foster was to drive the car, Foster permitted Coady to operate it. While operated by Coady the automobile was involved in a collision which allegedly damaged the plaintiff. The trial court denied the motion to dismiss and this Court affirmed. The trial court, however, made the following crucial finding of fact:

> '3. That the said James J. Coady was operating the automobile of the defendant, Concetta Phyllis Sasso, at the time and place of the collision giving rise to this action, for the said Concetta Phyllis Sasso, or under the control or direction, express or implied, of the defendant, Concetta Phyllis Sasso.'

253 N.C. at 186, 116 S.E. 2d at 343. In affirming the trial court's order, this Court said:

> In view of our conclusion that G.S. 20-71.1 is applicable in the determination by the court of the crucial question of

> fact, it follows that the (admitted) fact that defendant was the registered owner of the 1957 Ford was sufficient to support, but not to compel, a finding in plaintiff's favor as to the alleged agency. The credibility of the evidence (affidavits) offered by defendant was for consideration and determination by the court.

253 N.C. at 188, 116 S.E. 2d at 344.

So it is here. The credibility of Mears' evidence is for the trial court. If the trial court believes it to be true then, nothing else appearing but plaintiff's reliance on the statute's prima facie case, the trial court should find Mears had no control over the tractor, conclude in Mears' favor on the agency issue and allow its motion to dismiss for lack of personal jurisdiction. If the trial court does not believe Mears' evidence tending to show the absence of agency, then it may, but is not compelled to find Mears had control of the tractor, conclude in plaintiff's favor on the agency issue and deny Mears' motion to dismiss. As the order now stands, the agency issue has not been properly resolved by the trial court.

III.

We turn now to the trial court's order insofar as it denies Mears' Rule 12(b)(6) motion to dismiss for failure to state a claim. In considering the motion the trial court heard evidence and based its ruling on that evidence. Where matters outside the pleadings are presented to and not excluded by the court on a motion to dismiss for failure to state a claim, the motion shall be treated as one for summary judgment under Rule 56. N.C.R. Civ. P. 12(b); *Stanback v. Stanback*, 297 N.C. 181, 254 S.E. 2d 611 (1979). We, therefore, as did the Court of Appeals, treat this aspect of the trial court's order as being a denial of Mears' motion for summary judgment.

As the Court of Appeals correctly noted, the denial of a motion for summary judgment is a non-appealable interlocutory order. *Tridyn Industries, Inc. v. American Mutual Insurance Co.*, 296 N.C. 486, 251 S.E. 2d 443 (1979); *Waters v. Qualified Personnel, Inc.*, 294 N.C. 200, 240 S.E. 2d 338 (1978); *Golden v. Golden*, 43 N.C. App. 393, 258 S.E. 2d 809 (1979). The Court of Appeals, however, proceeded to consider this issue. It held the trial court

properly denied the motion because the prima facie case created by N.C.G.S. § 20-71.1 and Mears' evidence to the contrary created a genuine issue of material fact on the agency question.

Since the Court of Appeals addressed the trial court's ruling on the Rule 12(b)(6) motion and since it has been briefed and argued before us, we elect to consider it in the exercise of our supervisory powers in the interest of judicial economy and for the guidance of the trial court below should the agency issue ever come to jury trial in this jurisdiction.

We agree essentially with the result reached by the Court of Appeals on this motion. We simply wish to point out, as we have already shown in Part II, *supra*, that when a plaintiff on an agency issue relies entirely on the prima facie case created by the statute and defendant offers positive evidence which, if believed, would demonstrate the absence of agency, the presumption created by the statute does not remain in the case to be weighed against the contrary evidence. Rather, the only question for the jury is whether it believes the contrary evidence. Defendant is entitled to a peremptory instruction that if the jury does believe the contrary evidence, it must find for defendant on the agency issue.

The result is that insofar as the Court of Appeals affirmed the trial court's order denying Mears' motion to dismiss for want of personal jurisdiction, the decision is reversed and the matter remanded to the trial court for further proceedings consistent with this opinion. Insofar as the Court of Appeals affirmed the denial of Mears' motion to dismiss for failure to state a claim, the decision is affirmed.

Reversed in part and remanded; affirmed in part.

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

STATE OF NORTH CAROLINA v. CLESTAN HIGGINBOTTOM

No. 634A83

(Filed 30 January 1985)

1. **Constitutional Law § 80; Rape and Allied Offenses § 7— first degree sexual offense—mandatory life sentence—no cruel and unusual punishment**

The imposition of a mandatory sentence of life imprisonment for a first degree sexual offense committed upon a four-year-old child is not so disproportionate as to constitute a violation of the eighth amendment of the Constitution of the United States although the offense was committed without physical injury or violence, the use of weapons or overt humiliation.

2. **Criminal Law § 114.3— instruction on witness credibility—no expression of opinion**

The trial court's instruction on witness credibility, including a statement that "it is not necessarily the number of witnesses or the quantity of evidence, but rather, it is the quality or convincing force of the evidence that may be of the most concern to you," did not constitute an expression of opinion as to the credibility of defendant's witnesses because it came at the outset of the charge and following the testimony of the last of defendant's witnesses.

3. **Criminal Law § 99.7— admonishment of witnesses—no expression of opinion**

The trial court's admonishment of certain disorderly defense witnesses out of the presence of the jury did not constitute an expression of opinion of hostility toward the witnesses.

4. **Witnesses § 1.2— four-year-old child—competency as witness**

The trial court did not abuse its discretion in permitting the four-year-old victim to testify in a trial for a first degree sexual offense after conducting an extensive voir dire which included examination by the prosecutor, defense counsel and the court. The child was not rendered incompetent as a witness because she asked her mother several questions while testifying, because she complained several times that her lip hurt, looked away and put her hand in her mouth, or because at some point the district attorney gave her a soda in his office and reviewed her testimony with her.

5. **Criminal Law § 181.3— post-trial motion for appropriate relief—discretion of court**

The disposition of post-trial motions for appropriate relief under G.S. 15A-1414 is within the discretion of the trial court, and the refusal to grant such a motion is not error absent a showing of abuse of that discretion.

6. **Criminal Law § 162— absence of objection—tactical decision—question not presented on appeal**

Defendant cannot complain on appeal about various methods used by the district attorney to elicit answers from the four-year-old victim of a sexual offense where defendant failed to object at trial, and defendant's attorney revealed at a hearing on a motion for appropriate relief that his failure to object was a tactical decision.

7. **Criminal Law § 87.2— sexual offense—leading questions to child victim**

The trial court did not abuse its discretion in permitting the prosecutor to use leading questions in examining the four-year-old victim of a sexual offense where the child was required to testify about matters of a most delicate nature, and she had difficulty understanding the questions posed to her because of her age.

8. **Criminal Law § 89.5— variance in corroborating testimony**

In a prosecution for a sexual offense committed upon a four-year-old child, testimony by the child's mother that the child told her the sexual acts were "yucky" was admissible to corroborate testimony by the child even though the child did not testify that the acts were "yucky." In any event, the admission of such testimony, if error, was not reversible error since it provided insignificant embellishment to other testimony which established ample evidence that defendant committed the crime charged.

9. **Criminal Law § 98— child witness emotionally upset—recess—discretion of court**

When the four-year-old victim of a sexual offense became emotionally upset while testifying, the trial court did not abuse its discretion in ordering a recess during which the child was taken to the district attorney's office.

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

APPEAL by defendant from *Brannon, J.*, at the 12 September 1983 Criminal Session of Superior Court, ONSLOW County.

On 26 July 1983 defendant was charged with having committed a first-degree sexual offense upon Cassandra Harsen, a four-year-old child. Defendant entered a plea of not guilty.

The State presented evidence through the testimony of Cassandra Harsen and her mother, Jenny Morrell, which tended to show that Cassandra was four years old at the time of the assault and that she lived with her mother in Jacksonville. In May 1983 Cassandra was left in the care of defendant and his wife, Nina Higginbottom, while Ms. Morrell went on a week's vacation. The two families were well acquainted and had exchanged babysitting services in the past.

Cassandra's testimony tended to show that one night while she was staying with the Higginbottoms, Nina Higginbottom fixed popcorn for the children and put them to bed. Cassandra and the Higginbottoms' three-year-old son, Kenny, shared a bed in Kenny's bedroom. Cassandra went to sleep and was awakened by defendant who entered the bedroom and laid on the bed. Defend-

ant then made the child suck on his penis. Afterwards he asked her if it felt good and if it tasted good.

Ms. Morrell testified that when she returned from the mountains the following week, Cassandra told her that defendant made her put his "wee-wee" in her mouth.

Defendant's evidence tended to show that on the night in question, defendant, his wife, children, and Cassandra visited a next-door neighbor to celebrate the neighbor's birthday. Mrs. Higginbottom left the birthday party to take the children home and to fix popcorn. Defendant left the party between 10:30 and 11:30 p.m. and returned home. After the children were put in bed, both defendant and Mrs. Higginbottom checked on the children. Mrs. Higginbottom testified that her husband had to go into the children's bedroom to quiet them but that she was nearby while he was in the bedroom. Defendant and his wife returned to the living room where they watched television until late that night. Defendant fell asleep in the den on a love seat and slept there all night. Mrs. Higginbottom slept on a couch in the den. Other evidence presented by defendant tended to suggest that Cassandra told the story about defendant because she was angry at him for not permitting her to spend the night with some of defendant's friends. A number of witnesses testified that Cassandra behaved normally after the night in question and that defendant had a good reputation in the community.

The jury returned a verdict of guilty of first-degree sexual offense. The trial court sentenced defendant to life imprisonment from which he appealed pursuant to N.C.G.S. 7A-27(a).

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

W. M. Cameron, III for defendant-appellant.

BRANCH, Chief Justice.

[1] Defendant first argues that his sentence of life imprisonment is unconstitutionally excessive and constitutes cruel and unusual punishment in violation of the eighth amendment to the Constitution of the United States.

The eighth amendment requires that "a criminal sentence . . . be proportionate to the crime for which defendant has been

convicted." *Solem v. Helm*, 463 U.S. 277, 290 (1983); *State v. Ysaguire*, 309 N.C. 780, 309 S.E. 2d 436 (1983). We note, however, that only in "exceedingly unusual non-capital cases will the sentences imposed be so grossly disproportionate as to violate the Eighth Amendment's proscription of cruel and unusual punishment." *State v. Ysaguire*, 309 N.C. at 786, 309 S.E. 2d at 440. This Court has repeatedly stated that it is within the province of the General Assembly and not the judiciary to determine the extent of punishment which may be imposed upon those convicted of crimes. *State v. Shane*, 309 N.C. 438, 306 S.E. 2d 765 (1983), *cert. denied*, --- U.S. ---, 104 S.Ct. 1604 (1984); *State v. Cradle*, 281 N.C. 198, 188 S.E. 2d 296, *cert. denied*, 409 U.S. 1047 (1972). Punishment within the maximum fixed by statute cannot be classified as cruel and unusual punishment unless the punishment provisions of the statute itself are unconstitutional. *State v. Cradle*, 281 N.C. 198, 188 S.E. 2d 296.

First-degree sexual offense, a Class B Felony, carries with it a mandatory sentence of life imprisonment. *See* N.C. Gen. Stat. § 14-1.1 (1981). In *State v. Shane*, 309 N.C. 438, 306 S.E. 2d 765 (1983) this Court rejected the argument that a life sentence for first-degree sexual offense is cruel and unusual punishment. Defendant concedes that a first-degree sexual offense is neither a trivial nor an insignificant crime. Nonetheless he attempts to distinguish his case from *Shane* by noting that in his case there was no physical injury or violence, no use of weapons, bondage, or overt humiliation.

It is true that the offense in this case was committed without verbal or physical abuse or violence. Nonetheless, at the time of the offense, N.C.G.S. § 14-27.4 declared that a person committed a first-degree sexual offense when he or she engaged in a sexual act

> (1) [w]ith a victim who is a child of the age of 12 years or less and the defendant is of the age of 12 years or more and is four years older than the victim.

N.C. Gen. Stat. § 14-27.4(a) (amended 1983).

Clearly the legislature determined that whether or not accompanied by violence or force, acts of a sexual nature when performed upon a child are sufficiently serious to warrant the punishment mandated for Class B Felonies. Since it is the func-

tion of the legislature and not the judiciary to determine the extent of punishment to be imposed, we accord substantial deference to the wisdom of that body. *See Solem v. Helm*, 463 U.S. at 290, n. 16. The imposition of a mandatory sentence of life imprisonment for first-degree sexual offense is not so disproportionate as to constitute a violation of the eighth amendment of the Constitution of the United States. This assignment of error is overruled.

[2] By his next assignment of error defendant contends that the trial judge erred by impermissibly expressing his opinion in his instructions to the jury as to the credibility of defendant's witnesses. Although the State offered only two witnesses at trial, the defendant called fourteen witnesses to testify in his behalf. The trial court, in pertinent part, instructed the jury as follows:

> THE COURT: All right, ladies and gentlemen, this is a criminal action entitled the State of North Carolina versus Clestan Higginbottom.
>
> The defendant has been placed on trial on a charge of first degree sexual offense. All of the evidence in the case has now been presented, both that of the State and of the defense. In any case, civil or criminal, it is not necessarily the number of witnesses or the quantity of evidence, but rather, it is the quality or convincing force of the evidence that may be of the most concern to you. Having heard all the evidence, it now becomes your duty to decide from this evidence what the facts are. You must apply the law that I am about to give you to those facts as you, and you alone, find those to be.

The record reflects no request for the instruction by the State. Defendant concedes that the instruction is a correct statement of law. He maintains, however, that the credibility instruction, coming as it did at the outset of the charge and following the testimony of the last of defendant's witnesses, appeared to be a direct comment by the judge on the credibility of those witnesses.

The trial court has wide discretion in presenting the issues of a case to the jury if the law is adequately explained. *State v. Mundy*, 265 N.C. 528, 144 S.E. 2d 572 (1965). A trial judge has a duty to instruct on all substantial and essential features of the case embraced within the issue and arising on the evidence. *State*

v. Harris, 306 N.C. 724, 295 S.E. 2d 391 (1982). A trial judge may in his discretion also instruct on the subordinate features of the case without request by counsel. *Id.* The purpose of a charge is to give a clear instruction which applies the law to the evidence in such a manner as to assist the jury in understanding the case and in reaching a correct verdict. *Id.; State v. Williams*, 280 N.C. 132, 184 S.E. 2d 875 (1971).

The trial judge did not abuse his discretion or impermissibly express his opinion in this case. Although not required to give an instruction on witness credibility, this instruction was a correct statement of the law. Defendant may not have benefited by the instruction; nonetheless it did not constitute an improper expression of opinion by the trial judge.

[3] By this assignment of error defendant also argues that during the course of the trial, the trial judge admonished witnesses for defendant to keep order, thus demonstrating his poor opinion of those witnesses. Although it is true that the trial court admonished certain of defendant's witnesses and warned them that their actions could result in their being jailed, he did so out of the presence of the jury. A trial judge has the power and the duty to control the witnesses in a courtroom. *See* N.C. Gen. Stat. § 15A-1033 (1983). We do not view the trial judge's actions out of the jury's presence to control disorderly witnesses as an indication of an ongoing hostility toward the witnesses. We note additionally that the judge carefully instructed the jury that it should draw no inference about his opinion of the case based on his rulings or actions during trial. We find no merit in this assignment of error.

[4] Defendant next contends the trial court erred in allowing Cassandra Harsen to testify. He argues that a four-year-old child inherently lacks the capacity to be a competent witness and that this child demonstrated her lack of competence. We disagree.

The rule in this State is that there is no age below which one is considered incompetent as a matter of law. *State v. Jones*, 310 N.C. 716, 314 S.E. 2d 529 (1984). The test is whether the witness understands the obligation of an oath or affirmation and has sufficient intelligence to give evidence which will assist the jury in determining the truth of the matters which it is called upon to decide. *Id. See State v. Ludlum*, 303 N.C. 666, 281 S.E. 2d 159

(1981) (four-year-old's testimony sufficient to support conviction of first-degree sexual offense). This is a matter which rests in the sound discretion of the trial judge in light of his examination and observation of a particular witness. *State v. Jones*, 310 N.C. 716, 314 S.E. 2d 529 (1984).

The trial court conducted an extensive *voir dire* of the young witness in this case. The *voir dire* included examination by the prosecutor, the defendant's counsel and the court. The child answered questions consistently and intelligently throughout, responding to questions about her name, her age, and her city of residence. She testified that she knew what a lie was and that a heavenly Father punished persons who told lies. She was able to answer questions clearly and to relate details and occurrences to the jury. At the conclusion of the *voir dire*, the trial judge ruled that the child was a competent witness, stating

> In my discretion I find that she is of sufficient age and intelligence and overall comprehension to, and has sufficient mind to understand the nature and obligation of an oath and to correctly perceive and then impart her impressions of the matters which she has seen or heard.

We find that the trial court acted well within its discretion in allowing the child to testify. Defendant refers to a number of points in the child's testimony which he alleges demonstrate Cassandra's heavy reliance on her mother's guidance, her lack of concentration and her susceptibility to influence. Although it is true that the child several times asked her mother questions while testifying, those questions related to matters which were not pertinent to the issues of the case and included such matters as what a "Smurf" was and whether one of Cassandra's siblings was a stepsister or a real sister. From the record it appears that Cassandra several times complained that her lip hurt, looked away and put her hand to her mouth. These mannerisms, characteristic of any four-year-old child, do not exhibit such a lack of concentration on the part of the witness as to render her incompetent. The child's testimony indicates that at some point the district attorney gave the child a soda pop in his office and reviewed with her her testimony. While this conduct may have been an appropriate subject for cross examination or a jury argument, it in no way alters Cassandra's competence as a witness. This assignment of error is without merit.

[5] Defendant assigns as error the trial court's denial of his motion for appropriate relief. Pursuant to Article 89 of the General Statutes, defendant filed a motion for appropriate relief four days after judgment was entered. Several errors cited by defendant in his motion for relief were not objected to at trial. Generally, a defendant's failure to enter an appropriate objection results in a waiver of his right to assert the alleged error upon appeal. *See State v. McDougall*, 308 N.C. 1, 301 S.E. 2d 308 (1983); N.C. Gen. Stat. § 15A-1446(a) & (b) (1983). We have discussed in this opinion and have found no merit in other contentions raised by defendant in his motion for appropriate relief. In considering the remainder of the contentions in the motion, we note that the disposition of post-trial motions for appropriate relief under N.C.G.S. § 15A-1414 are within the discretion of the trial court. The refusal to grant them is not error absent a showing of an abuse of that discretion. *See State v. Batts*, 303 N.C. 155, 277 S.E. 2d 385 (1981). We find no abuse of discretion in the trial court's denial of defendant's motion for appropriate relief.

[6] The defendant contends that he was denied a fair trial because of "domination of the child witness by the district attorney." Defendant points to leading questions by the district attorney and various methods the prosecutor used to elicit answers from the child. Although defendant objected to several leading questions, he did not object to other behavior of which he now complains. Indeed, in the hearing on the motion, defendant's attorney revealed that his failure to object was a tactical decision calculated to portray the child witness as susceptible to adult domination. Defendant cannot now complain since his chosen course results in a waiver of his right to assert error on appeal.

[7] It is true that the prosecutor used leading questions in examining the witness. Leading questions are necessary and permitted on direct examination when a "witness has difficulty in understanding the question because of immaturity, age, infirmity or ignorance or when the inquiry is into a subject of delicate nature such as sexual matters." *State v. Greene*, 285 N.C. 482, 492, 206 S.E. 2d 229, 236 (1974). Furthermore, rulings by the trial court on the use of leading questions are discretionary and reversible only for abuse of discretion. *State v. Smith*, 290 N.C. 148, 226 S.E. 2d 10, *cert. denied*, 429 U.S. 932 (1976).

It is clear that the child was required to testify about matters of a most delicate nature. It is equally clear that because of her age, she had difficulty understanding the questions posed to her by trial counsel. In allowing the district attorney to examine the witness with leading questions, we find that the trial court did not abuse its discretion. *See State v. Stanley*, 310 N.C. 353, 312 S.E. 2d 482 (1984) (trial court did not abuse discretion in permitting leading questions of a six-year-old witness concerning sexual matters).

[8] Defendant next contends that the trial court improperly admitted certain testimony of Ms. Morrell, the mother of Cassandra. Ms. Morrell testified that upon her return from her mountain trip, Cassandra told her about defendant's sexual conduct. Ms. Morrell was permitted for purposes of corroboration to relate what Cassandra had said to her:

> A. Okay. She whispered in my ear that she was scared to tell me what she had to tell me but that Higgy [defendant] made her put his wee-wee in his mouth.
>
> Q. (Mr. Stroud) In her mouth?
>
> A. In her mouth, yeah. And I questioned her about it some more because, you know, I just didn't really know. She told me that she thought it was yucky.
>
> MR. CAMERON: Objection, Your Honor.
>
> THE COURT: Well, again, received for the purpose of corroboration of the preceding witness. It will be for the jury to determine whether or not it corroborates.

Defendant contends that Ms. Morrell's testimony went beyond the proper scope of corroboration because the child did not testify about the sexual acts being "yucky." Ms. Morrell also testified that Cassandra told her she cried, that defendant's penis almost choked her and that she felt like throwing up. Since defendant objected only to the testimony about Cassandra's saying "it was yucky," we address ourselves only to that statement.

It is not necessary that evidence prove the precise facts brought out in a witness's testimony before that evidence may be deemed corroborative of such testimony and properly admissible. *State v. Burns*, 307 N.C. 224, 297 S.E. 2d 384 (1982). The term

"corroborate" means "[t]o strengthen; to add weight or credibility to a thing by additional and confirming facts or evidence." *State v. Case*, 253 N.C. 130, 135, 116 S.E. 2d 429, 433 (1960) *cert. denied*, 365 U.S. 830 (1961) (quoting Black's Law Dictionary, 444 (3rd ed.)). Although Cassandra's prior statement to her mother did not precisely track her trial testimony, it tended to confirm and strengthen her testimony. *See State v. Burns*, 307 N.C. 224, 297 S.E. 2d 384 (1982). As in *Burns* we find that although the child's prior statements to her mother were "perhaps not tending to prove the precise narrow facts brought out in the [child's] testimony during the trial, certainly [they] constituted corroborating evidence supplementary to [her] testimony and tending to strengthen and confirm [her] testimony." *Id.* at 231, 297 S.E. 2d at 388. Whether or not the statement was corroborative was a matter for the jury to decide, as the court correctly instructed. *Id.*

In any event, assuming for the sake of argument that the admission was error, it was not reversible error. The statement provided insignificant embellishment to other testimony which established ample evidence that defendant had committed the crime charged. *See e.g. State v. Taylor*, 304 N.C. 249, 283 S.E. 2d 761 (1981), *cert. denied*, 463 U.S. 1213, 103 S.Ct. 3552 (1983).

[9] Defendant points to numerous "improper indulgences" granted the child throughout the trial in his motion for appropriate relief. At one point after the prosecutor asked the child about what defendant had done to her, the child became emotionally upset. The trial court ordered a recess during which time Cassandra was taken to the district attorney's office. Defendant objected outside the presence of the jury to the timing of the recess and to the fact that the prosecutor had an opportunity to review the child's testimony prior to a crucial point in the State's case. The prosecutor related that he had merely attempted to reassure the child during the recess that defendant could not hurt her. He stated to the trial judge that he did not recall reviewing Cassandra's testimony further. The trial judge informed the attorneys that it was his custom to recess court whenever a witness lost composure. He further stated that reviewing a witness's testimony is a proper function of trial counsel.

A presiding judge is given large discretionary power as to the conduct of a trial. *State v. Rhodes*, 290 N.C. 16, 224 S.E. 2d

631 (1976). Absent controlling statutory provisions or established rules, all matters relating to the orderly conduct of the trial are within his discretion. *Id.* We find no abuse of discretion on the part of the trial judge.

We have reviewed the matters raised in defendant's motion for appropriate relief. We hold that the trial court did not abuse its discretion in denying the motion and this assignment of error is overruled.

We do not deem it necessary to address defendant's final assignment of error because we have already disposed of the contention raised by it.

We find that defendant received a fair trial free of prejudicial error.

No error.

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

LAWRENCE ANDERSON WHITE v. JEAN MALCOLM WHITE

No. 559PA83

(Filed 30 January 1985)

1. **Divorce and Alimony § 30— equitable distribution—legislative policy favoring equal division of property—standard of review**

Marital property must be divided equally if no evidence is admitted tending to show that an equal division would be inequitable; however, when such evidence is admitted, the trial court must exercise its discretion in assigning the weight each factor should receive in any given case and in making an equitable division. Appellate review is limited to a determination of whether there was a clear abuse of discretion. G.S. 50-20.

2. **Divorce and Alimony § 21.9— equitable distribution—findings supported equal division of property**

In an action for divorce and equitable distribution of property, the court did not abuse its discretion by concluding that each party was entitled to an equal share of the marital property where the court found that defendant wife had contributed non-financial services and wages to the marriage which exceeded in value the total fair market value of her interest in the jointly held

property and her separately held property, that plaintiff husband had been employed during the early part of the marriage, that his present salary was less than defendant's, and that defendant's vested pension rights exceeded plaintiff's. A specific statement that the distribution ordered was equitable was not required. G.S. 50-20.

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

ON discretionary review of the decision of the Court of Appeals, 64 N.C. App. 432, 308 S.E. 2d 68 (1983), affirming the order entered by *Judge Narley Cashwell* June 9, 1982 in District Court, WAKE County. Heard in the Supreme Court November 13, 1984.

James S. Warren for plaintiff appellee.

Kirby, Wallace, Creech, Sarda and Zaytoun, by John R. Wallace, for defendant appellant.

MITCHELL, Justice.

This case presents fundamental questions arising under the Equitable Distribution Act concerning the proper distribution of marital property when a couple is divorced.

The litigants in this action were married on September 8, 1951. In July 1980, the plaintiff husband abandoned the home of the parties. On November 23, 1981, he filed an action for divorce based on one year's separation. The defendant wife counterclaimed for equitable distribution of the marital property under N.C.G.S. 50-20. A hearing was held at the April 6, 1982 Session of District Court, Wake County on all issues arising from the pleadings. The trial court entered a judgment granting divorce absolute on April 6, 1982. In a separate order entered June 8, 1982, the trial court resolved the issues arising from the defendant wife's counterclaim for equitable distribution. That order of June 8 is the subject of this appeal.

With regard to the wife's claim for equitable distribution the trial court made findings of fact which may be summarized as follows:

Prior to the marriage, the plaintiff had received a Bachelor of Science degree in agricultural engineering from North Carolina State University. The defendant had obtained her certification as a registered nurse and was working at Rex Hospital in Raleigh at the time of the marriage.

The plaintiff was employed as a salesman of heavy equipment and was transferred to Charlotte shortly after the marriage. The defendant gave up her job and moved to Charlotte with him. Soon thereafter, she became pregnant with their first child which was born in September 1952. A second child was born of the marriage in February 1954. The parties agreed that the defendant wife would not pursue a nursing career, but would instead devote her time and energy to the rearing of the children. During the first twenty-four years of the marriage, the plaintiff husband traveled extensively in connection with his sales job. During this period the defendant attended to the needs of the children and managed the home. She also contributed substantially to the career of her husband by acquiescing in several job transfers that he made. The defendant wife also worked part time, often at night and on weekends, in various communities in which the family resided. In June 1970, the defendant began work full time as an Occupational Health Nurse with the Postal Service. She has continued in that position to the present.

During the course of the marriage, the plaintiff invested in securities in his separate name. He purchased the majority of his holdings during the early 1970's. He was employed through 1975, but from 1975 until 1978 he had no full-time employment. During this period the defendant's earnings and contributions to the home were $63,471, or more than three times the $19,505 earned and contributed by the plaintiff husband. Her earnings permitted him to devote his full attention to the management of his individual investments.

In 1978, the plaintiff husband obtained a position with the Postal Service and is presently so employed. He is 55, earns $20,500 per year and has the opportunity to earn salary increases in his present employment. The defendant wife is 52, earns $23,000 per year and has reached the maximum salary level which can be earned in her present employment. He has bursitis. She suffers from arthritis and osteoporosis and has had periods of depression which on two occasions interfered with her work. He has vested pension rights of $3,300. She has vested pension rights of $8,900. The plaintiff husband also has prospects of inheriting a substantial estate.

The parties, either individually or jointly, owned the following marital property: (1) a house, lot and greenhouse valued at

$57,900; (2) automobiles valued at $2,500; (3) securities valued at $72,408.86; (4) banking and savings accounts in the amount of $1,478; and (5) furniture and household goods valued at $1,000. Since 1975 the defendant wife has made the regular mortgage payments on the house. The trial court also found that the defendant had contributed services as a spouse, mother, homemaker and wage earner which exceeded in value the total fair market value of her interest in the jointly held property and her separately held property.

The trial court concluded that the contributions of the parties entitled each to an equal share of the marital property and ordered the property distributed accordingly. The order was affirmed by the Court of Appeals. This Court allowed the defendant wife's petition for discretionary review.

The defendant wife contends that the trial court erred in ordering an equal division of the marital property. She argues that her contributions to the marital estate vastly exceeded those of her husband, and that she should be awarded a greater share of the property.

This case involves the Equitable Distribution Act. 1981 N.C. Sess. Laws, ch. 815. Though touched upon in *Mims v. Mims*, 305 N.C. 41, 286 S.E. 2d 779 (1982), this is our first opportunity to expressly address the Act. Therefore, it is appropriate to briefly examine the purposes of the Act.

The theory of husband-wife unity which existed at early common law gave the wife virtually no legal status or property rights. Upon marriage the wife's personal property vested absolutely in her husband. When the wife brought any real property into the marriage, the husband became seized of an estate in it which gave him the right of possession and control. He could sell and convey the land for a period not exceeding the coverture, and he was entitled to rents received from her real property. Though the wife retained her interest in the real property, she could not convey during coverture even with the consent of the husband. Also, the wife's personal estate and the husband's interest in her real property were subject to levy under execution for his debts. 2 R. Lee, *N.C. Family Law* § 107 (4th ed. 1980) [hereinafter cited as *Lee*].

In the 1830's and 1840's the North Carolina General Assembly enacted several statutes which accorded married women greater control over their property. Under these provisions a conveyance of the wife's land was required to be jointly executed by the husband and wife, and the wife was privately questioned as to the voluntary nature of the transfer. 1 Rev. Stat. 1836-37, ch. 37, § 9; Rev. Code 1854, ch. 37, § 8. The wife was also permitted to have and retain property acquired by her following a divorce. 1 Rev. Stat. 1836-37, ch. 39, § 11; Rev. Code 1854, ch. 39, § 13. Another statutory provision prohibited the husband from leasing the wife's real property for a term of years or for life without her joining in the lease following a privy examination. 1 Rev. Stat. 1836-37, ch. 43, § 9. A fourth provision prevented the sale under execution of the husband's interest in his wife's real property. Rev. Code 1854, ch. 56, § 1. These enactments paved the way for a constitutional provision which established a woman's right to keep as her separate estate all property she brought into the marriage or acquired during coverture and which exempted her separate estate from liability for the husband's debts. N.C. Const. of 1868, art. X, § 6 (now N.C. Const. art. X, § 4). Chapter 52 of the North Carolina General Statutes and N.C.G.S. 39-7 *et seq.* carry forward the intent of those early statutory provisions.

Despite the enlightened views evidenced by these enactments, our courts continued to adhere to the common law rules based on title when confronted with the task of dividing marital property upon divorce. *See 2 Lee*, §§ 107-27; L. Kelso, *North Carolina Divorce, Alimony and Child Custody*, § 8-1 (1983); *Survey of Developments In North Carolina Law*, 60 N.C. L. Rev. 1159 (1982); Marschall, *Proposed Reforms In North Carolina Divorce Law*, 8 N.C. Cent. L.J. 35 (1976). The allocation of marital property to the party who held title thereto tended to reward the spouse directly responsible for its acquisition, while overlooking the contribution of the homemaking spouse. L. Golden, *Equitable Distribution of Property*, § 1.03 (1983) [hereinafter cited as *Golden*]. Though the title theory approach made property distribution relatively simple, the result was often harsh for the homemaker. *See e.g., Leatherman v. Leatherman*, 297 N.C. 618, 256 S.E. 2d 793 (1979).

In 1981, the General Assembly sought to alleviate the unfairness of the common law rule by enacting our Equitable Distri-

bution Act which is now codified as N.C.G.S. 50-20 and 21. As early as the 1930's, a third of the states had some form of equitable distribution. By the early 1980's, forty-one states and the District of Columbia had adopted the concept. *Golden*, § 1.02. Equitable distribution reflects the idea that marriage is a partnership enterprise to which both spouses make vital contributions and which entitles the homemaker spouse to a share of the property acquired during the relationship. *See In Re Marriage of Komnick*, 84 Ill. 2d 89, 417 N.E. 2d 1305 (1981); *Rothman v. Rothman*, 65 N.J. 219, 320 A. 2d 496 (1974); *D'Agostino v. D'Agostino*, 463 A. 2d 200 (R.I. 1983); *LaRue v. LaRue*, 304 S.E. 2d 312 (W. Va. 1983); Sharp, *Equitable Distribution of Property In North Carolina: A Preliminary Analysis*, 61 N.C. L. Rev. 247 (1983).

[1] With this background information in mind, we now turn to the specific issues raised by this appeal. Our first task is to determine whether the trial court was correct in its view that the Equitable Distribution Act creates a presumption that an equal division of the marital property is equitable and therefore appropriate. N.C.G.S. 50-20(c) provides:

> There shall be an equal division by using net value of marital property unless the court determines that an equal division is not equitable. If the court determines that an equal division is not equitable, the court shall divide the marital property equitably. Factors the court shall consider under this subsection are as follows:
>
> (1) The income, property, and liabilities of each party at the time the division of property is to become effective;
>
> (2) Any obligation for support arising out of a prior marriage;
>
> (3) The duration of the marriage and the age and physical and mental health of both parties;
>
> (4) The need of a parent with custody of a child or children of the marriage to occupy or own the marital residence and to use or own its household effects;
>
> (5) The expectation of nonvested pension or retirement rights, which is separate property;
>
> (6) Any equitable claim to, interest in, or direct or indirect contribution made to the acquisition of such marital property

by the party not having title, including joint efforts or expenditures and contributions and services, or lack thereof, as a spouse, parent, wage earner or homemaker;

(7) Any direct or indirect contribution made by one spouse to help educate or develop the career potential of the other spouse;

(8) Any direct contribution to an increase in value of separate property which occurs during the course of the marriage;

(9) The liquid or nonliquid character of all marital property;

(10) The difficulty of evaluating any component asset or any interest in a business, corporation or profession, and the economic desirability of retaining such asset or interest, intact and free from any claim or interference by the other party;

(11) The tax consequences to each party; and

(12) Any other factor the court finds to be just and proper.

The trial court in the present case indicated that "pursuant to G.S. 50-20, an equal division of the marital property of the parties is presumed appropriate." The statute in fact does more. It does not create a "presumption" in any of the senses that term has been used to express "the common idea of assuming or inferring the existence of one fact from another fact or combination of facts." 2 Brandis on North Carolina Evidence, § 215 (2d ed. 1982). Instead, the statute is a legislative enactment of public policy so strongly favoring the equal division of marital property that an equal division is made *mandatory* "unless the court determines that an equal division is not equitable." N.C.G.S. 50-20(c). The clear intent of the legislature was that a party desiring an unequal division of marital property bear the burden of producing evidence concerning one or more of the twelve factors in the statute and the burden of proving by a preponderance of the evidence that an equal division would not be equitable. Therefore, if no evidence is admitted tending to show that an equal division would be inequitable, the trial court *must* divide the marital property equally.

When evidence tending to show that an equal division of marital property would not be equitable is admitted, however, the trial court must exercise its discretion in assigning the weight each factor should receive in any given case. It must then make an equitable division of the marital property by balancing the evidence presented by the parties in light of the legislative policy which favors equal division.

In the present case evidence was admitted tending to show that an equal division would not be equitable. We turn then to consider the proper standard of review of equitable distribution awards in such cases. Historically our trial courts have been granted wide discretionary powers concerning domestic law cases. *See, e.g., Sayland v. Sayland*, 267 N.C. 378, 148 S.E. 2d 218 (1966) (permanent alimony); *Hall v. Hall*, 250 N.C. 275, 108 S.E. 2d 487 (1959) (alimony *pendente lite*); *Wright v. Wright*, 216 N.C. 693, 6 S.E. 2d 555 (1940) (alimony and child support); *In Re Custody of Pitts*, 2 N.C. App. 211, 162 S.E. 2d 524 (1968) (child custody). The legislature also clearly intended to vest trial courts with discretion in distributing marital property under N.C.G.S. 50-20, but guided always by the public policy expressed therein favoring an equal division. The legislative intent to vest our trial courts with such broad discretion is emphasized by the inclusion of the catch-all factor codified in N.C.G.S. 50-20(c)(12).

It is well established that where matters are left to the discretion of the trial court, appellate review is limited to a determination of whether there was a clear abuse of discretion. *See, e.g., Clark v. Clark*, 301 N.C. 123, 271 S.E. 2d 58 (1980); *Welch v. Kearns*, 261 N.C. 171, 134 S.E. 2d 155 (1964); *Lamm v. Lorbacher*, 235 N.C. 728, 71 S.E. 2d 49 (1952); *In Re LaFayette Bank & Trust Co. of Fayetteville*, 198 N.C. 783, 153 S.E. 452 (1930). A trial court may be reversed for abuse of discretion only upon a showing that its actions are manifestly unsupported by reason. *See Clark v. Clark*, 301 N.C. 123, 271 S.E. 2d 58 (1980). A ruling committed to a trial court's discretion is to be accorded great deference and will be upset only upon a showing that it was so arbitrary that it could not have been the result of a reasoned decision.

[2] Turning to the facts of this case, we are unable to say that the trial court abused its discretion in concluding that each party was entitled to an equal share of the marital property. The find-

ings of fact show that the trial court admitted and considered evidence relating to several of the twelve factors contained in N.C.G.S. 50-20(c). The defendant wife does not allege that the trial court failed to consider the evidence relevant to such factors. Instead she claims that in reaching a decision on the division of the marital property, the trial court failed to give proper weight to her nonfinancial contributions to the marriage and to the fact that her income significantly exceeded that of her husband from 1975 to 1978.

The trial court found as a fact that she had contributed nonfinancial services and wages to the marriage which exceeded in value the total fair market value of her interest in the jointly held property and her separately held property. The trial court, however, also found facts favorable to the plaintiff including that he was employed during the early part of the marriage, that his present salary was less than the defendant's, and that the defendant's vested pension rights exceeded his. The trial court perhaps could have weighed the evidence differently and awarded the defendant wife more than an equal share of the property. However, when coupled with the legislative policy favoring equal division, we cannot say that the evidence fails to show any rational basis for the distribution ordered by the court. Therefore, we detect no abuse of discretion.

In this case the trial court did not expressly state in its order that an equal division of the marital property would be equitable. The defendant argues that a specific determination to this effect was required. We disagree. The task of a trial court when faced with an action under N.C.G.S. 50-20 is to equitably distribute the marital property between the litigants. This is evident from the language and the title of the Act. Once the trial court orders a distribution, it has held *sub silentio* that such distribution is fair and equitable. A specific statement that the distribution ordered is equitable is not required.

As modified herein, the decision of the Court of Appeals affirming the order of the trial court is affirmed.

Modified and affirmed.

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

STATE OF NORTH CAROLINA v. ROBERT GLENN JOYNER

No. 175A84

(Filed 30 January 1985)

1. **Criminal Law § 32.2; Robbery § 4.3— apparent use of firearm—presumption of danger or threat to life**

Where there is evidence that defendant has committed a robbery with what appears to the victim to be a firearm or other dangerous weapon and nothing to the contrary appears in evidence, the presumption that the victim's life was endangered or threatened is mandatory. If the jury in such cases finds the basic fact (that the robbery was accomplished with what appeared to the victim to be a firearm or other dangerous weapon), the jury must find the elemental fact (that a life was endangered or threatened).

2. **Criminal Law § 32.2; Robbery § 4.3— presumption of danger or threat to life—rebutting evidence—permissive inference**

The mandatory presumption of danger or threat to life merely requires the defendant to come forward with some evidence (or take advantage of evidence already offered by the prosecution) to rebut the connection between the basic and elemental facts. When any evidence is introduced tending to show that the life of the victim was not endangered or threatened, the mandatory presumption disappears, leaving only a permissive inference which permits but does not require the jury to infer the elemental fact (danger or threat to life) from the basic fact proven (robbery with what appeared to the victim to be a firearm or other dangerous weapon).

3. **Criminal Law § 32.2; Robbery § 4.3— inference of danger or threat to life—when permitted**

The trial court may permit the jury to make the inference of a danger or threat to life only if, in light of all the evidence, there continues to be a rational connection between the basic fact proved and the elemental fact to be inferred, and the latter is more likely than not to flow from the former. Although the burden of proof beyond a reasonable doubt always remains with the State, defendant has the burden of demonstrating to the court the invalidity of the permissive inference as applied in his case.

4. **Robbery § 4.3— threat or danger to life—rebutting evidence—permissive inference**

Testimony by detectives that a rifle defendant said he used in a robbery was unloaded and without a firing pin when discovered some six hours after the crime, evidence of a statement made by defendant more than six hours after the crime that the rifle would not fire, and testimony by a detective as to the manner in which the hammer could be removed from a .38 caliber pistol amounted to "some evidence" from which the jury could but was not required to infer that the rifle was unloaded and had no firing pin at the time of the robbery and that no life was endangered or threatened. Therefore, the mandatory presumption of danger or threat to life disappeared, leaving a mere permissive inference to that effect, and the trial court properly left the jury

free to infer either that the disputed element of the offense of armed robbery did or did not exist when it instructed on possible verdicts of guilty of armed robbery, guilty of common law robbery and not guilty.

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

APPEAL of right under N.C.G.S. 7A-30(2) from the decision of a divided panel of the Court of Appeals, 67 N.C. App. 134, 312 S.E. 2d 681 (1984), finding no error in the judgment or sentence for armed robbery entered against the defendant by *Judge John B. Lewis, Jr.* on March 1, 1983 in Superior Court, PITT County. Heard in the Supreme Court September 11, 1984.

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

Robert L. Shoffner, Jr., Assistant Public Defender, Third Judicial District, for the defendant appellant.

MITCHELL, Justice.

The controlling question presented is whether the State's evidence that the defendant endangered or threatened the life of the victim was sufficient to overcome the defendant's motion for a directed verdict on the charge of robbery with firearms or other dangerous weapons (armed robbery). We hold that the evidence was sufficient in this regard and affirm the decision of the Court of Appeals finding no error in the defendant's trial and conviction.

The defendant was tried upon an indictment proper in form for robbery with firearms or other dangerous weapons (armed robbery). N.C.G.S. 14-87. At trial the State introduced evidence tending to show that Wayne Williams and two other employees of Domino's Pizza at Charles Street Boulevard in Greenville, North Carolina were closing the business for the night at approximately 2:45 a.m. on December 7, 1982. They had placed the day's receipts of approximately $2,200 in cash and checks into a bank bag for the purpose of making a night bank deposit after closing. They left the building with Williams carrying the bank bag. Immediately after he locked the side door and began to walk away from the building, Williams was pushed from behind. He whirled around and saw a man wearing a Halloween type mask. The man was holding a rifle with his finger on the trigger and the end of the barrel about sixteen inches from Williams' face. He demanded

that Williams give him the money and said "Damn it, I'll kill you." Williams shoved the bank bag at the man and dropped it to the ground. Williams then ran from the scene. One of the other employees had already departed. The third employee stood still and watched as the robber picked up the bank bag and ran away.

Detectives of the Greenville Police Department arrived at a residence where they found the defendant at approximately 8:30 a.m. on December 7. After advising the defendant of his constitutional rights, the detectives began questioning him. Sometime shortly thereafter, the defendant confessed that he had committed the robbery at Domino's Pizza. He then took the detectives to an old abandoned building located several blocks from the residence and approximately one-half mile from Domino's Pizza and showed them where he had hidden a .22 caliber bolt action rifle he said he had carried during the robbery. The detectives took custody of the rifle and determined at that time that it was unloaded. The defendant then took the detectives to an apartment where he had hidden the bank bag approximately three miles from Domino's Pizza. The detectives retrieved the bank bag which still contained the checks taken in the robbery but none of the cash.

After recovering the rifle and bank bag, the detectives took the defendant to the magistrate's office where he gave a written statement. During some of their conversations at that time, the defendant stated that the rifle would not fire. At some later time, the detectives determined that the firing pin was missing from the rifle.

The defendant offered no evidence.

The trial court instructed the jury that they could return a verdict of guilty of armed robbery, guilty of common law robbery or not guilty. The jury found the defendant guilty of armed robbery, and the trial court entered judgment thereon and sentenced the defendant to a fourteen year term of imprisonment.

The defendant assigns as error the trial court's denial of his motion for a directed verdict of not guilty on the armed robbery charge. In support of this assignment, he contends that the State's evidence conclusively showed that the rifle he used was not loaded and did not have a firing pin at the time of the rob-

bery. The defendant argues that, this being the case, the State's evidence conclusively showed that the robbery was not committed in such manner as to endanger or threaten the life of any person. We do not agree.

The defendant was convicted of a violation of N.C.G.S. 14-87, which provides in pertinent part:

> (a) Any person . . . who, having in possession or with the use or threatened use of any firearms or other dangerous weapon, implement or means, whereby the life of a person is endangered or threatened, unlawfully takes or attempts to take personal property from another . . . shall be guilty of a Class D felony.

In determining whether a robbery with a particular implement constitutes a violation of this section, "the determinative question is whether the evidence was sufficient to support a jury finding that a person's *life* was in fact endangered or threatened." *State v. Alston*, 305 N.C. 647, 650, 290 S.E. 2d 614, 616 (1982).

[1] When a person commits a robbery by the use or threatened use of an implement which appears to be a firearm or other dangerous weapon, *the law presumes*, in the absence of any evidence to the contrary, that the instrument is what his conduct represents it to be—an implement endangering or threatening the life of the person being robbed. *State v. Thompson*, 297 N.C. 285, 289, 254 S.E. 2d 526, 528 (1979). Thus, where there is evidence that a defendant has committed a robbery with what appears to the victim to be a firearm or other dangerous weapon *and nothing to the contrary appears in evidence*, the presumption that the victim's life was endangered or threatened is mandatory. *See State v. Thompson*, 297 N.C. 285, 254 S.E. 2d 526 (1979). If the jury in such cases finds the basic fact (that the robbery was accomplished with what appeared to the victim to be a firearm or other dangerous weapon), the jury must find the elemental fact (that a life was endangered or threatened). This is so because, when *no evidence* is introduced tending to show that a life was not endangered or threatened, "no issue is raised as to the nonexistence of the elemental facts and the jury may be directed to find the elemental facts if it finds the basic facts to exist beyond a reasonable doubt." *State v. White*, 300 N.C. 494, 507, 268 S.E. 2d 481, 489, *rehearing den.*, 301 N.C. 107, 273 S.E. 2d 443 (1980).

When considering the validity of a mandatory presumption, courts generally examine the presumption *on its face* and without regard for the facts of the particular case "to determine the extent to which the basic and elemental facts coincide." *Ulster County Court v. Allen*, 442 U.S. 140, 157-58 (1979); *State v. White*, 300 N.C. at 503, 268 S.E. 2d at 487. Viewing the mandatory presumption under consideration here in such light, we conclude that, when *no evidence* to the contrary is introduced, it will be unerringly accurate "in the run of cases" to which it may be applied and, standing alone, will support a jury's finding that a person's life was endangered or threatened beyond a reasonable doubt. Therefore, the presumption is valid. *Ulster County Court v. Allen*, 442 U.S. at 159; *State v. White*, 300 N.C. at 507, 268 S.E. 2d at 489. In such cases, the trial court correctly permits the jury to consider possible verdicts of guilty of armed robbery or not guilty.

[2] The mandatory presumption under consideration here, however, is of the type which merely requires the defendant "to come forward with *some evidence* (or take advantage of evidence already offered by the prosecution) to rebut the connection between the basic and elemental facts. . . ." *State v. White*, 300 N.C. at 507, 268 S.E. 2d at 489. Therefore, when *any evidence* is introduced tending to show that the life of the victim was not endangered or threatened, "the mandatory presumption disappears, leaving only a mere permissive inference. . . ." *Id.* The permissive inference which survives permits but does not require the jury to infer the elemental fact (danger or threat to life) from the basic fact proven (robbery with what appeared to the victim to be a firearm or other dangerous weapon). *See generally State v. White*, 300 N.C. 494, 268 S.E. 2d 481 (1980). *See State v. Alston*, 305 N.C. 647, 290 S.E. 2d 614 (1982).

[3] The inference remaining being permissive, the trial court must analyze its application to the case at hand and permit the jury to make the inference only if, in light of all the evidence, there continues to be a "rational connection" between the basic fact proved and the elemental fact to be inferred, and the latter is "more likely than not to flow from" the former. *Ulster County Court v. Allen*, 442 U.S. at 165; *Leary v. United States*, 395 U.S. 6, 36 (1969); *State v. White*, 300 N.C. at 504, 268 S.E. 2d at 488. Although the burden of proof beyond a reasonable doubt always

remains upon a State, the defendant has the burden of demonstrating to the court the invalidity of the permissive inference as applied in his case. *Ulster County Court v. Allen*, 442 U.S. at 157; *State v. White*, 300 N.C. at 503, 268 S.E. 2d at 487. If the defendant makes such a showing, the trial court may not allow the inference to be made by the jury.

[4] The defendant contends that the State's evidence conclusively showed that the rifle used in the robbery was unloaded and without a firing pin at the time the robbery was committed and could not have endangered or threatened anyone's life at that time. He further contends that this being the case, the trial court erred in permitting the jury to consider and return the verdict of guilty of armed robbery. He contends that the trial court instead should have permitted the jury to consider only possible verdicts of guilty of common law robbery or not guilty. We find the defendant's contentions in this regard without merit.

The defendant first directs our attention to those portions of the State's evidence tending to show that the rifle the defendant said he used in the robbery was unloaded and without a firing pin at the time it was recovered by the detectives approximately *six hours after the robbery.* Assuming *arguendo* that such evidence tended to show that the rifle in question was unloaded and without a firing pin at the time the robbery was committed, it was *some evidence* of the nonexistence of the element of danger or threat to life. *But cf., Sloan v. Light Co.*, 248 N.C. 125, 102 S.E. 2d 822 (1958). (As a general rule, proof of the existence of a condition at a given time does not raise a presumption that the same condition existed previously.) Such evidence only removed the mandatory presumption in the present case and required the trial court to permit the jury also to consider a possible verdict of guilty of the lesser included offense of common law robbery. *See State v. Alston*, 305 N.C. 647, 290 S.E. 2d 614 (1982). It was not, however, so compelling as to prevent a permissive inference of danger or threat to life or to require a directed verdict in the defendant's favor on the armed robbery charge.

The statement of the defendant to the detectives that the rifle would not fire was made some time after the rifle was recovered and more than six hours after the robbery. The defendant did not state that the rifle would not fire at the time the

crime was committed. Likewise, the testimony by the detectives was only that the rifle was unloaded and without a firing pin when discovered some six hours after the crime. Even if the jury believed that the rifle the defendant led the detectives to was in fact the rifle he used during the robbery, the foregoing evidence would not require the jury to infer that the rifle was in the same condition at the time of the robbery.

The defendant next calls our attention to testimony of Detective Lee Garrish which the defendant also contends showed that the rifle in question could not have endangered or threatened anyone's life at the time the robbery was committed. During cross examination of Detective Garrish by the defendant, the following transpired:

> Q. Now, if this had a firing pin in it, looking at that clock, how long would it take you to remove it with, you know, no tools on you?
>
> A. Remove what?
>
> Q. The firing pin. Would it be very simple to do that?
>
> A. I'm not sure. I'm not—
>
> Q. You don't know whether you'd have to take tools to get it out or not?
>
> A. Now, I'm not familiar with this type of weapon.

Detective Garrish then went on to describe briefly and in very general terms how one would go about removing the hammer from some unspecified type of .38 caliber pistol. He then indicated that, except for the fact that the firing pin was missing, he saw nothing indicating that the rifle had been tampered with or disassembled at the time he took it into his custody.

The defendant argues in his brief before this Court that:

> Defendant's cross-examination of Detective Garrish as to how long it would take to remove the firing pin from the rifle in question, the tools needed to remove the pin, and whether the rifle showed any signs that it had been tampered with was designed to remove any contention that defendant committed the robbery and then ran to the old building and by

the light of the moon, quickly removed the firing pin before placing the rifle behind the building.

Assuming that the defendant's cross examination of Detective Garrish was designed to achieve this result, it failed. Detective Garrish testified specifically that he had no familiarity with the procedures involved in removing a firing pin from a bolt action .22 rifle such as the one in evidence in the present case. His testimony as to the manner in which the hammer could be removed from an unspecified type of .38 caliber pistol had little if any probative value in the present case, even if it is assumed that it was admissible. Nothing in the evidence tends to indicate that the method of removing a firing pin from a bolt action .22 caliber rifle is in any way similar to the method used in removing the hammer from any type of .38 caliber pistol. Nor does anything in the evidence indicate that testimony concerning the method for removing the hammer from an unspecified type of .38 caliber pistol is in any way relevant to the issues arising in the present case.

All of the evidence to which the defendant directs our attention, when taken together, amounted to "some evidence" from which the jury could but was not required to infer that the rifle was unloaded and had no firing pin at the time of the robbery and that no life was endangered or threatened. As a result, the mandatory presumption of danger or threat to life arising from the defendant's use of what appeared to the victim to be a firearm or other dangerous weapon disappeared leaving a mere permissive inference to that effect. *See generally State v. White*, 300 N.C. 494, 268 S.E. 2d 481 (1980). *See State v. Alston*, 305 N.C. 647, 290 S.E. 2d 614 (1982). The result was that the jury was free to infer either that the disputed element of the offense of armed robbery did or did not exist. The trial court correctly provided for both possibilities when it properly instructed the jury that they were to consider possible verdicts of guilty of armed robbery, guilty of the lesser included offense of common law robbery and not guilty. The evidence relied upon by the defendant, however, was not so compelling as to make the use of the permissive inference of danger or threat to life inappropriate in the present case or to require the trial court to enter a directed verdict in the defendant's favor on the charge of armed robbery.

It is appropriate to point out that the statement of the robber to the victim during the course of the robbery that he would kill the victim was also some evidence which would tend to support a finding that life was endangered or threatened. Although such evidence is irrelevant when considering the constitutionality of a mandatory presumption, all of the evidence should be considered by courts when determining whether to allow the use of a permissive inference in a given case. *Ulster County Court v. Allen*, 442 U.S. at 159-60.

The defendant has also sought on appeal to challenge portions of the trial court's final mandate to the jury. The defendant failed to object to the charge at trial as required by Rule 10(b)(2), Rules of Appellate Procedure. Therefore, our review on appeal is limited to a review for "plain error" as that term is defined in *State v. Odom*, 307 N.C. 655, 300 S.E. 2d 375 (1983). We find none.

For the foregoing reasons, the decision of the Court of Appeals finding no error in the defendant's trial is

Affirmed.

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

STATE OF NORTH CAROLINA v. RONALD JAMES HAROLD

No. 44PA84

(Filed 30 January 1985)

1. Burglary and Unlawful Breakings § 6— instructions on dwelling—proper

In a prosecution for first degree murder and first degree burglary where the evidence showed that the deceased had been living in a house for five months prior to her death, her brother had been staying there for a month prior to the killing, and deceased was occupying the home on the night of her killing with her two children, her brother, and another man, the court did not err in failing to instruct the jury that it could convict the defendant of first degree burglary only if the house entered was owned by the deceased and the defendant had no ownership interest therein. The relevant inquiry is whether the house is the *dwelling* of another, not whether it is *owned* by another. G.S. 14-51.

2. Homicide § 25.2— prosecution for murder and burglary—instruction on first degree murder—conviction for murder not dependent on burglary

A conviction for first degree murder was not dependent upon a burglary conviction where the court charged the jury only on the theory that the killing was committed with premeditation and not on the theory that the killing occurred pursuant to a felony.

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

ON writ of certiorari to review the judgment of *Judge Robert E. Gaines* entered February 17, 1978 in Superior Court, CATAWBA County.

The defendant was tried on indictments charging him with first degree murder and first degree burglary. He was convicted of both charges. Upon recommendation of the jury, the trial court sentenced the defendant to life imprisonment for the murder conviction. He also received a life term for the first degree burglary conviction. The defendant did not appeal.

Subsequently, after nearly five years, the defendant petitioned this Court for a writ of certiorari to review the case. The petition was granted March 6, 1984. Heard in the Supreme Court October 8, 1984.

Rufus L. Edmisten, Attorney General, by William Farrell, Assistant Attorney General, for the State.

Warren A. Hutton for defendant appellant.

MITCHELL, Justice.

The defendant contends that the trial court erred by failing to instruct the jury that it must find as an essential element of first degree burglary that the dwelling entered was owned by the deceased and that the defendant possessed no ownership interest. The defendant also contends that the first degree murder conviction must be vacated because the evidence shows that it was based on the first degree burglary conviction which resulted from the erroneous instruction. We find the defendant's contentions to be without merit.

The State's evidence tended to show that at one time the defendant and the deceased, Catherine Glover Dease, had been romantically involved. The relationship ended, however, in 1976.

On the evening of September 15, 1977, Dease was at her home in Conover with her brother, her two children, and Nathaniel Leader. Early that evening the defendant Ronald James Harold came to her home. The defendant and Dease began to argue about her plans to marry Leader. The confrontation quickly escalated to violence as the defendant pushed Dease to the floor. Her brother and Leader interceded, and the defendant was told to leave the house. At some point during the argument, the defendant was heard to say to Dease "I will get you for this."

Dease's brother, David Glover, agreed to drive the defendant to Hickory. During the drive the defendant told Glover that he was going to kill Dease. Glover took the defendant to Hickory and then returned to his sister's house. Shortly after Glover arrived at the house, Dease and Leader returned from Newton where they had gone to "make out a warrant."

At approximately 10:00 p.m. Dease observed the defendant walking up to the house carrying a gun. The defendant unsuccessfully attempted to gain entry through the front door which was locked. He then discovered an unlocked kitchen window, pushed it up, and entered the house. Dease immediately ran to her bedroom and jumped out of a window. She proceeded to run to a neighbor's house. The defendant ran out of the house following her. He caught Dease and threw her to the ground. As Dease begged for her life, the defendant shot her at point blank range. She died shortly thereafter.

Dr. Guy Guarino, a board certified pathologist, conducted an autopsy on the body of Dease. Dr. Guarino testified that in his opinion the deceased died from a gunshot wound to the chest which caused massive hemorrhaging. He stated that in his opinion death occurred within two minutes of the shooting.

The defendant took the stand and testified that he first met the deceased in May 1974. They dated for several months until Dease moved to New York. She returned to North Carolina in March 1975 and once again began dating the defendant. Eventually Dease and her children moved into an apartment with the defendant.

The defendant testified that sometime later they decided to purchase a house in Conover. The defendant went with Dease to

buy the house after he had been released from jail on another crime. The house was placed in Dease's name. The defendant stated that he and Dease had agreed that after his pending criminal case was over, title to the house would be changed to his name and they would be married. The defendant said he gave Dease money for the electric power for the house and bought some decorations for the bedroom and bathroom. He also helped clean out the house. The defendant stated that he lived in the house with Dease and her children until the week prior to her death on September 15, 1977.

The defendant further testified that he went to the house on the evening of September 15 and found Leader there. He tried to talk with Dease, but she refused to discuss anything with him. An argument ensued and David Glover drove him to Hickory. He denied knocking Dease down or telling her brother that he planned to kill her. The defendant acquired a gun in Hickory and returned to the house in Conover to discuss matters with Dease. When no one would open the front door, the defendant went to the kitchen window. Dease ordered him to get off her property. The defendant stated that Dease's reference to the house as "her" property upset him. He then entered the house through the unlocked kitchen window and chased Dease through the house and into the yard of a neighboring home. Dease fell and the defendant stood over her. The defendant testified that he wanted to reach down and help her but instead "something" came over him causing him to shoot her.

Dr. Billy Royal, a psychiatrist, testified for the defendant. Dr. Royal stated that he had examined the defendant following the shooting and concluded that he suffered from paranoid schizophrenia. Dr. Royal stated that while this illness could cause a person to do things that he had no control over, he could not say that this had occurred here. He further testified that in his opinion, the defendant was aware of the distinction between right and wrong.

Several witnesses testified that the defendant had a good reputation in the community and was not known as a violent person. According to some of these witnesses, the defendant and Dease were dating in 1977. The defendant's grandmother stated that the defendant was living with Dease as late as a week before the killing.

At the conclusion of the guilt-innocence determination phase of the trial, the jury returned verdicts finding the defendant guilty of first degree murder and first degree burglary. A sentencing hearing was convened to determine the sentence to be imposed for the first degree murder conviction. The jury recommended that the defendant be sentenced to life imprisonment. The trial court entered a life sentence for the murder and a life sentence for the first degree burglary conviction.

[1] The defendant's sole assignment of error concerns the trial court's instructions on first degree burglary. At the conclusion of its explanation of the elements of first degree burglary, the trial court stated in pertinent part, "So, members of the jury, I charge that if you find from the evidence, beyond a reasonable doubt, that on or about the 15th day of September 1977, Ronald James Harold, raised a window of Catherine Dease's dwelling house and entered the house without her consent. . . ." The defendant argues that the jury should have been instructed that it could convict him of first degree burglary only if it found that the house entered was owned by Dease and that he had no ownership interest therein.

The constituent elements of first degree burglary are: (1) The breaking (2) and entering (3) in the nighttime (4) into a dwelling house or sleeping apartment (5) of another (6) which is actually occupied at the time of the offense (7) with the intent to commit a felony therein. *See* N.C.G.S. 14-51 (1981); *State v. Beaver*, 291 N.C. 137, 229 S.E. 2d 179 (1976); *State v. Tippett*, 270 N.C. 588, 155 S.E. 2d 269 (1967); *State v. Allen*, 186 N.C. 302, 119 S.E. 504 (1923). The requirement that the dwelling house or sleeping apartment broken into be that of someone other than the defendant was an element of burglary at common law and is implicitly incorporated in N.C.G.S. 14-51. *See, e.g., State v. Freeman*, 307 N.C. 445, 298 S.E. 2d 376 (1983); *State v. Simpson*, 303 N.C. 439, 279 S.E. 2d 542 (1981); *State v. Wells*, 290 N.C. 485, 226 S.E. 2d 325 (1976).

The defendant's emphasis on the issue of the ownership of the dwelling house here is misplaced. We have stated that the reason for prohibiting the offense of first degree burglary "is to protect the habitation of men, where they repose and sleep, from meditated harm." *State v. Surles*, 230 N.C. 272, 275, 52 S.E. 2d 880, 882 (1949). We have also held that in burglary cases occupa-

tion or possession of a dwelling is equivalent to ownership, and actual ownership of the premises need not be proved. *State v. Beaver*, 291 N.C. 137, 229 S.E. 2d 179 (1976). These holdings recognize that the inquiry relevant to this element of the crime is whether the premises is the *dwelling* of another, not whether it is *owned* by another. The trial court was not required to give any instruction concerning the ownership of the house, as the concept of title is not controlling in ascertaining whether the offense has been committed.

In order to sustain a conviction for burglary it is incumbent upon the State to produce substantial evidence tending to show that the premises broken into is the dwelling house of another. "Dwelling house" has been defined as "The house in which a man lives with his family; a residence; abode; habitation; the apartment or building, or group of buildings, occupied by a family as a place of residence." Black's Law Dictionary 596 (rev. 4th ed. 1968). During the State's case-in-chief, evidence was presented which showed that Dease had been living in the house for five months prior to her death, her brother had been staying there for a month prior to the killing, and that on the night of the killing, Dease, her two children, her brother and Nathaniel Leader were occupying the house. We hold that this evidence was sufficient to support a finding that the structure broken into was the dwelling house of another, that other person being Catherine Dease.

[2] Finally, we point out that even if the trial court had been required to give the instruction now put forth, the defendant's argument that the first degree murder conviction would have to be vacated is erroneous. In its instruction on the first degree murder indictment, the trial court charged the jury only on the theory that the killing was committed with premeditation and deliberation and did not charge on the theory that the killing occurred pursuant to a felony. The murder conviction was in no way dependent upon the burglary conviction.

The defendant received a fair trial free from prejudicial error.

No error.

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

MIDDLESEX CONSTRUCTION CORPORATION v. THE STATE OF NORTH CAROLINA *EX REL.* STATE ART MUSEUM BUILDING COMMISSION

No. 231PA84

(Filed 30 January 1985)

THIS case is before us on grant of plaintiff's motion for discretionary review prior to determination by the Court of Appeals pursuant to N.C.G.S. § 7A-31(a). The trial court dismissed plaintiff's claims against defendant for breach of contract on the grounds that the superior court lacked jurisdiction to hear the claims.

Sanford, Adams, McCullough & Beard, by J. Allen Adams, E. D. Gaskins, Jr., and Lisa M. Nieman, for plaintiff-appellant.

Rufus L. Edmisten, Attorney General, by T. Buie Costen, Special Deputy Attorney General, for defendant-appellee.

PER CURIAM.

This action was properly before the trial court pursuant to N.C.G.S. § 143-135.3 and this Court's previous opinion in *Middlesex Construction Corporation v. State*, 307 N.C. 569, 299 S.E. 2d 640 (1983) and its Order of 10 January 1984, reported at 310 N.C. 150, 312 S.E. 2d 648 (1984). The superior court's order dismissing the action is therefore reversed, and this cause is remanded to the Superior Court of Wake County for trial before the judge without a jury on all issues of law and fact pursuant to N.C.G.S. § 143-135.3.

Reversed and remanded.

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

SERVOMATION CORPORATION, PLAINTIFF	)	
v.	)	ORDER
HICKORY CONSTRUCTION COMPANY, DEFENDANT AND THIRD PARTY PLAINTIFF	)	
v.	)	
MILLER-BROOKS ROOFING COMPANY, THIRD PARTY DEFENDANT	)	

No. 595P84

(Filed 8 January 1985)

UPON consideration of the Defendant and Third Party Plaintiff's petition filed in this matter for discretionary review of the decision of the North Carolina Court of Appeals pursuant to G.S. 7A-31, the petition is allowed solely for the purpose of entering this order. The case is remanded to the Court of Appeals for reconsideration in light of our recent opinion in *Cyclone Roofing Co. v. LaFave Company*, 312 N.C. --- (No. 181A84, 6 November 1984). By order of the Court in conference, this the 8th day of January 1985.

MEYER, J.
For the Court

State v. McAninch

STATE OF NORTH CAROLINA	)	
	)	
v.	)	ORDER
	)	
BRIAN DOUGLAS McANINCH	)	

No. 570P84

(Filed 8 January 1985)

UPON consideration of the defendant's petition filed in this matter for a writ of certiorari to the North Carolina Court of Appeals to review its decision, the following order is entered and is hereby certified to the North Carolina Court of Appeals:

"The defendant's petition for writ of certiorari is allowed for the sole purpose of entering this order. The order of the Court of Appeals denying defendant's petition for writ of certiorari is reversed and the cause is remanded to the Court of Appeals for review on the merits. By order of the Court in conference, this the 8th day of January 1985.

MITCHELL, J.
For the Court"

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

BARE v. WAYNE POULTRY CO.

No. 528P84.

Case below: 70 N.C. App. 88.

Petition by defendant for discretionary review under G.S. 7A-31 denied 8 January 1985.

BLEGGI v. BLEGGI

No. 659P84.

Case below: 65 N.C. App. 221.

Petition by defendant for writ of certiorari to North Carolina Court of Appeals denied 8 January 1985.

CHILDRESS v. FORSYTH COUNTY HOSPITAL AUTH.

No. 562P84.

Case below: 70 N.C. App. 281.

Petition by defendant Urban for discretionary review under G.S. 7A-31 denied 8 January 1985.

COLONY HILL CONDOMINIUM I ASSOC. v. COLONY CO.

No. 600P84.

Case below: 70 N.C. App. 390.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 8 January 1985.

DAVIDSON AND JONES, INC. v. N. C. DEPT. OF ADMINISTRATION

No. 511PA84.

Case below: 69 N.C. App. 563.

Petition by plaintiff for writ of certiorari to North Carolina Court of Appeals allowed 8 January 1985.

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

HOWELL v. TREECE

No. 565P84.

Case below: 70 N.C. App. 322.

Petition by defendants for discretionary review under G.S. 7A-31 denied 8 January 1985. Motion by plaintiff to dismiss appeal for lack of substantial constitutional question allowed 8 January 1985.

JACKSON v. BUMGARDNER

No. 670A84.

Case below: 71 N.C. App. 107.

Petition by defendant for discretionary review under G.S. 7A-31 allowed 8 January 1985. Petition by defendant for discretionary review under G.S. 7A-31 allowed as to additional issues 8 January 1985. Notice of appeal by defendant dismissed 8 January 1985.

McDOWELL v. SMATHERS SUPER MARKET

No. 643P84.

Case below: 70 N.C. App. 775.

Petitions by defendants (Super Market and Charles Robert Smathers) for discretionary review under G.S. 7A-31 denied 8 January 1985.

McLEAN v. McDOUGALD

No. 584P84.

Case below: 70 N.C. App. 494.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 8 January 1985.

MARCOIN, INC. v. McDANIEL

No. 620P84.

Case below: 70 N.C. App. 498.

Petition by defendant for discretionary review under G.S. 7A-31 denied 8 January 1985.

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

MILLIKAN v. GUILFORD MILLS, INC.

No. 652P84.

Case below: 70 N.C. App. 705.

Petition by plaintiff for writ of certiorari to North Carolina Court of Appeals denied 8 January 1985.

NORTHWESTERN BANK v. BROWNING

No. 636P84.

Case below: 70 N.C. App. 787.

Petition by defendants for discretionary review under G.S. 7A-31 denied 8 January 1985. Motion by plaintiffs to dismiss appeal for lack of substantial constitutional question allowed 8 January 1985.

STARKEY v. CIMARRON APARTMENTS;
EVANS v. CIMARRON APARTMENTS

No. 644P84.

Case below: 70 N.C. App. 772.

Petition by plaintiffs for discretionary review under G.S. 7A-31 denied 8 January 1985.

STATE v. ATKINSON

No. 509P84.

Case below: 70 N.C. App. 146.

Petition by Attorney General for discretionary review under G.S. 7A-31 denied 8 January 1985.

STATE v. BOWENS

No. 657P84.

Case below: 71 N.C. App. 226.

Petition by defendant for discretionary review under G.S. 7A-31 denied 8 January 1985.

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

STATE v. COVIEL

No. 490P84.

Case below: 69 N.C. App. 622.

Petition by Attorney General for discretionary review under G.S. 7A-31 denied 8 January 1985. Motion by defendant to dismiss appeal for lack of substantial constitutional question allowed 8 January 1985.

STATE v. EDMONDSON

No. 601PA84.

Case below: 70 N.C. App. 426.

Petition by defendant for discretionary review under G.S. 7A-31 allowed 8 January 1985.

STATE v. HAWKINS

No. 13P85.

Case below: 71 N.C. App. 809.

Petition by defendant for writ of supersedeas and temporary stay denied 16 January 1985.

STATE v. JENKINS

No. 630P84.

Case below: 56 N.C. App. 256.

Petition by defendant for writ of certiorari to North Carolina Court of Appeals denied 8 January 1985.

STATE v. JOHNSON

No. 597P84.

Case below: 70 N.C. App. 495.

Petition by defendant for discretionary review under G.S. 7A-31 denied 8 January 1985.

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

STATE v. LEE

No. 536P84.

Case below: 70 N.C. App. 344.

Petition by defendant for discretionary review under G.S. 7A-31 denied 8 January 1985.

STATE v. SHOWELL

No. 661P84.

Case below: 70 N.C. App. 789.

Petition by defendant for writ of certiorari to North Carolina Court of Appeals denied 8 January 1985.

STATE v. WARREN

No. 645P84.

Case below: 70 N.C. App. 789.

Petition by defendant for discretionary review under G.S. 7A-31 denied 8 January 1985.

WYCOUGH v. FLINT KNIT CORP.

No. 435P84.

Case below: 69 N.C. App. 340.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 8 January 1985.

APPENDIXES

AMENDMENTS TO RULES OF
APPELLATE PROCEDURE

AMENDMENT TO STATE BAR RULES
CONCERNING IOLTA BOARD

AMENDMENTS TO RULES GOVERNING
ADMISSION TO PRACTICE OF LAW

AMENDMENTS TO STATE BAR RULES
CONCERNING ELECTION AND APPOINTMENT
OF COUNCILORS

AMENDMENT TO NOMINATING
COMMITTEE RULES

NORTH CAROLINA RULES OF
PROFESSIONAL CONDUCT

AMENDMENTS TO RULES OF APPELLATE PROCEDURE

Rules 1, 6, 8, 9, 10, 11, 12, 13, 14, 21, 26, 27, 28, 31, and 32 of the North Carolina Rules of Appellate Procedure, 287 N.C. 671, are hereby amended to read as in the following pages.

The effective date for these amendments shall be 1 February 1985. However, the amendments to Rules 9, 10, 11, 12, and 14 shall be applicable to all appeals in which the notice of appeal is filed on or after 1 February 1985; and Rule 26 shall be effective for documents filed on or after 1 February 1985.

Adopted by the Court in Conference this 27th day of November, 1984. These amendments shall be promulgated by publication in the Advance Sheets of the Supreme Court and the Court of Appeals.

BRANCH, C. J.
For the Court

WITNESS my hand and the Seal of the Supreme Court of North Carolina, this the 28th day of November, 1984.

J. GREGORY WALLACE
Clerk of the Supreme Court

RULE 1

SCOPE OF RULES: TRIAL TRIBUNAL DEFINED

(a) **Scope of Rules.** These rules govern procedure in all appeals from the courts of the trial division to the courts of the appellate division; in appeals in civil and criminal cases from the Court of Appeals to the Supreme Court; in direct appeals from administrative agencies, boards, and commissions to the appellate division; and in applications to the courts of the appellate division for writs and other relief which the courts or judges thereof are empowered to give.

(b) **Rules Do Not Affect Jurisdiction.** These rules shall not be construed to extend or limit the jurisdiction of the courts of the appellate division as that is established by law.

(c) **Definition of Trial Tribunal.** As used in these rules, the term "trial tribunal" includes the superior courts, the district courts, and any administrative agencies, boards, or commissions from which appeals lie directly to the appellate division.

Adopted: 13 June 1975.

Amended: 27 November 1984—1(a) and (c)—effective 1 February 1985.

RULE 6

SECURITY FOR COSTS ON APPEAL

(a) **In Regular Course.** Except in pauper appeals an appellant in a civil action must provide adequate security for the costs of appeal in accordance with the provisions of G.S. 1-285 and 1-286.

(b) **In Forma Pauperis Appeals.** An appellant in a civil action may be allowed to prosecute an appeal in forma pauperis without providing security for costs in accordance with the provisions of G.S. 1-288.

(c) **Filed with Record on Appeal.** When security for costs is required, the appellant shall file with the record on appeal a certified copy of the appeal bond or a certificate of the clerk of the trial tribunal showing cash deposit made in lieu of bond.

(d) **Dismissal for Failure to File or Defect in Security.** For failure of the appellant to provide security as required by subdivision (a) or to file evidence thereof as required by subdivision (c), or

for a substantial defect or irregularity in any security provided, the appeal may on motion of an appellee be dismissed by the appellate court where docketed, unless for good cause shown the court permits the security to be provided or the filing to be made out of time, or the defect or irregularity to be corrected. A motion to dismiss on these grounds shall be made and determined in accordance with Rule 37 of these rules. When the motion to dismiss is made on the grounds of a defect or irregularity, the appellant may as a matter of right correct the defect or irregularity by filing a proper bond or making proper deposit with the clerk of the appellate court within 10 days after service of the motion upon him or before the case is called for argument, whichever first occurs.

(e) **No Security for Costs in Criminal Appeals.** Pursuant to G.S. 15A-1449, no security for costs is required upon appeal of criminal cases to the appellate division.

Adopted: 13 June 1975.
Amended: 27 November 1984—6(e)—effective 1 February 1985.

RULE 8

STAY PENDING APPEAL

(a) When appeal is taken in a civil action from a judgment, order, or other determination of a trial court, stay of execution or enforcement thereof pending disposition of the appeal must ordinarily first be sought by the deposit of security with the clerk of the superior court in those cases for which provision is made by law for the entry of stays upon deposit of adequate security, or by application to the trial court for a stay order in all other cases. After a stay order or entry has been denied or vacated by a trial court, an appellant may apply to the appropriate appellate court for a writ of supersedeas in accordance with Rule 23. Application for the writ of supersedeas may similarly be made to the appellate court in the first instance when extraordinary circumstances make it impracticable to obtain a stay by deposit of security or by application to the trial court for a stay order.

(b) **Stay in Criminal Cases.** When a defendant has given notice of appeal, those portions of criminal sentences which impose fines or costs are automatically stayed pursuant to the provisions of G.S. 15A-1451. Stays of imprisonment or of the execu-

tion of death sentences must be pursued under G.S. 15A-536 or Appellate Rule 23, Writ of Supersedeas.

Adopted: 13 June 1975.

Amended: 27 November 1984—8(b)—effective 1 February 1985.

RULE 9

THE RECORD ON APPEAL

(a) **Function; Composition of Record.** In appeals from the trial division of the General Court of Justice, review is solely upon the record on appeal and the verbatim transcript of proceedings, if one is designated, constituted in accordance with this Rule 9.

(1) **Composition of the Record in Civil Actions and Special Proceedings.** The record on appeal in civil actions and special proceedings shall contain:

(i) an index of the contents of the record, which shall appear as the first page thereof;

(ii) a statement identifying the judge from whose judgment or order appeal is taken, the session at which the judgment or order was rendered, or if rendered out of session, the time and place of rendition, and the party appealing;

(iii) a copy of the summons with return, or of other papers showing jurisdiction of the trial court over person or property, or a statement showing same;

(iv) copies of the pleadings, and of any pre-trial order on which the case or any part thereof was tried;

(v) so much of the evidence, set out in the form provided in Rule 9(c)(1), as is necessary for an understanding of all errors assigned, or a statement specifying that the entire verbatim transcript of proceedings is being filed with the record pursuant to Rule 9(c)(2), or designating portions of the transcript to be so filed;

(vi) where error is assigned to the giving or omission of instructions to the jury, a transcript of the entire charge given;

(vii) copies of the issues submitted and the verdict, or of the trial court's findings of fact and conclusions of law;

(viii) a copy of the judgment, order, or other determination from which appeal is taken;

(ix) a copy of the notice of appeal, or of an appropriate entry showing appeal taken orally, of all orders establishing time limits relative to the perfecting of the appeal, of any order finding a party to the appeal to be a civil pauper, and of any agreement, notice of approval, or order settling the record on appeal and settling the verbatim transcript of proceedings if one is filed pursuant to Rule 9(c)(2) and (3);

(x) copies of all other papers filed and statements of all other proceedings had in the trial court which are necessary to an understanding of all errors assigned unless they appear in the verbatim transcript of proceedings which is being filed with the record pursuant to Rule 9(c)(2); and

(xi) exceptions and assignments of error set out in the manner provided in Rule 10.

(2) **Composition of the Record in Appeals from Superior Court Review of Administrative Boards and Agencies.** The record on appeal in cases of appeal from judgments of the superior court rendered upon review of the proceedings of administrative boards or agencies, other than those specified in Rule 18(a), shall contain:

(i) an index of the contents of the record, which shall appear as the first page thereof;

(ii) a statement identifying the judge from whose judgment or order appeal is taken, the session at which the judgment or order was rendered, or if rendered out of session, the time and place of rendition, and the party appealing;

(iii) a copy of the summons, notice of hearing or other papers showing jurisdiction of the board or agency over the persons or property sought to be bound in the proceeding, or a statement showing same;

(iv) copies of all petitions and other pleadings filed in the superior court;

(v) copies of all items included in the record of administrative proceedings which were filed in the superior court for review; (formerly (vi))

(vi) so much of the evidence before the superior court, set out in the form provided in Rule 9(c)(1), as is necessary for an understanding of all errors assigned, or a statement that the entire verbatim transcript of the proceedings is being filed with the record pursuant to Rule 9(c)(2), or designating portions of the transcript to be so filed; (formerly (vii))

(vii) a copy of any findings of fact and conclusions of law and of the judgment, order, or other determination of the superior court from which appeal is taken; (formerly (v))

(viii) a copy of the notice of appeal from the superior court, or of an appropriate entry showing appeal taken orally, of all orders establishing time limits relative to the perfecting of the appeal, of any order finding a party to the appeal to be a civil pauper, and of any agreement, notice of approval, or order settling the record on appeal and settling the verbatim transcript of proceedings, if one is filed pursuant to Rule 9(c)(2) and (3); and

(ix) exceptions and assignments of error to the actions of the superior court, set out in the manner provided in Rule 10.

(3) **Composition of the Record in Criminal Actions.** The record on appeal in criminal actions shall contain:

(i) an index of the contents of the record, which shall appear as the first page thereof;

(ii) a statement identifying the judge from whose judgment or order appeal is taken, the session at which the judgment or order was rendered, or if rendered out of session, the time and place of rendition, and the party appealing;

(iii) copies of all warrants, informations, presentments, and indictments upon which the case has been tried in any court;

(iv) copies of docket entries or a statement showing all arraignments and pleas;

(v) so much of the evidence, set out in the form provided in Rule 9(c)(1), as is necessary for an understanding of all errors assigned, or a statement that the entire verbatim transcript of the proceedings is being filed with the record pursuant to Rule 9(c)(2), or designating portions of the transcript to be so filed;

(vi) where error is assigned to the giving or omission of instructions to the jury, a transcript of the entire charge given;

(vii) copies of the verdict and of the judgment, order, or other determination from which appeal is taken;

(viii) a copy of the notice of appeal, or of an appropriate entry showing appeal taken orally, of all orders establishing time limits relative to the perfecting of the appeal, of any order finding defendant indigent for the purposes of the appeal and assigning counsel, and of any agreement, notice of approval, or order settling the record on appeal and settling the verbatim transcript of proceedings, if one is to be filed pursuant to Rule 9(c)(2);

(ix) copies of all other papers filed and statements of all other proceedings had in the trial courts which are necessary for an understanding of all errors assigned, unless they appear in the verbatim transcript of proceedings which is being filed with the record pursuant to Rule 9(c)(2); and

(x) exceptions and assignments of error set out in the manner provided in Rule 10.

(b) **Form of Record; Amendments.** The record on appeal shall be in the format prescribed by Rule 26(g) and the appendixes to these rules.

(1) **Order of Arrangement.** The items constituting the record on appeal should be arranged, so far as practicable, in the order in which they occurred or were filed in the trial tribunal. (formerly (b)(4))

(2) **Inclusion of Unnecessary Matter; Penalty.** It shall be the duty of counsel for all parties to an appeal to avoid including in the record on appeal matter not necessary for an understanding of the errors assigned. The cost of including such matter may be charged as costs to the party

or counsel who caused or permitted its inclusion. (formerly (b)(5))

(3) **Filing Dates and Signatures on Papers.** Every pleading, motion, affidavit, or other paper included in the record on appeal shall show the date on which it was filed and, if verified, the date of verification and the person who verified. Every judgment, order, or other determination shall show the date on which it was entered. The typed or printed name of the person signing a paper shall be entered immediately below the signature. (formerly (c)(3))

(4) **Pagination; Counsel Identified.** The pages of the record on appeal shall be numbered consecutively, be referred to as "record pages" and be cited as "(R p__)." Pages of the verbatim transcript of proceedings filed under Rule 9(c)(2) shall be referred to as "transcript pages" and cited as "(T p__)." At the end of the record on appeal shall appear the names, office addresses, and telephone numbers of counsel of record for all parties to the appeal. (formerly (c)(4))

(5) **Additions and Amendments to Record on Appeal.** On motion of any party or on its own initiative, the appellate court may order additional portions of a trial court record or transcript sent up and added to the record on appeal. On motion of any party the appellate court may order any portion of the record on appeal or transcript amended to correct error shown as to form or content. Prior to the docketing of the record on appeal in the appellate court, such motions may be made by any party to the trial tribunal. (formerly (b)(6))

(c) **Presentation of Testimonial Evidence and Other Proceedings.** Testimonial evidence, voir dire, and other trial proceedings necessary to be presented for review by the appellate court may be included either in the record on appeal in the form specified in Rule 9(c)(1) or in the verbatim transcript of proceedings of the trial tribunal as provided in Rule 9(c)(2) and (c)(3). Where error is assigned to the giving or omission of instructions to the jury, a transcript of the entire charge given shall be included in the record on appeal.

(1) **When Testimonial Evidence Narrated—How Set Out in Record.** Where error is assigned with respect to the admission or exclusion of evidence, the question and answer form shall be utilized in setting out the pertinent questions and answers. Other testimonial evidence required to

be included in the record on appeal by Rule 9(a) shall be set out in narrative form except where such form might not fairly reflect the true sense of the evidence received, in which case it may be set out in question and answer form. Counsel are expected to seek that form or combination of forms best calculated under the circumstances to present the true sense of the required testimonial evidence concisely and at a minimum of expense to the litigants. To this end, counsel may object to particular narration that it does not accurately reflect the true sense of testimony received; or to particular question and answer portions that the testimony might with no substantial loss in accuracy be summarized in narrative form at substantially less expense. When a judge or referee is required to settle the record on appeal under Rule 11(c) and there is dispute as to the form, he shall settle the form in the course of his general settlement of the record on appeal.

(2) **Designation that Verbatim Transcript of Proceedings in Trial Tribunal Will Be Used.** Appellant may designate in the record that the testimonial evidence will be presented in the verbatim transcript of the evidence in the trial tribunal in lieu of narrating the evidence as permitted by Rule 9(c)(1). Appellant may also designate that the verbatim transcript will be used to present voir dire, jury instructions or other trial proceedings where those proceedings are the basis for one or more assignments of error and where a verbatim transcript of those proceedings has been made. Any such designation shall refer to the page numbers of the transcript being designated. Appellant need not designate all of the verbatim transcript which has been made, provided that when the verbatim transcript is designated to show the testimonial evidence, so much of the testimonial evidence must be designated as is necessary for an understanding of all errors assigned.

(3) **Verbatim Transcript of Proceedings—Settlement, Filing, Copies, Briefs.** Whenever a verbatim transcript is designated to be used pursuant to Rule 9(c)(2):

(i) it shall be settled, together with the record on appeal, according to the procedures established by Rule 11;

(ii) appellant shall cause the settled, verbatim transcript to be filed, contemporaneously with the record on ap-

peal, with the clerk of the appellate court in which the appeal is docketed;

(iii) in criminal appeals, the district attorney, upon settlement of the record, shall forward one copy of the settled transcript to the Attorney General of North Carolina; and

(iv) the briefs of the parties must comport with the requirements of Rule 28 regarding complete statement of the facts of the case and regarding appendixes to the briefs.

(4) **Presentation of Discovery Materials.** Discovery materials offered into evidence at trial shall be brought forward, if relevant, as other evidence. In all instances where discovery materials are considered by the trial tribunal, other than as evidence offered at trial, the following procedures for presenting those materials to the appellate court shall be used: Depositions shall be treated as testimonial evidence and shall be presented by narration or by transcript of the deposition in the manner prescribed by this Rule 9(c). Other discovery materials, including interrogatories and answers, requests for admission, responses to requests, motions to produce, and the like, pertinent to questions raised on appeal, may be set out in the record on appeal or may be sent up as documentary exhibits in accordance with Rule 9(d)(2).

(d) **Models, Diagrams, and Exhibits of Material.**

(1) **Exhibits.** Maps, plats, diagrams and other documentary exhibits filed as portions of or attachments to items required to be included in the record on appeal shall be included as part of such items in the record on appeal. Where such exhibits are not necessary to an understanding of the errors assigned, they may by agreement of counsel or by order of the trial court upon motion be excluded from the record on appeal.

(2) **Transmitting Exhibits.** Three legible copies of each documentary exhibit offered in evidence and required for understanding of errors assigned shall be filed in the appellate court. When an original exhibit has been settled as a necessary part of the record on appeal, any party may within 10 days after settlement of the record on appeal in writing request the clerk of superior court to transmit

the exhibit directly to the clerk of the appellate court. The clerk shall thereupon promptly identify and transmit the exhibit as directed by the party. Upon receipt of the exhibit, the clerk of the appellate court shall make prompt written acknowledgment thereof to the transmitting clerk and the exhibit shall be included as part of the records in the appellate court. Portions of the record on appeal in either appellate court which are not suitable for reproduction may be designated by the Clerk of the Supreme Court to be exhibits. Counsel may then be required to submit three additional copies of those designated materials.

(3) **Removal of Exhibits from Appellate Court.** All models, diagrams, and exhibits of material placed in the custody of the Clerk of the appellate court must be taken away by the parties within 90 days after the mandate of the Court has issued or the case has otherwise been closed by withdrawal, dismissal, or other order of the Court, unless notified otherwise by the Clerk. When this is not done, the Clerk shall notify counsel to remove the articles forthwith; and if they are not removed within a reasonable time after such notice, the Clerk shall destroy them, or make such other disposition of them as to him may seem best.

Adopted: 13 June 1975.

Amended: 10 June 1981—9(c)(1)—applicable to all appeals docketed on or after 1 October 1981;
12 January 1982—9(c)(1)—applicable to all appeals docketed after 15 March 1982;
27 November 1984—applicable to all appeals in which the notice of appeal is filed on or after 1 February 1985.

RULE 10

EXCEPTIONS AND ASSIGNMENTS OF ERROR IN RECORD ON APPEAL

(a) **Function in Limiting Scope of Review.** Except as otherwise provided in this Rule 10, the scope of review on appeal is confined to a consideration of those exceptions set out in the record on appeal or in the verbatim transcript of proceedings, if one is filed pursuant to Rule 9(c)(2), and made the basis of assignments of error in the record on appeal in accordance

with this Rule 10. No exception not so set out may be made the basis of an assignment of error; and no exception so set out which is not made the basis of an assignment of error may be considered on appeal. Provided, that upon any appeal duly taken from a final judgment any party to the appeal may present for review, by properly raising them in his brief, the questions whether the judgment is supported by the verdict or by the findings of fact and conclusions of law, whether the court had jurisdiction of the subject matter, and whether a criminal charge is sufficient in law, notwithstanding the absence of exceptions or assignments of error in the record on appeal.

(b) **Exceptions.**

(1) **General.** Any exception which was properly preserved for review by action of counsel taken during the course of proceedings in the trial tribunal by objection noted or which by rule or law was deemed preserved or taken without any such action, may be set out in the record on appeal or in the verbatim transcript of proceedings, if one is filed pursuant to Rule 9(c)(2) and made the basis of an assignment of error. Bills of exception are not required. Each exception shall be set out immediately following the record of judicial action to which it is addressed and shall identify the action, without any statement of the grounds or argumentation, by any clear means of reference. Exceptions so set out shall be numbered consecutively in order of their occurrence.

(2) **Jury Instructions; Findings and Conclusions of Judge.** No party may assign as error any portion of the jury charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly that to which he objects and the grounds of his objection; provided, that opportunity was given to the party to make the objection out of the hearing of the jury, and, on request of any party, out of the presence of the jury. In the record on appeal an exception to instructions given the jury shall identify the portion in question by setting it within brackets or by any other clear means of reference. An exception to the failure to give particular instructions to the jury, or to make a particular finding of fact or conclusion of law which finding or conclusion was not specifically requested of the trial judge, shall identify the omitted instruction, finding or conclusion by setting out its

substance immediately following the instructions given, or findings or conclusions made. A separate exception shall be set out to the making or omission of each finding of fact or conclusion of law which is to be assigned as error.

(3) **Sufficiency of the Evidence.** A defendant in a criminal case may not assign as error the insufficiency of the evidence to prove the crime charged unless he moves to dismiss the action, or for judgment as in case of nonsuit, at trial. If a defendant makes such a motion after the State has presented all its evidence and has rested its case and that motion is denied and the defendant then introduces evidence, his motion for dismissal or judgment as in case of nonsuit made at the close of State's evidence is waived. Such a waiver precludes the defendant from urging the denial of such motion as a ground for appeal.

A defendant may make a motion to dismiss the action or judgment as in case of nonsuit at the conclusion of all the evidence, irrespective of whether he made an earlier such motion. If the motion at the close of all the evidence is denied, the defendant may urge as ground for appeal the denial of his motion made at the conclusion of all the evidence. However, if a defendant fails to move to dismiss the action or for judgment as in case of nonsuit at the close of all the evidence, he may not challenge on appeal the sufficiency of the evidence to prove the crime charged.

If a defendant's motion to dismiss the action or for judgment as in case of nonsuit is allowed, or shall be sustained on appeal, it shall have the force and effect of a verdict of "not guilty" as to such defendant.

(c) **Assignments of Error—Form.** The exceptions upon which a party intends to rely shall be indicated by setting out at the conclusion of the record on appeal assignments of error based upon such exceptions. Each assignment of error shall be consecutively numbered; shall, so far as practicable, be confined to a single issue of law; shall state plainly and concisely and without argumentation the basis upon which error is assigned; and shall be followed by a listing of all the exceptions upon which it is based, identified by their numbers and by the record pages or transcript pages at which they appear. Exceptions not thus listed will be deemed abandoned. It is not necessary to include in an assignment of error those portions of the record or transcript of proceedings to which it is

directed, a proper listing of the exceptions upon which it is based being sufficient.

(d) **Exceptions and Cross-Assignments of Error by Appellee.** Without taking an appeal an appellee may set out exceptions to and cross-assign as error any action or omission of the trial court to which an exception was duly taken or as to which an exception was deemed by rule or law to have been taken, and which deprived the appellee of an alternative basis in law for supporting the judgment, order, or other determination from which appeal has been taken. Portions of the record or transcript of proceedings necessary to an understanding of such cross-assignments of error may be included in the record on appeal by agreement of the parties under Rule 11(a), may be included by the appellee in a proposed alternative record on appeal under Rule 11(b), or may be designated for inclusion in the verbatim transcript of proceedings, if one is filed under Rule 9(c)(2).

Adopted: 13 June 1975.

Amended: 10 June 1981—10(b)(2), applicable to every case the trial of which begins on or after 1 October 1981;
7 July 1983—10(b)(3);
27 November 1984—applicable to appeals in which the notice of appeal is filed on or after 1 February 1985.

RULE 11

SETTLING THE RECORD ON APPEAL

(a) **By Agreement.** Within 60 days after appeal is taken, the parties may by agreement entered in the record on appeal settle a proposed record on appeal prepared by any party in accordance with Rule 9 as the record on appeal.

(b) **By Appellee's Approval of Appellant's Proposed Record on Appeal.** If the record on appeal is not settled by agreement under Rule 11(a), the appellant shall, within 60 days after appeal is taken, file in the office of the clerk of superior court and serve upon all other parties a proposed record on appeal constituted in accordance with the provisions of Rule 9. Within 15 days after service of the proposed record on appeal upon him an appellee may file in the office of the clerk of superior

court and serve upon all other parties a notice of approval of the proposed record on appeal, or objections, amendments, or a proposed alternative record on appeal in accordance with Rule 11(c). If all appellees within the times allowed them either file notices of approval or fail to file either notices of approval or objections, amendments, or proposed alternative records on appeal, appellant's proposed record on appeal thereupon constitutes the record on appeal.

(c) **By Judicial Order or Appellant's Failure to Request Judicial Settlement.** Within 15 days after service upon him of appellant's proposed record on appeal, an appellee may file in the office of the clerk of superior court and serve upon all other parties specific amendments or objections to the proposed record on appeal, or a proposed alternative record on appeal. Amendments or objections to the proposed record on appeal shall be set out in a separate paper.

If any appellee timely files amendments, objections, or a proposed alternative record on appeal, the appellant or any other appellee, within 10 days after expiration of the time within which the appellee last served might have filed, may in writing request the judge from whose judgment, order, or other determination appeal was taken to settle the record on appeal. A copy of the request, endorsed with a certificate showing service on the judge, shall be filed forthwith in the office of the clerk of the superior court, and served upon all other parties. If only one appellee or only one set of appellees proceeding jointly have so filed, and no other party makes timely request for judicial settlement, the record on appeal is thereupon settled in accordance with the appellee's objections, amendments or proposed alternative record on appeal. If more than one appellee proceeding separately have so filed, failure of the appellant to make timely request for judicial settlement results in abandonment of the appeal as to those appellees, unless within the time allowed an appellee makes request in the same manner.

The judge shall send written notice to counsel for all parties setting a place and a time for a hearing to settle the record on appeal. The hearing shall be held not later than 15 days after service of the request for hearing upon the judge. The judge shall settle the record on appeal by order entered not more than 20 days after service of the request for hearing upon the judge.

Provided, that nothing herein shall prevent settlement of the record on appeal by agreement of the parties at any time within the times herein limited for settling the record by judicial order.

(d) **Multiple Appellants; Single Record on Appeal.** When there are multiple appellants (2 or more), whether proceeding separately or jointly, as parties aligned in interest, or as cross-appellants, there shall nevertheless be but one record on appeal, and the appellants shall attempt to agree to the procedure for constituting a proposed record on appeal. The exceptions and assignments of error of the several appellants shall be set out separately in the single record on appeal and related to the several appellants by any clear means of reference. In the event multiple appellants cannot agree to the procedure for constituting a proposed record on appeal, the judge from whose judgment, order, or other determination the appeals are taken shall, on motion of any appellant with notice to all other appellants, enter an order settling the procedure, including the allocation of costs.

(e) **Extensions of Time.** The times provided in this rule for taking any action may be extended in accordance with the provisions of Rule 27(c).

Adopted: 13 June 1975.

Amended: 27 November 1984—11(a), (c), (e), and (f)—applicable to appeals in which the notice of appeal is filed on or after 1 February 1985.

RULE 12

FILING THE RECORD; DOCKETING THE APPEAL; COPIES OF THE RECORD

(a) **Time for Filing Record on Appeal.** Within 15 days after the record on appeal has been settled by any of the procedures provided in this Rule 11 or Rule 18, but no later than 150 days after giving notice of appeal, the appellant shall file the record on appeal with the clerk of the court to which appeal is taken.

(b) **Docketing the Appeal.** At the time of filing the record on appeal, the appellant shall pay to the clerk the docket fee fixed pursuant to G.S. 7A-20(b), and the clerk shall thereupon enter

the appeal upon the docket of the appellate court. If an appellant is authorized to appeal in forma pauperis as provided in G.S. 1-288 or 7A-450 et seq., the clerk shall docket the appeal upon timely filing of the record on appeal. An appeal is docketed under the title given to the action in the trial division, with the appellant identified as such. The clerk shall forthwith give notice to all parties of the date on which the appeal was docketed in the appellate court.

(c) **Copies of Record on Appeal.** The appellant need file but a single copy of the record on appeal. Upon filing, the appellant may be required to pay to the clerk of the appellate court a deposit fixed by the clerk to cover the costs of reproducing copies of the record on appeal. The clerk will reproduce and distribute copies as directed by the court. By stipulation filed with the record on appeal the parties may agree that specified portions of the record on appeal need not be reproduced in the copies prepared by the clerk. Upon prior agreement with the clerk, the appellant may file with the record on appeal a proposed printed record prepared in accordance with Rule 26 and the appendixes to these rules.

In civil appeals in forma pauperis the appellant need not pay a deposit for reproducing copies, but at the time of filing the original record on appeal shall also deliver to the clerk two legible copies thereof.

Adopted: 13 June 1975.

Amended: 27 November 1984—applicable to appeals in which the notice of appeal is filed on or after 1 February 1985.

RULE 13

FILING AND SERVICE OF BRIEFS

(a) **Time for Filing and Service.** Within 20 days after the clerk of the appellate court has mailed the printed record to the parties, the appellant shall file his brief in the office of the clerk of the appellate court, and serve copies thereof upon all other parties separately represented. In civil appeals in forma pauperis, no printed record is created; accordingly, appellant's 20 days for filing and serving the brief shall run from the date of docketing the record on appeal in the appellate court. Within 20 days after appellant's brief has been served on an

appellee, the appellee shall similarly file and serve copies of his brief.

(b) **Copies Reproduced by Clerk.** A party need file but a single copy of his brief. At the time of filing the party may be required to pay to the clerk of the appellate court a deposit fixed by the clerk to cover the cost of reproducing copies of the brief. The clerk will reproduce and distribute copies of briefs as directed by the court.

In civil appeals in forma pauperis a party need not pay the deposit for reproducing copies, but at the time of filing his original brief shall also deliver to the clerk two legible photocopies thereof.

(c) **Consequence of Failure to File and Serve Briefs.** If an appellant fails to file and serve his brief within the time allowed, the appeal may be dismissed on motion of an appellee or on the court's own initiative. If an appellee fails to file and serve his brief within the time allowed, he may not be heard in oral argument except by permission of the court.

Adopted: 13 June 1975.

Amended: 7 October 1980—13(a)—effective 1 January 1981;

27 November 1984—13(a) and (b)—effective 1 February 1985.

RULE 14

APPEALS OF RIGHT FROM COURT OF APPEALS TO SUPREME COURT UNDER G.S. 7A-30

(a) **Notice of Appeal; Filing and Service.** Appeals of right from the Court of Appeals to the Supreme Court are taken by filing notices of appeal with the Clerk of the Court of Appeals and with the Clerk of the Supreme Court and serving notice of appeal upon all other parties within 15 days after the mandate of the Court of Appeals has been issued to the trial tribunal. The running of the time for filing and serving a notice of appeal is tolled as to all parties by the filing by any party within such time of a petition for rehearing under Rule 31 of these rules, and the full time for appeal thereafter commences to run and is computed as to all parties from the date of entry by the Court of Appeals of an order denying the peti-

tion for rehearing. If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within 10 days after the first notice of appeal was filed. A petition prepared in accordance with Rule 15(c) for discretionary review in the event the appeal is determined not to be of right or for issues in addition to those set out as the basis for a dissenting opinion may be filed with or contained in the notice of appeal.

(b) **Content of Notice of Appeal.**

(1) **Appeal Based Upon Dissent in Court of Appeals.** In an appeal which is based upon the existence of a dissenting opinion in the Court of Appeals the notice of appeal shall specify the party or parties taking the appeal; shall designate the judgment of the Court of Appeals from which the appeal is taken; shall state the basis upon which it is asserted that appeal lies of right under G.S. 7A-30; and shall state the issue or issues which are the basis of the dissenting opinion and which are to be presented to the Supreme Court for review.

(2) **Appeal Presenting Constitutional Question.** In an appeal which is asserted by the appellant to involve a substantial constitutional question, the notice of appeal shall specify the party or parties taking the appeal; shall designate the judgment of the Court of Appeals from which the appeal is taken; shall state the basis upon which it is asserted that appeal lies of right under G.S. 7A-30; shall specify the articles and sections of the Constitution asserted to be involved; shall state with particularity how appellant's rights thereunder have been violated; and shall affirmatively state that the constitutional issue was timely raised (in the trial tribunal if it could have been, in the Court of Appeals if not) and either not determined or determined erroneously.

(c) **Record on Appeal.**

(1) **Composition.** The record on appeal filed in the Court of Appeals constitutes the record on appeal for review by the Supreme Court. However, the Supreme Court may note de novo any deficiencies in the record on appeal and may take such action in respect thereto as it deems appropriate, including dismissal of the appeal.

(2) **Transmission; Docketing; Copies.** Upon the filing of a notice of appeal, the Clerk of the Court of Appeals will

forthwith transmit the original record on appeal to the Clerk of the Supreme Court, who shall thereupon file the record and docket the appeal. The Clerk of the Supreme Court will procure or reproduce copies of the record on appeal for distribution as directed by the Court, and may require a deposit from appellant to cover the cost of reproduction. In appeals in forma pauperis, the Clerk of the Court of Appeals will transmit with the original record on appeal the copies filed by the appellant in that Court under Rule 12(c).

(d) **Briefs.**

(1) **Filing and Service; Copies.** Within 20 days after filing notice of appeal in the Supreme Court, the appellant shall file with the Clerk of the Supreme Court and serve upon all other parties copies of a new brief prepared in conformity with Rule 28, presenting only those questions upon which review by the Supreme Court is sought; provided, however, that when the appeal is based upon the existence of a substantial constitutional question or when the appellant has filed a petition for discretionary review for issues in addition to those set out as the basis of a dissent in the Court of Appeals, the appellant shall file and serve a new brief within 20 days after entry of the order of the Supreme Court which determines for the purpose of retaining the appeal on the docket that a substantial constitutional question does exist or allows or denies the petition for discretionary review in an appeal based upon a dissent. Within 20 days after service of the appellant's brief upon him, the appellee shall similarly file and serve copies of a new brief.

The parties need file but single copies of their respective briefs. At the time of filing a brief, the party may be required to pay to the Clerk a deposit fixed by the Clerk to cover the cost of reproducing copies of the brief. The Clerk will reproduce and distribute copies as directed by the Court.

In civil appeals in forma pauperis a party need not pay the deposit for reproducing copies, but at the time of filing his original new brief shall also deliver to the Clerk two legible copies thereof.

(2) **Failure to File or Serve.** If an appellant fails to file and serve his brief within the time allowed, the appeal may be

dismissed on motion of an appellee or on the court's own initiative. If an appellee fails to file and serve his brief within the time allowed, he may not be heard in oral argument except by permission of the Court.

Adopted: 13 June 1975.

Amended: 31 January 1977—14(d)(1);
7 October 1980—14(d)(1)—effective 1 January 1981;
27 November 1984—14(a), (b), and (d)—applicable to appeals in which the notice of appeal is filed on or after 1 February 1985.

RULE 21

CERTIORARI

(a) **Scope of the Writ.**

(1) **Review of the Judgments and Orders of Trial Tribunals.** The writ of certiorari may be issued in appropriate circumstances by either appellate court to permit review of the judgments and orders of trial tribunals when the right to prosecute an appeal has been lost by failure to take timely action, or when no right of appeal from an interlocutory order exists, or for review pursuant to G.S. 15A-1422(c)(3) of an order of the trial court denying a motion for appropriate relief.

(2) **Review of the Judgments and Orders of the Court of Appeals.** The writ of certiorari may be issued by the Supreme Court in appropriate circumstances to permit review of the decisions and orders of the Court of Appeals when the right to prosecute an appeal of right or to petition for discretionary review has been lost by failure to take timely action; or for review of orders of the Court of Appeals when no right of appeal exists.

(b) **Petition for Writ; to Which Appellate Court Addressed.** Application for the writ of certiorari shall be made by filing a petition therefor with the clerk of the court of the appellate division to which appeal of right might lie from a final judgment in the cause by the tribunal to which issuance of the writ is sought.

(c) **Same; Filing and Service; Content.** The petition shall be filed without unreasonable delay and shall be accompanied by proof of service upon all other parties. The petition shall contain a statement of the facts necessary to an understanding of the issues presented by the application; a statement of the reasons why the writ should issue; and certified copies of the judgment, order or opinion or parts of the record which may be essential to an understanding of the matters set forth in the petition. The petition shall be verified by counsel or the petitioner. Upon receipt of the prescribed docket fee, the clerk will docket the petition.

(d) **Response; Determination by Court.** Within 10 days after service upon him of the petition any party may file a response thereto with supporting affidavits or certified portions of the record not filed with the petition. Filing shall be accompanied by proof of service upon all other parties. The court for good cause shown may shorten the time for filing a response. Determination will be made on the basis of the petition, the response and any supporting papers. No briefs or oral argument will be received or allowed unless ordered by the court upon its own initiative.

(e) **Petition for Writ in Post Conviction Matters; to Which Appellate Court Addressed.** Petitions for writ of certiorari to review orders of the trial court denying motions for appropriate relief upon grounds listed in G.S. 15A-1415(b) by persons who have been sentenced to life imprisonment or death shall be filed in the Supreme Court. In all other cases such petitions shall be filed in and determined by the Court of Appeals and the Supreme Court will not entertain petitions for certiorari or petitions for further discretionary review in these cases.

Adopted: 13 June 1975.

Amended: 18 November 1981—21(a) and (e);
27 November 1984—21(a)—effective 1 February 1985.

RULE 26

FILING AND SERVICE

(a) **Filing.** Papers required or permitted by these rules to be filed in the trial or appellate divisions shall be filed with the clerk

of the appropriate court. Filing may be accomplished by mail addressed to the clerk but is not timely unless the papers are received by the clerk within the time fixed for filing, except that proposed records on appeal and briefs shall be deemed filed on the date of mailing, as evidenced by the proof of service, if first class mail is utilized.

(b) **Service of All Papers Required.** Copies of all papers filed by any party and not required by these rules to be served by the clerk shall, at or before the time of filing, be served on all other parties to the appeal.

(c) **Manner of Service.** Service may be made in the manner provided for service and return of process in Rule 4 of the N. C. Rules of Civil Procedure, and may be so made upon a party or upon his attorney of record. Service may also be made upon a party or his attorney of record by delivering a copy to either or by mailing it to either at his last known address, or if no address is known, by filing it in the office of the clerk with whom the original paper is filed. Delivery of a copy within this Rule means handing it to the attorney or to the party, or leaving it at the attorney's office with a partner or employee. Service by mail is complete upon deposit of the paper enclosed in a postpaid, properly addressed wrapper in a Post Office or official depository under the exclusive care and custody of the United States Post Office Department, or, for those having access to such services, upon deposit with the State Courier Service or Inter-Office Mail.

(d) **Proof of Service.** Papers presented for filing shall contain an acknowledgment of service by the person served or proof of service in the form of a statement of the date and manner of service and of the names of the persons served, certified by the person who made service. Proof of service shall appear on or be affixed to the papers filed.

(e) **Joint Appellants and Appellees.** Any paper required by these rules to be served on a party is properly served upon all parties joined in the appeal by service upon any one of them.

(f) **Numerous Parties to Appeal Proceeding Separately.** When there are unusually large numbers of appellees or appellants proceeding separately, the trial tribunal upon motion of any party or on its own initiative, may order that any papers required by these rules to be served by a party on all other parties need be served only upon parties designated in the order, and that the filing of such a paper and service thereof upon

the parties designated constitutes due notice of it to all other parties. A copy of every such order shall be served upon all parties to the action in such manner and form as the court directs.

(g) **Form of Papers; Copies.** Papers presented to either appellate court for filing shall be letter size (8½ x 11") with the exception of wills and exhibits. Documents filed in the trial division prior to July 1, 1982, may be included in records on appeal whether they are letter size or legal size (8½ x 14"). Papers shall be prepared on white paper of 16-20 pound substance in pica type so as to produce a clear, black image, leaving a margin of approximately one inch on each side. The format of all papers presented for filing shall follow the instructions found in the Appendixes to these Appellate Rules.

All documents presented to either appellate court other than records on appeal, which in this respect are governed by Appellate Rule 9, shall, unless they are less than 5 pages in length, be preceded by a subject index of the matter contained therein, with page references, and a table of authorities, i.e., cases (alphabetically arranged), constitutional provisions, statutes, and textbooks cited, with references to the pages where they are cited.

The body of the document shall at its close bear the printed name, post office address, and telephone number of counsel of record, and in addition, at the appropriate place, the manuscript signature of counsel of record.

Adopted: 13 June 1975.

Amended: 5 May 1981—26(g)—effective for all appeals arising from cases filed in the court of original jurisdiction after 1 July 1982;
11 February 1982—26(c);
7 December 1982—26(g)—effective for documents filed on and after 1 March 1983;
27 November 1984—26(a)—effective for documents filed on and after 1 February 1985.

RULE 27

COMPUTATION AND EXTENSION OF TIME

(a) **Computation of Time.** In computing any period of time prescribed or allowed by these rules, by order of court, or by

any applicable statute, the day of the act, event, or default after which the designated period of time begins to run is not included. The last day of the period so computed is to be included, unless it is a Saturday, Sunday, or a legal holiday, in which event the period runs until the end of the next day which is not a Saturday, Sunday, or a legal holiday.

(b) **Additional Time After Service by Mail.** Whenever a party has the right to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon him and the notice or paper is served upon him by mail, three days shall be added to the prescribed period.

(c) **Extensions of Time; By Which Court Granted.** Except as herein provided, courts for good cause shown may upon motion extend any of the times prescribed by these rules or by order of court for doing any act required or allowed under these rules; or may permit an act to be done after the expiration of such time. Courts may not extend the time for taking an appeal or for filing a petition for discretionary review or a petition for rehearing prescribed by these rules or by law.

(1) **Motions for Extension of Time in the Trial Division.** All motions for extensions of time not to exceed 150 days from the date the notice of appeal is given are made to the trial tribunal from whose judgment, order, or other determination the appeal has been taken during the time prior to docketing of the appeal in the appellate division. No extension of time which runs beyond 150 days from the date the notice of appeal is given shall be granted by the trial tribunal.

Motions for extensions of time made to a trial tribunal may be made orally or in writing and without notice to other parties and may be determined at any time or place within the state; provided that motions to extend the time for serving the proposed record on appeal made after the expiration of any time previously allowed for such service must be in writing and with notice to all other parties and may be allowed only after all other parties have had opportunity to be heard. Such motions may be determined ex parte, but the moving party shall promptly serve on all other parties to the appeal a copy of any order extending time.

Motions made under this Rule 27 to a court of the trial divisions may be heard and determined by any of

those judges of the particular court specified in Rule 36 of these rules. Such motions made to a commission may be heard and determined by the chairman of the commission; or if to a commissioner, then by that commissioner.

(2) **Motions for Extension of Time in the Appellate Division.** All motions for extensions of time, including the time for filing the record on appeal, to a time greater than 150 days from the date the notice of appeal is given may only be made to the appellate court to which appeal has been taken. Any subsequent motion for any extension of time shall be made to the appellate court.

Adopted: 13 June 1975.

Amended: 7 March 1978—27(c);
4 October 1978—27(c)—effective 1 January 1979;
27 November 1984—27(a) and (c)—effective 1 February 1985.

RULE 28

BRIEFS: FUNCTION AND CONTENT

(a) **Function.** The function of all briefs required or permitted by these rules is to define clearly the questions presented to the reviewing court and to present the arguments and authorities upon which the parties rely in support of their respective positions thereon. Review is limited to questions so presented in the several briefs. Questions raised by assignments of error in appeals from trial tribunals but not then presented and discussed in a party's brief, are deemed abandoned. Similarly, questions properly presented for review in the Court of Appeals but not then presented and discussed in the new briefs required by Rules 14(d)(1) and 15(g)(2) to be filed in the Supreme Court for review by that Court are deemed abandoned.

(b) **Content of Appellant's Brief.** An appellant's brief in any appeal shall contain, under appropriate headings, and in the form prescribed by Rule 26(g) and the Appendixes to these rules, in the following order:

(1) A table of contents and table of authorities required by Rule 26(g).

(2) A statement of the questions presented for review.

(3) A concise statement of the procedural history of the case. This shall indicate the nature of the case and summarize the course of proceedings up to the taking of the appeal before the court.

(4) A full and complete statement of the facts. This should be a non-argumentative summary of all material facts underlying the matter in controversy which are necessary to understand all questions presented for review, supported by references to pages in the transcript of proceedings, the record on appeal, or exhibits, as the case may be.

(5) An argument, to contain the contentions of the appellant with respect to each question presented. Each question shall be separately stated. Immediately following each question shall be a reference to the assignments of error and exceptions pertinent to the question, identified by their numbers and by the pages at which they appear in the printed record on appeal, or the transcript of proceedings if one is filed pursuant to Rule 9(c)(2). Exceptions not set out in the appellant's brief, or in support of which no reason or argument is stated or authority cited, will be taken as abandoned.

The body of the argument shall contain citations of the authorities upon which the appellant relies. Evidence or other proceedings material to the question presented may be narrated or quoted in the body of the argument, with appropriate reference to the record on appeal or the transcript of proceedings, or the exhibits.

(6) A short conclusion stating the precise relief sought.

(7) Identification of counsel by signature, typed name, office address and telephone number.

(8) The proof of service required by Rule 26(d).

(9) The appendix required by Rule 28(d).

(c) **Content of Appellee's Brief; Presentation of Additional Questions.** An appellee's brief in any appeal shall contain a table of contents and table of authorities as required by Rule 26(g), an argument, a conclusion, identification of counsel and proof of service in the form provided in Rule 28(b) for an appellant's brief, and any appendix as may be required by Rule 28(d). It need contain no statement of the questions presented, state-

ment of the procedural history of the case, or statement of the facts, unless the appellee disagrees with the appellant's statements and desires to make a restatement or unless the appellee desires to present questions in addition to those stated by the appellant.

Without having taken appeal, an appellee may present for review, by stating them in his brief, any questions raised by cross-assignments of error under Rule 10(d). Without having taken appeal or made cross-assignments of error, an appellee may present the question, by statement and argument in his brief, whether a new trial should be granted to the appellee rather than a judgment n.o.v. awarded to the appellant when the latter relief is sought on appeal by the appellant.

If the appellee desires to present questions in addition to those stated by the appellant, the appellee's brief must contain a full, non-argumentative summary of all material facts necessary to understand the new questions supported by references to pages in the record on appeal, the transcript of proceedings, or the appendixes, as appropriate.

(d) **Appendixes to Briefs.** Whenever the transcript of proceedings is filed pursuant to Rule 9(c)(2), the parties must file verbatim portions of the transcript as appendixes to their briefs, if required by this Rule 28(d).

(1) **When Appendixes to Appellant's Brief Are Required.** Except as provided in Rule 28(d)(2), the appellant must reproduce as appendixes to its brief:

(i) those portions of the transcript of proceedings which must be reproduced verbatim in order to understand any question presented in the brief;

(ii) those portions of the transcript showing the pertinent questions and answers when a question presented in the brief involves the admission or exclusion of evidence.

(2) **When Appendixes to Appellant's Brief Are Not Required.** Notwithstanding the requirements of Rule 28(d)(1), the appellant is not required to reproduce an appendix to its brief with respect to an assignment of error:

(i) whenever the portion of the transcript necessary to understand a question presented in the brief is reproduced verbatim in the body of the brief;

(ii) to show the absence or insufficiency of evidence unless there are discrete portions of the transcript where the subject matter of the alleged insufficiency of the evidence is located; or

(iii) to show the general nature of the evidence necessary to understand a question presented in the brief if such evidence has been fully summarized as required by Rule 28(b)(4) and (5).

(3) **When Appendixes to Appellee's Brief Are Required.** Appellee must reproduce appendixes to his brief in the following circumstances:

(i) Whenever the appellee believes that appellant's appendixes do not include portions of the transcript required by Rule 28(d)(1), the appellee shall reproduce those portions of the transcript he believes to be necessary to understand the question.

(ii) Whenever the appellee presents a new or additional question in his brief as permitted by Rule 28(c), the appellee shall reproduce portions of the transcript as if he were the appellant with respect to each such new or additional question.

(4) **Format of Appendixes.** The appendixes to the briefs of any party shall be in the format prescribed by Rule 26(g) and shall consist of clear photocopies of transcript pages which have been deemed necessary for inclusion in the appendix under this Rule 28(d). The pages of the appendix shall be consecutively numbered and an index to the appendix shall be placed at its beginning.

(e) **References in Briefs to the Record.** References in the briefs to exceptions and assignments of error shall be by their numbers and to the pages of the printed record on appeal or of the transcript of proceedings, or both, as the case may be, at which they appear. Reference to parts of the printed record on appeal and to the verbatim transcript or documentary exhibits shall be to the pages where the parts appear.

(f) **Joinder of Multiple Parties in Briefs.** Any number of appellants or appellees in a single cause or in causes consolidated for appeal may join in a single brief although they are not formally joined on the appeal. Any party to any appeal may adopt by reference portions of the briefs of others.

(g) **Additional Authorities.** Additional authorities discovered by a party after filing his brief may be brought to the attention of the court by filing a memorandum thereof with the clerk of the court and serving copies upon all other parties. The memorandum may not be used as a reply brief or for additional argument, but shall simply state the issue to which the additional authority applies and provide a full citation of the authority. Authorities not cited in the briefs nor in such a memorandum may not be cited and discussed in oral argument.

Before the Court of Appeals, the party shall file an original and three copies of the memorandum; in the Supreme Court, the party shall file an original and 14 copies of the memorandum.

(h) **Reply Briefs.**

(1) If the appellee has presented in its brief new or additional questions as permitted by Rule 28(c), an appellant may, within 20 days after service upon him of such brief, file and serve a reply brief limited to those new or additional questions presented in the appellee's brief.

(2) Except for a reply brief filed under Rule 28(h)(1), or unless the court, upon its own initiative, orders a reply brief to be filed and served, none will be received or considered by the court.

(i) **Amicus Curiae Briefs.** A brief of an amicus curiae may be filed only by leave of the appellate court wherein the appeal is docketed or in response to a request made by that Court on its own initiative.

A person desiring to file an amicus curiae brief shall present to the Court a motion for leave to file, served upon all parties, within ten days after the appeal is docketed. The motion shall state concisely the nature of the applicant's interest, the reasons why an amicus curiae brief is believed desirable, the questions of law to be addressed in the amicus curiae brief and the applicant's position on those questions. Unless otherwise ordered by the Court, the application for leave will be determined solely upon the motion, and without responses thereto or oral argument.

The clerk of the appellate court will forthwith notify the applicant and all parties of the court's action upon the application. Unless other time limits are set out in the order of the

Court permitting the brief, the amicus curiae shall file the brief within the time allowed for the filing of the brief of the party supported or, if in support of neither party, within the time allowed for filing appellant's brief. In all cases where amicus curiae briefs are permitted by a court, the clerk of the court at the direction of the court will notify all parties of the times within which they may file reply briefs. Such reply briefs will be limited to points or authorities presented in the amicus curiae brief which are not presented in the main briefs of the parties. No reply brief of an amicus curiae will be received.

A motion of an amicus curiae to participate in oral argument will be allowed only for extraordinary reasons.

Adopted: 13 June 1975.

Amended: 27 January 1981—repeal 28(d)—effective 1 July 1981;
10 June 1981—28(b) and (c)—effective 1 October 1981;
12 January 1982—28(b)(4)—effective 15 March 1982;
7 December 1982—28(i)—effective 1 January 1983;
27 November 1984—28(b), (c), (d), (e), (g), and (h)—effective 1 February 1985.

RULE 31

PETITION FOR REHEARING

(a) **Time for Filing; Content.** A petition for rehearing may be filed in a civil action within 15 days after the mandate of the court has been issued. The petition shall state with particularity the points of fact or law which, in the opinion of the petitioner, the court has overlooked or misapprehended, and shall contain such argument in support of the petition as petitioner desires to present. It shall be accompanied by a certificate of at least two attorneys who for periods of at least five years respectively, shall have been members of the bar of this State and who have no interest in the subject of the action and have not been counsel for any party to the action, that they have carefully examined the appeal and the authorities cited in the decision, and that they consider the

decision in error on points specifically and concisely identified. Oral argument in support of the petition will not be permitted.

(b) **How Addressed; Filed.** A petition to the Supreme Court shall be addressed to the court. Two copies thereof shall be filed with the clerk.

A petition to the Court of Appeals shall be addressed to the court. Two copies thereof shall be filed with the clerk.

(c) **How Determined.** Within 30 days after the petition is filed, the court will either grant or deny the petition. Determination to grant or deny will be made solely upon the written petition; no written response will be received from the opposing party; and no oral argument by any party will be heard. Determination by the court is final. The rehearing may be granted as to all or less than all points suggested in the petition. When the petition is denied the clerk shall forthwith notify all parties.

(d) **Procedure When Granted.** Upon grant of the petition the clerk shall forthwith notify the parties that the petition has been granted, and if the court has ordered oral argument, shall give notice of the time set therefor, which time shall be not less than 30 days from the date of such notice. The case will be reconsidered solely upon the record on appeal, the petition to rehear, and new briefs of both parties, and the oral argument if one has been ordered by the court. The briefs shall be addressed solely to the points specified in the order granting the petition to rehear. The petitioner's brief shall be filed within 10 days after the clerk has given notice of the grant of the petition; and the opposing party's brief, within 20 days after petitioner's brief is served upon him. Filing and service of the new briefs shall be in accordance with the requirements of Rule 13.

(e) **Stay of Execution.** When a petition for rehearing is filed, the petitioner may obtain a stay of execution in the trial court to which the mandate of the appellate court has been issued. The procedure is as provided for stays pending appeal by Rule 8 of these rules.

(f) **Waiver by Appeal from Court of Appeals.** The timely filing of a notice of appeal from, or of a petition for discretionary review of, a determination of the Court of Appeals constitutes a waiver of any right thereafter to petition the Court of Ap-

peals for rehearing as to such determination or, if a petition for rehearing has earlier been filed, an abandonment of such petition.

(g) **No Petition in Criminal Cases.** The courts will not entertain petitions for rehearing in criminal actions.

Adopted: 13 June 1975.
Amended: 27 November 1984—31(a)—effective 1 February 1985.

RULE 32

MANDATES OF THE COURTS

(a) **In General.** Unless a court of the appellate division directs that a formal mandate shall issue, the mandate of the court consists of certified copies of its judgment and of its opinion and any direction of its clerk as to costs. The mandate is issued by its transmittal from the clerk of the issuing court to the clerk or comparable officer of the tribunal from which appeal was taken to the issuing court.

(b) **Time of Issuance.** Unless a court orders otherwise, its clerk shall enter judgment and issue the mandate of the court 20 days after the written opinion of the court has been filed with the clerk.

Adopted: 13 June 1975.
Amended: 27 November 1984—32(b)—effective 1 February 1985.

AMENDMENT TO STATE BAR RULES CONCERNING IOLTA BOARD

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 July 26, 1985.

BE IT RESOLVED by the Council of The North Carolina State Bar, that Article X, Canons of Ethics and Rules of Professional Conduct of the Certificate of Organization of The North Carolina State Bar, as appears in 205 N.C. 865 and as amended in 307 N.C. 718 for the creation of a standing committee for the disposition of funds received from interest on trust accounts is amended by rewriting Rule IV of Paragraph J of Section 5 of Article VI to read as follows:

> "The Board of Trustees shall consist of nine members appointed by the Council of the North Carolina State Bar. Effective September 1, 1985, three shall be appointed for a term of three years, three shall be for a term of two years, and three shall be for a term of one year. Thereafter, all appointments shall be for a term of three years beginning September 1. No member shall serve more than two consecutive three-year terms, in addition to service prior to the beginning of a full three-year term. The Council of the North Carolina State Bar shall designate the Chairman and Vice-Chairman from time to time and shall fill any vacancy which occurs before the expiration of a term for the balance of the term so remaining."

NORTH CAROLINA
WAKE COUNTY

I, B. E. James, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments were duly adopted by the Council of the North Carolina State Bar at its meeting on Friday, July 26, 1985.

Given over my hand and the Seal of the North Carolina State Bar, this the 31st day of July, 1985.

B. E. JAMES
Secretary

After examining the foregoing amendments to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 19th day of September, 1985.

JOSEPH BRANCH
Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar be spread upon the Minutes of the Supreme Court and that they be published in the forthcoming volume of the Reports as provided by the Act incorporating the North Carolina State Bar.

This the 19th day of September, 1985.

BILLINGS, J.
For the Court

AMENDMENTS TO RULES GOVERNING ADMISSION TO PRACTICE OF LAW

The following amendments to the Rules Governing Admission to the Practice of Law in the State of North Carolina were duly adopted by the Council of the North Carolina State Bar at its regular quarterly meeting on July 26, 1985.

BE IT RESOLVED that Rules .0501(5), .0502(3), .0502(4) and .0903 of the Rules Governing Admission to the Practice of Law in the State of North Carolina as appear in 289 NC 742 and as amended in 293 NC 759, 295 NC 747, 296 NC 746, 304 NC 746, 306 NC 793, 307 NC 707 and 310 NC 753 be amended as follows:

.0501 REQUIREMENTS FOR GENERAL APPLICANTS

(5) TO BE DELETED.

.0502 REQUIREMENTS FOR COMITY APPLICANTS

(3) TO BE DELETED.

To renumber the subsections of Rule .0501 and .0502 following the foregoing deletions.

To amend the first paragraph of Rule .0502(4) of the Rules Governing Admission to the Practice of Law in the State of North Carolina to read as follows:

.0502 REQUIREMENTS FOR COMITY APPLICANTS

(4) Prove to the satisfaction of the Board that the applicant is duly licensed to practice law in a state, or territory of the United States, or the District of Columbia having comity with North Carolina and that in such state, or territory of the United States, or the District of Columbia, *while so licensed therein*, the applicant has been for at least four out of the last six years, immediately preceding the filing of his application with the Secretary, actively and substantially engaged in the practice of law. Practice of law for the purposes of this rule when conducted pursuant to a license granted by another jurisdiction shall include: . . .

.0903 SUBJECT MATTER

The examination may deal with the following subjects: Business Associations (including agency, corporations, and partnerships), Civil Procedure, Constitutional Law, Contracts, Criminal Law and Procedure, Evidence, *Family Law*, Legal Ethics, Real Property, Security Transactions including The Uniform Commercial Code, Taxation, Torts, Trusts, Wills, Decedents' Estates and Equity.

NORTH CAROLINA
WAKE COUNTY

I, B. E. James, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments were duly adopted by the Council of the North Carolina State Bar at its meeting on Friday, July 26, 1985.

Given over my hand and the Seal of the North Carolina State Bar, this the 31st day of July, 1985.

B. E. JAMES
Secretary

After examining the foregoing amendments to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 19th day of September, 1985.

JOSEPH BRANCH
Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar be spread upon the Minutes of the Supreme Court and that they be published in the forthcoming volume of the Reports as provided by the Act incorporating the North Carolina State Bar.

This the 19th day of September, 1985.

BILLINGS, J.
For the Court

AMENDMENTS TO STATE BAR RULES CONCERNING ELECTION AND APPOINTMENT OF COUNCILORS

The following amendments to the Rules and Regulations of the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on July 26, 1985.

BE IT RESOLVED by the Council of The North Carolina State Bar that the Certificate of Organization of The North Carolina State Bar as appears in 205 N.C. 856 is amended to provide for a new Article XII to read as follows:

ARTICLE XII

ELECTION AND APPOINTMENT OF STATE BAR COUNCILORS

Section 1. **PURPOSE**

The purpose of these rules is to promulgate fair, open, and uniform procedures to elect and appoint North Carolina State Bar Councilors in all judicial district bars. These rules should encourage a broader and more diverse participation and representation of all attorneys in the election and appointment of Councilors.

Section 2. Every Judicial District Bar, in any calendar year at the end of which the term of one or more of its Councilors will expire, shall fill said vacancy or vacancies at an election to be held at a meeting during that year.

(1) The officers of the District Bar shall fix the time and place of such election and shall give to each active member (as defined in G.S. 84-16) of the District Bar a written notice thereof directed to him or her at his or her address on file with the North Carolina State Bar, which notice shall be placed in the United States mail, postage prepaid, at least thirty days prior to the date of the election.

(2) The District Bar shall submit its written notice of the election to the North Carolina State Bar, at least six weeks before the date of the election.

(3) The North Carolina State Bar will, at its expense, mail these notices.

(4) The notice shall state the date, time and place of the election, give the number of vacancies to be filled, name a person or committee named by the local bar to which nominations may be

made prior to the meeting, advise that additional nominations may be made from the floor at the meeting itself, and advise that all elections must be by a majority of the votes cast by those present and voting.

Section 3. All nominations made either before or at the meeting shall be voted on at the meeting by secret ballot of those present and voting.

(1) Cumulative voting shall not be permitted.

(2) Nominees receiving a majority of the votes cast shall be declared elected.

Section 4. The unexpired term of any vacancy occurring in the office of Councilor because of resignation, death or any cause other than the expiration of a term, shall be filled within ninety days of the occurrence of the vacancy by an election conducted in the same manner as above provided.

Section 5. Nothing contained herein shall prohibit the District Bar of any Judicial District from adopting by-laws providing for the geographical rotation or division of its Councilor representation.

NORTH CAROLINA
WAKE COUNTY

I, B. E. James, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments were duly adopted by the Council of the North Carolina State Bar at its meeting on Friday, July 26, 1985.

Given over my hand and the Seal of the North Carolina State Bar, this the 31st day of July, 1985.

B. E. JAMES
Secretary

After examining the foregoing amendments to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84 of the General Statutes, provided Subsections 1 and 2 of Section 2 relating to the 30 days' notice and six weeks' notice prior to the date of the election shall not apply to any District Bar whose election date has been set prior to the effective date of these Rules and cannot comply with said subsection.

This the 19th day of September, 1985.

JOSEPH BRANCH
Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar be spread upon the Minutes of the Supreme Court and that they be published in the forthcoming volume of the Reports as provided by the Act incorporating the North Carolina State Bar.

This the 19th day of September, 1985.

BILLINGS, J.
For the Court

AMENDMENT TO NOMINATING COMMITTEE RULES

The following amendments to the Rules and Regulations of the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on July 26, 1985.

BE IT RESOLVED by the Council of the North Carolina State Bar that Article III and Article IV as appear in 205 NC 856 and as amended in 221 NC 583, 274 NC 606, 298 NC 829-832 and 307 NC 736-739 be and the same are hereby amended by rewriting the second sentence of subsection a of Section 5 of Article III entitled NOMINATING COMMITTEE to read as follows:

> "The Nominating Committee shall be composed of the immediate past president and the five most recent living past presidents who are in good standing with the North Carolina State Bar."

NORTH CAROLINA
WAKE COUNTY

I, B. E. James, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments were duly adopted by the Council of the North Carolina State Bar at its meeting on Friday, July 26, 1985.

Given over my hand and the Seal of the North Carolina State Bar, this the 30th day of July, 1985.

B. E. JAMES
Secretary

After examining the foregoing amendments to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 19th day of September, 1985.

JOSEPH BRANCH
Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar be spread upon the Minutes of the Supreme Court and that they be published in the forthcoming volume of the Reports as provided by the Act incorporating the North Carolina State Bar.

This the 19th day of September, 1985.

BILLINGS, J.
For the Court

NORTH CAROLINA RULES OF PROFESSIONAL CONDUCT

PREAMBLE: A LAWYER'S RESPONSIBILITIES

A lawyer is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice.

As a representative of clients, a lawyer performs various functions. As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system. As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealing with others. As intermediary between clients, a lawyer seeks to reconcile their divergent interests as an advisor and, to a limited extent, as a spokesperson for each client. A lawyer acts as evaluator by examining a client's legal affairs and reporting about them to the client or to others.

In all professional functions a lawyer should be competent, prompt and diligent. A lawyer should maintain communication with a client concerning the representation. A lawyer should keep in confidence information relating to representation of a client except so far as disclosure is required or permitted by the Rules of Professional Conduct or other law.

A lawyer's conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer's business and personal affairs. A lawyer should use the law's procedures only for legitimate purposes and not to harass or intimidate others. A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials. While it is a lawyer's duty, when necessary, to challenge the rectitude of official action, it is also a lawyer's duty to uphold legal process.

As a public citizen, a lawyer should seek improvement of the law, the administration of justice and the quality of service rendered by the legal profession. As a member of a learned profession, a lawyer should cultivate knowledge of the law beyond its use for clients, employ that knowledge in reform of the law and work to strengthen legal education. A lawyer should be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance, and should therefore devote profes-

sional time and civic influence in their behalf. A lawyer should aid the legal profession in pursuing these objectives and should help the bar regulate itself in the public interest.

Many of a lawyer's professional responsibilities are prescribed in the Rules of Professional Conduct, as well as substantive and procedural law. However, a lawyer is also guided by personal conscience and the approbation of professional peers. A lawyer should strive to attain the highest level of skill, to improve the law and the legal profession and to exemplify the legal profession's ideals of public service.

A lawyer's responsibilities as a representative of clients, an officer of the legal system and a public citizen are usually harmonious. In the nature of law practice, however, conflicting responsibilities are encountered. The Rules of Professional Conduct prescribe terms for resolving such conflicts. Within the framework of these Rules many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules.

The legal profession is largely self-governing. Although other professions also have been granted powers of self-government, the legal profession is unique in this respect because of the close relationship between the profession and the processes of government and law enforcement. This connection is manifested in the fact that ultimate authority over the legal profession is vested largely in the courts.

To the extent that lawyers meet the obligations of their professional calling, the occasion for government regulation is obviated. Self-regulation also helps maintain the legal profession's independence from government domination. An independent legal profession is an important force in preserving government under law, for abuse of legal authority is more readily challenged by a self-regulated profession.

The legal profession's relative autonomy carries with it special responsibilities of self-government. The profession has a responsibility to assure that its regulations are conceived in the public interest and not in furtherance of parochial or self-interested concerns of the bar. Every lawyer is responsible for observance of the Rules of Professional Conduct. A lawyer should also aid in securing their observance by other lawyers. Neglect of these responsibilities compromises the independence of the profession and the public interest which it serves.

Lawyers play a vital role in the preservation of society. The fulfillment of this role requires an understanding by lawyers of their relationship to our legal system. The Rules of Professional Conduct, when properly applied, serve to define that relationship.

SCOPE

The Rules of Professional Conduct are rules of reason. They should be interpreted with reference to the purposes of legal representation and of the law itself. Some of the Rules are imperatives, cast in the terms "shall" or "shall not." These define proper conduct for purposes of professional discipline. Others, generally cast in the term "may," are permissive and define areas under the Rules in which the lawyer has professional discretion. No disciplinary action should be taken when the lawyer chooses not to act or acts within the bounds of such discretion. Other Rules define the nature of relationships between the lawyer and others. The Rules are thus partly obligatory and disciplinary and partly constitutive and descriptive in that they define a lawyer's professional role. Many of the Comments use the term "should." Comments do not add obligations to the Rules but provide guidance for practicing in compliance with the Rules.

The Rules presuppose a larger legal context shaping the lawyer's role. That context includes court rules and statutes relating to matters of licensure, laws defining specific obligations of lawyers and substantive and procedural law in general. Compliance with the Rules, as with all law in an open society, depends primarily upon understanding and voluntary compliance, secondarily upon reinforcement by peer and public opinion and finally, when necessary, upon enforcement through disciplinary proceedings. The Rules do not, however, exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules. The Rules simply provide a framework for the ethical practice of law.

Furthermore, for purposes of determining the lawyer's authority and responsibility, principles of substantive law external to these Rules determine whether a client-lawyer relationship exists. Most of the duties flowing from the client-lawyer relationship attach only after the client has requested the lawyer to render legal services and the lawyer has agreed to do so. But there are some duties, such as that of confidentiality under Rule 4, that may attach when the lawyer agrees to consider whether a client-lawyer relationship shall be established. Whether a client-lawyer relationship exists for any specific purpose can depend on the circumstances and may be a question of fact.

Under various legal provisions, including constitutional, statutory and common law, the responsibilities of government lawyers may include authority concerning legal matters that ordinarily reposes in the client in private client-lawyer relationships. For example, a lawyer for a government agency may have authority on behalf of the government to decide upon settlement or whether to appeal from an adverse judgment. Such authority in various respects is generally vested in the attorney general and the state's attorney in state government, and their federal counterparts, and the same may be true of other government law officers. Also, lawyers under the supervision of these officers may be authorized to represent several government agencies in intragovernmental legal controversies in circumstances where a private lawyer could not represent multiple private clients. They also may have authority to represent the "public interest" in circumstances where a private lawyer would not be authorized to do so. These Rules do not abrogate any such authority.

Failure to comply with an obligation or prohibition imposed by a Rule is a basis for invoking the disciplinary process. The Rules presuppose that disciplinary assessment of a lawyer's conduct will be made on the basis of the facts and circumstances as they existed at the time of the conduct in question and in recognition of the fact that a lawyer often has to act upon uncertain or incomplete evidence of the situation. Moreover, the Rules presuppose that whether or not discipline should be imposed for a violation, and the severity of a sanction, depend on all the circumstances, such as the willfulness and seriousness of the violation, extenuating factors and whether there have been previous violations.

Violation of a Rule should not give rise to a cause of action nor should it create any presumption that a legal duty has been breached. The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability. Furthermore, the purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons. The fact that a Rule is a just basis for a lawyer's self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the Rule. Accordingly, nothing in the Rules should be deemed to augment any substantive legal duty of lawyers, or the extra-disciplinary consequences of violating such a duty.

Moreover, these Rules are not intended to govern or affect judicial application of either the attorney-client or work product privilege. Those privileges were developed to promote compliance with law and fairness in litigation. In reliance on the attorney-client privilege, clients are entitled to expect that communications within the scope of the privilege will be protected against compelled disclosure. The attorney-client privilege is that of the client and not of the lawyer. The fact that in exceptional situations the lawyer under the Rules has a limited discretion to disclose a client confidence does not vitiate the proposition that, as a general matter, the client has a reasonable expectation that information relating to the client will not be voluntarily disclosed and that disclosure of such information may be judicially compelled only in accordance with recognized exceptions to the attorney-client and work product privileges.

The lawyer's exercise of discretion not to disclose information should not be subject to reexamination. Permitting such reexamination would be incompatible with the general policy of promoting compliance with law through assurances that communications will be protected against disclosure.

The Comment accompanying each Rule explains and illustrates the meaning and purpose of the Rule. The Preamble and this note on Scope provide general orientation. The Comments are intended as guides to interpretation, but the text of each Rule is authoritative.

DEFINITIONS

"Belief" or "Believes" denotes that the person involved actually supposed the fact in question to be true. A person's belief may be inferred from circumstances.

"Firm" or "Law firm" denotes a lawyer or lawyers in a private firm or professional corporation, lawyers employed in the legal department of a corporation or other organization and lawyers employed in a legal services organization.

"Fraud" or "Fraudulent" denotes conduct having a purpose to deceive and not merely negligent misrepresentation or failure to apprise another of relevant information.

"Full disclosure" denotes communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question.

"Knowingly," "Known," or "Knows" denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.

"Partner" denotes a member of a partnership or a shareholder in a law firm organized as a professional corporation.

"Reasonable" or "Reasonably" when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer.

"Reasonable belief" or "Reasonably believes" when used in reference to a lawyer denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.

"Reasonably should know" when used in reference to a lawyer denotes that a lawyer of reasonable prudence and competence would ascertain the matter in question.

"Substantial" when used in reference to degree or extent denotes a material matter of clear and weighty importance.

North Carolina Rules of Professional Conduct

CANON I. A LAWYER SHOULD ASSIST IN MAINTAINING THE INTEGRITY AND COMPETENCE OF THE LEGAL PROFESSION.

RULE 1.1 Bar Admission and Disciplinary Matters

An applicant for admission to the bar, or a lawyer in connection with a bar admission application or in connection with a disciplinary matter, shall not:

(A) Knowingly make a false statement of material fact; or

(B) Fail to disclose a fact necessary to correct a misapprehension known by the person to have arisen in the matter, or knowingly fail to respond to a lawful demand for information from an admissions or disciplinary authority, except that this Rule does not require disclosure of information otherwise protected by Rule 4.

COMMENT:

The duty imposed by this Rule extends to persons seeking admission to the bar as well as to lawyers. Hence, if a person makes a material false statement in connection with an application for admission, it may be the basis for subsequent disciplinary action if the person is admitted, and in any event may be relevant in a subsequent admission application. The duty imposed by this Rule applies to a lawyer's own admission or discipline as well as that of others. Thus, it is a separate professional offense for a lawyer to knowingly make a misrepresentation or omission in connection with a disciplinary investigation of the lawyer's own conduct. This Rule also requires affirmative clarification of any misunderstanding on the part of the admissions or disciplinary authority of which the person involved becomes aware. It should also be noted that G.S. 84-28(b)(3) defines failure to answer a formal inquiry of the North Carolina State Bar as misconduct for which discipline is appropriate.

This Rule is subject to the provisions of the Fifth Amendment of the United States Constitution and corresponding provisions of the North Carolina Constitution. A person relying on such a provision in response to a question, however, should do so openly and not use the right of nondisclosure as a justification for failure to comply with this Rule.

A lawyer representing an applicant for admission to the bar, or representing a lawyer who is the subject of a disciplinary in-

quiry or proceeding, is governed by the rules applicable to the client-lawyer relationship.

RULE 1.2 Misconduct

It is professional misconduct for a lawyer to:

(A) Violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(B) Commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

(C) Engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(D) Engage in conduct that is prejudicial to the administration of justice;

(E) State or imply an ability to influence improperly a government agency or official; or

(F) Knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.

COMMENT:

Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some kinds of offense carry no such implication. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, or breach of trust, or serious interference with the administration of justice are in that category. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation and professional unfitness.

Lawyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyer's abuse of public office can suggest an inability to fulfill the professional role of attorney. The same is true of abuse of positions of private trust such as trustee, executor, administrator, guardian, agent and officer, director or manager of a corporation or other organization.

RULE 1.3 Reporting Professional Misconduct

(A) A lawyer having knowledge that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the North Carolina State Bar or other appropriate authority.

(B) A lawyer having knowledge that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the appropriate authority.

(C) This Rule does not require disclosure of information otherwise protected by Rule 4.

COMMENT:

Self-regulation of the legal profession requires that members of the profession initiate disciplinary investigation when they know of a substantial violation of the Rules of Professional Conduct. Lawyers have a similar obligation with respect to judicial misconduct. An apparently isolated violation may indicate a pattern of misconduct that only a disciplinary investigation can uncover. Reporting a violation is especially important where the victim is unlikely to discover the offense.

A report about misconduct is not required where it would involve violation of Rule 4. However, a lawyer should encourage a client to consent to disclosure where prosecution would not substantially prejudice the client's interest.

If a lawyer were obliged to report every violation of the Rules, the failure to report any violation would itself be a professional offense. Such a requirement existed before but proved to be unenforceable. This Rule limits the reporting obligation to those offenses that a self-regulating profession must vigorously endeavor to prevent. A measure of judgment is, therefore, required in complying with the provisions of this Rule. The term "substantial" refers to the seriousness of the alleged offense and not the quantum of evidence of which the lawyer is aware. Similar considerations apply to the reporting of judicial misconduct.

The duty to report professional misconduct does not apply to a lawyer retained to represent a lawyer whose professional conduct is in question. Such a situation is governed by the rules applicable to the client-lawyer relationship.

CANON II. A LAWYER SHOULD ASSIST THE LEGAL PROFESSION IN FULFILLING ITS DUTY TO MAKE LEGAL COUNSEL AVAILABLE.

RULE 2.1 Communications Concerning a Lawyer's Services

A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it:

(A) Contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading;

(B) Is likely to create an unjustified expectation about results the lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate the Rules of Professional Conduct or other law; or

(C) Compares the lawyer's services with other lawyers' services, unless the comparison can be factually substantiated.

COMMENT:

This Rule governs all communications about a lawyer's services, including advertising permitted by Rule 2.2. Whatever means are used to make known a lawyer's services, statements about them should be truthful. The prohibition in paragraph (B) of statements that may create "unjustified expectations" would ordinarily preclude advertisements about results obtained on behalf of clients, such as the amounts of damage awards or the lawyer's record in obtaining favorable verdicts, and advertisements containing client endorsements. Such information may create the unjustified expectation that similar results can be obtained for others without reference to specific factual and legal circumstances.

RULE 2.2 Advertising

(A) Subject to the requirements of Rule 2.2, a lawyer may advertise services through public media, such as telephone directories, legal directories, newspapers or other periodicals, outdoor advertising, radio or television, or through written communications not involving solicitation as defined in Rule 2.4.

(B) A copy or recording of an advertisement or written communication shall be kept for two years after its last dissemination along with a record of when and where it was used.

(C) A lawyer shall not give anything of value to a person for recommending the lawyer's services, except that a lawyer may

pay the reasonable cost of advertising or written communication permitted by this Rule and may pay the usual charges of a not-for-profit lawyer referral service or other legal service organization. A lawyer may participate in and share the cost of a private lawyer referral service so long as the following conditions are met:

1. Only compensation for administrative service may be paid to a lawyer or layman incident to the operation of the private referral service, which compensation shall be reasonable in amount;

2. All advertisements shall be paid for by the participants in the service;

3. No profit in specie or kind may be received other than from legal fees earned from representation of referred clients;

4. Employees of the referral service may not initiate contact with prospective clients; and

5. All advertisements shall:

   (a) State clearly and conspicuously that the referral service is privately operated, which statement shall be given the same prominence as the name of the referral service;

   (b) State that a list of all participating lawyers will be mailed free of charge to members of the public upon request and state further where such information may be obtained; and

   (c) Indicate that the service is not operated or endorsed by any public agency or any disinterested organization.

Any lawyer participating in a private lawyer referral service shall be professionally responsible for its operation.

(D) Any communication made pursuant to this rule other than that of a lawyer referral service as described above in subsection (C) above shall include the name of at least one lawyer or law firm responsible for its content.

COMMENT:

To assist the public in obtaining legal services, lawyers should be allowed to make known their services not only through

reputation but also through organized information campaigns in the form of advertising. Advertising involves an active quest for clients, contrary to the tradition that a lawyer should not seek clientele. However, the public's need to know about legal services can be fulfilled in part through advertising. This need is particularly acute in the case of persons of moderate means who have not made extensive use of legal services. The interest in expanding public information about legal services in combination with the lawyer's own rights under the First Amendment ought to prevail over considerations of tradition. Nevertheless, advertising by lawyers entails the risk of practices that are misleading, overreaching, deceptive, coercive, intimidating, or vexatious.

This Rule permits public dissemination of information concerning a lawyer's name or firm name, address and telephone number; the kinds of services the lawyer will undertake; the basis on which the lawyer's fees are determined, including prices for specific services and payment and credit arrangements; a lawyer's foreign language ability; names of references and, with their consent, names of clients regularly represented; and other information that might invite the attention of those seeking legal assistance.

This Rule does not prohibit communications authorized by law, such as notices to members of a class in class action litigation.

RULE 2.3 Firm Names and Letterheads

(A) A lawyer shall not use a firm name, letterhead or other professional designation that violates Rules 2.1 or 2.2. A trade name may be used by a lawyer in private practice if it does not imply a connection with a government agency or with a public or charitable legal services organization and is not otherwise false or misleading. Every trade name used by a law firm shall be registered with the North Carolina State Bar, and upon a determination by the Council that such name is potentially misleading, a remedial disclaimer or an appropriate identification of the firm's composition or connection may be required. For purposes of this section, the use of the names of deceased former members of a firm shall not render the firm name a trade name.

(B) A law firm practicing in more than one jurisdiction may use the same name in each jurisdiction, but identification of its members and associates in any communication shall indicate the jurisdictional limitations of those not licensed to practice in North Carolina.

(C) A law firm maintaining offices only in North Carolina may not list any person not licensed to practice law in North Carolina as an attorney affiliated with the firm.

(D) The name of a lawyer holding a public office shall not be used in the name of the law firm, or in communications on its behalf, during any substantial period in which the lawyer is not actively and regularly practicing with the firm, whether or not the lawyer is precluded from practicing by law.

(E) A lawyer shall not hold himself out as practicing in a law firm unless the association is in fact a firm.

(F) No lawyer may maintain a permanent professional relationship with any lawyer not licensed to practice law in North Carolina unless law offices are maintained in North Carolina and in a state where such other lawyer is licensed and practices and a certificate of registration authorizing said professional relationship is first obtained from the Secretary of the North Carolina State Bar.

COMMENT:

A firm may be designated by the names of all or some of its members, by the names of deceased members where there has been a continuing succession in the firm's identity or by a trade name such as the "ABC Legal Clinic." Use of trade names in law practice is acceptable so long as they are not misleading and are otherwise in conformance with the rules and regulations of the State Bar.

As it is unlawful for a person trained as an attorney to practice law in North Carolina without a license from the State, it is misleading and improper for such a person to be listed in any firm communication, public or private, as having any continuing affiliation with the firm as a lawyer, unless he actively practices and maintains offices in another jurisdiction where he is licensed.

Nothing in these rules shall be construed to confer the right to practice law in North Carolina upon any lawyer not licensed to practice law in North Carolina.

With regard to paragraph (E), lawyers sharing office facilities who are not in fact partners may not denominate themselves as, for example, "Smith and Jones," for that title suggests partnership in the practice of law.

RULE 2.4 Solicitation

(A) A lawyer may not solicit professional employment from a prospective client with whom the lawyer has no family or prior professional relationship in-person or by telephone when a signifi-

cant motive for the lawyer's doing so is the lawyer's pecuniary gain.

(B) A lawyer may not solicit professional employment from a prospective client with whom the lawyer has no family or prior professional relationship by mail, telegram or by other written communication when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain. This prohibition does not include letters addressed or advertising circulars distributed generally to persons not known to need legal services in a particular matter of the kind provided by the lawyer, but who are so situated that they might in general find such services useful.

COMMENT:

There is a potential for abuse inherent in direct solicitation by a lawyer of prospective clients. It subjects the lay person to the private importuning of a trained advocate, in a direct interpersonal encounter. A prospective client often feels overwhelmed by the situation giving rise to the need for legal services and may have an impaired capacity for reason, judgment and protective self-interest. Furthermore, the lawyer seeking the retainer is faced with a conflict stemming from the lawyer's own interest, which may color the advice and representation offered the vulnerable prospect.

The situation is therefore fraught with the possibility of undue influence, intimidation, and overreaching. This potential for abuse inherent in direct solicitation of prospective clients justifies its prohibition, particularly since lawyer advertising permitted under Rule 2.2 offers an alternative means of communicating necessary information to those who may be in need of legal services.

Advertising makes it possible for a prospective client to be informed about the need for legal services, and about the qualifications of available lawyers and law firms, without subjecting the prospective client to direct personal persuasion that may overwhelm the client's judgment.

The use of general advertising to transmit information from lawyer to prospective client, rather than direct private contact, will help to assure that the information flows cleanly as well as freely. Advertising is out in public view, thus subject to scrutiny by those who know the lawyer. This informal review is itself likely to help guard against statements and claims that might constitute false or misleading communications, in violation of Rule 2.1. Direct, private communications from a lawyer to a prospective client are not subject to such scrutiny and consequently are much more likely to approach or cross the dividing line between accurate representations and those that are false and misleading.

As the United States Supreme Court has recognized in *Ohralik v. Ohio State Bar Assn.*, 436 U.S. 447, the State has a legitimate and compelling interest in preventing those aspects of solicitation that involve fraud, undue influence, intimidation, overreaching and vexation. These dangers attend direct solicitation whether in-person or by mail. Direct mail solicitation cannot be effectively regulated by means less drastic than outright prohibition.

General mailings not speaking to a specific matter do not pose the same danger of abuse as targeted mailings, and therefore are not prohibited by this Rule. The representations made in such mailings are necessarily general rather than tailored, less importuning than informative. They are addressed to recipients unlikely to be specially vulnerable at the time, hence who are likely to be more skeptical about unsubstantiated claims. General mailings not addressed to recipients involved in a specific legal matter or incident, therefore, more closely resemble permissible advertising rather than prohibited solicitation.

Similarly, this Rule would not prohibit a lawyer from contacting representatives of organizations or groups that may be interested in establishing a group or prepaid legal plan for its members, insureds, beneficiaries or other third parties for the purpose of informing such entities of the availability of and details concerning the plan or arrangement which he or his firm is willing to offer. This form of communication is not directed to a specific prospective client known to need legal services related to a particular matter. Rather, it is usually addressed to an individual acting in a fiduciary capacity seeking a supplier of legal services for others who may, if they choose, become prospective clients of the lawyer. Under these circumstances, the activity which the lawyer undertakes in communicating with such representatives and the type of information transmitted to the individual are functionally similar to and serve the same purpose as advertising permitted under Rule 2.2.

RULE 2.5 Specialization

A lawyer may not represent himself as a specialist in a communication unless he is certified as a specialist by the North Carolina State Bar or unless the communication includes the following disclaimer or language which is substantively similar:

"REPRESENTATIONS OF SPECIALTY DO NOT INDICATE STATE CERTIFICATION OF EXPERTISE."

COMMENT:

The use of the word "specialize" in any of its variant forms connotes to the public a particular expertise often subject to rec-

ognition by the State. Indeed, the North Carolina State Bar has instituted programs providing for official certification of specialists in certain areas of practice. In order to avoid any confusion, the Rule requires that any representation of specialty be not only true, but be accompanied by a disclaimer of state certification if such is not the case. A lawyer may, however, describe his practice without using the term "specialize" in any manner which is truthful and not misleading and forego use of a disclaimer. He may, for instance, indicate a "concentration" or an "interest" or a "limitation" without disclaimer.

RULE 2.6 Fees for Legal Services

(A) A lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee.

(B) A fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence experienced in the area of law involved would be left with a definite and firm conviction that the fee is in excess of a reasonable fee. Factors to be considered in determining the reasonableness of a fee include the following:

(1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly.

(2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.

(3) The fee customarily charged in the locality for similar legal services.

(4) The amount involved and the results obtained.

(5) The time limitations imposed by the client or by the circumstances.

(6) The nature and length of the professional relationship with the client.

(7) The experience, reputation, and ability of the lawyer or lawyers performing the services.

(8) Whether the fee is fixed or contingent.

(C) A lawyer shall not enter into an arrangement for, charge, or collect a contingent fee for representing a defendant in a criminal case or for representing a party in a civil case in which such a fee is prohibited by law or otherwise.

(D) A division of fee between lawyers who are not in the same firm may be made only if:

(1) The division is in proportion to the services performed by each lawyer or, by written agreement with the client, each lawyer assumes joint responsibility for the representation;

(2) The client is advised of and does not object to the participation of all the lawyers involved; and

(3) The total fee is reasonable.

COMMENT:

When the lawyer has regularly represented a client, they ordinarily will have evolved an understanding concerning the basis or rate of the fee. In a new client-lawyer relationship, however, an understanding as to the fee should be promptly established. It is not necessary to recite all the factors that underlie the basis of the fee, but only those that are directly involved in its computation. It is sufficient, for example, to state that the basic rate is an hourly charge or a fixed amount or an estimated amount, or to identify the factors that may be taken into account in finally fixing the fee. When developments occur during the representation that render an earlier estimate substantially inaccurate, a revised estimate should be provided to the client. A written statement concerning the fee reduces the possibility of misunderstanding and is desirable.

A lawyer may require advance payment of a fee, but is obliged to return any unearned portion. See Rule 2.8(A)(3). This does not apply when the advance payment is a true retainer to reserve services rather than an advance to secure the payment of fees yet to be earned. A lawyer may accept property in payment for services, provided this does not involve acquisition of a propriety interest in the cause of action or subject matter of the litigation contrary to Rule 5.3(A). However a fee paid in property instead of money may be subject to special scrutiny because it involves questions concerning both the value of the services and the lawyer's special knowledge of the value of the property.

Once a fee contract has been reached between attorney and client, the attorney has an ethical obligation to fulfill the contract and represent his client's best interests regardless of whether he has struck an unfavorable bargain. An attorney may seek to renegotiate his fee agreement in light of changed circumstances or for other good cause, but he may not abandon or threaten to abandon

his client to cut his losses or to coerce an additional or higher fee. Any fee contract made or remade during the existence of the attorney-client relationship must be reasonable and freely and fairly made by the client having full knowledge of all material circumstances incident to the agreement. If a dispute later arises concerning the fee, the burden of proving reasonableness and fairness will be upon the lawyer. All fees, including contingent fees, should be reasonable and not excessive as to percentage or amount.

A division of fee is a single billing to a client covering the fee of two or more lawyers who are not in the same firm. A division of fee facilitates association of more than one lawyer in a matter in which neither alone could serve the client as well. Paragraph (D) permits the lawyers to divide a fee on either the basis of the proportion of services they render or by agreement between the participating lawyers if all assume responsibility for the representation as a whole and the client is advised and does not object. It does not require disclosure to the client of the share that each lawyer is to receive.

RULE 2.7 Agreements Restricting the Practice of a Lawyer

(A) A lawyer shall not be a party to or participate in a partnership or employment agreement with another lawyer that restricts the right of a lawyer to practice law after the termination of the relationship created by the agreement, except as a condition to payment of retirement benefits.

(B) In connection with the settlement of a controversy or suit, a lawyer shall not enter into an agreement that restricts his right to practice law.

COMMENT:

An agreement restricting the right of partners or associates to practice after leaving a firm not only limits their professional autonomy but also limits the freedom of clients to choose a lawyer.

RULE 2.8 Withdrawal from Employment

(A) In general.

(1) If permission for withdrawal from employment is required by the rules of a tribunal, a lawyer shall not withdraw from employment in a proceeding before that tribunal without its permission.

(2) In any event, a lawyer shall not withdraw from employment until he has taken reasonable steps to avoid foreseeable prejudice to the rights of his client, including giving due notice to his client, allowing time for employment of other counsel, delivering to the client all papers and property to which the client is entitled, and complying with applicable laws and rules.

(3) A lawyer who withdraws from employment shall refund promptly any part of a fee paid in advance that has not been earned.

(B) Mandatory withdrawal.

A lawyer representing a client before a tribunal, with its permission if required by its rules, shall withdraw from employment, and a lawyer representing a client in other matters shall withdraw from employment if:

(1) He knows or it is obvious that his client is bringing the legal action, conducting the defense, or asserting a position in the litigation, or is otherwise having steps taken for him, merely for the purpose of harassing or maliciously injuring any person.

(2) He knows or it is obvious that his continued employment will result in violation of a Rule of Professional Conduct.

(3) His mental or physical condition renders it unreasonably difficult for him to carry out the employment effectively.

(4) He is discharged by his client.

(C) Permissive Withdrawal.

If Rule 2.8(B) is not applicable, a lawyer may request permission to withdraw in matters pending before a tribunal, and may withdraw in other matters, only if:

(1) His Client:

(a) Insists upon presenting a claim or defense that is not warranted under existing law and cannot be supported by good faith argument for an extension, modification, or reversal of existing law.

(b) Personally seeks to pursue an illegal course of conduct.

(c) Insists that the lawyer pursue a course of conduct that is illegal, repugnant or imprudent or that is prohibited under the Rules of Professional Conduct.

(d) By other conduct renders it unreasonably difficult for the lawyer to carry out his employment effectively.

(e) Insists, in a matter not pending before a tribunal, that the lawyer engage in conduct that is contrary to the judgment and advice of the lawyer but not prohibited under the Rules of Professional Conduct.

(f) Deliberately disregards an agreement or obligation to the lawyer as to expenses or fees.

(g) Has used the lawyer's services to perpetrate a crime or fraud.

(2) His continued employment is likely to result in a violation of a Rule of Professional Conduct.

(3) His inability to work with co-counsel indicates that the best interests of the client likely will be served by withdrawal.

(4) His mental or physical condition renders it difficult for him to carry out the employment effectively.

(5) His client knowingly and freely assents to termination of his employment.

(6) He believes in good faith in a proceeding pending before a tribunal, that the tribunal will find the existence of other good cause for withdrawal.

COMMENT:

A lawyer should not accept representation in a matter unless it can be performed competently, promptly, without improper conflict of interest, and to completion.

A lawyer ordinarily must decline or withdraw from representation if the client demands that the lawyer engage in conduct that is illegal or violates the Rules of Professional Conduct or other law. The lawyer is not obliged to decline or withdraw simply because the client suggests such a course of conduct; a client may make such a suggestion in the hope that a lawyer will not be constrained by a professional obligation.

When a lawyer has been appointed to represent a client, withdrawal ordinarily requires approval of the appointing authority. Difficulty may be encountered if withdrawal is based on the client's demand that the lawyer engage in unprofessional conduct. The court may wish an explanation for the withdrawal, while the lawyer may be bound to keep confidential the facts that would constitute such an explanation. The lawyer's statement that professional considerations require termination of the representation ordinarily should be accepted as sufficient.

A client has a right to discharge a lawyer at any time, with or without cause, subject to liability for payment for the lawyer's services. Where future dispute about the withdrawal may be anticipated, it may be advisable to prepare a written statement reciting the circumstances.

Whether a client can discharge appointed counsel may depend on applicable law. A client seeking to do so should be given a full explanation of the consequences. These consequences may include a decision by the appointing authority that appointment of successor counsel is unjustified, thus requiring the client to represent himself.

If the client is mentally incompetent, the client may lack the legal capacity to discharge the lawyer, and in any event the discharge may be seriously adverse to the client's interests. The lawyer should make special effort to help the client consider the consequences and, in an extreme case, may initiate proceedings for a conservatorship or similar protection of the client.

A lawyer may withdraw from representation in some circumstances. Withdrawal is justified if the client persists in a course of action that the lawyer reasonably believes is criminal or fraudulent, for a lawyer is not required to be associated with such conduct even if the lawyer does not further it. Withdrawal is also permitted if the lawyer's services were misused in the past even if that would materially prejudice the client. The lawyer also may withdraw where the client insists on a repugnant or imprudent objective.

A lawyer may withdraw if the client refuses to abide by the terms of an agreement relating to the representation, such as an agreement concerning fees or court costs or an agreement limiting the objectives of the representation.

Even if the lawyer has been unfairly discharged by the client, a lawyer must take all reasonable steps to mitigate the consequences to the client.

The lawyer may never retain papers to secure a fee. Generally, anything in the file which would be helpful to successor counsel should be turned over. This includes papers and other things delivered to the discharged lawyer by the client such as original instruments, correspondence, and cancelled checks. Copies of all correspondence received and generated by the withdrawing or discharged lawyer should be released as well as legal instruments, pleadings, and briefs submitted by either side or prepared and ready for submission. The lawyer's personal notes and incomplete work product need not be released.

A lawyer who has represented an indigent on an appeal which has been concluded and who obtained a trial transcript furnished by the State for use in preparing the appeal, must turn over the transcript to the former client upon request, the transcript being property to which the former client is entitled.

CANON III. A LAWYER SHOULD ASSIST IN PREVENTING THE UNAUTHORIZED PRACTICE OF LAW.

RULE 3.1 Aiding Unauthorized Practice of Law.

(A) A lawyer shall not aid a person not licensed to practice law in North Carolina in the unauthorized practice of law.

(B) A lawyer shall not practice law in a jurisdiction where to do so would be in violation of regulations of the profession in that jurisdiction.

(C) A lawyer or law firm shall not employ a disbarred or suspended lawyer as a law clerk or legal assistant if that individual was associated with such lawyer or law firm at any time on or after the date of the acts which resulted in disbarment or suspension through and including the effective date of disbarment or suspension.

(D) A lawyer or law firm employing a disbarred or suspended lawyer as a law clerk or legal assistant shall not represent any client represented by the disbarred or suspended lawyer or by any lawyer with whom the disbarred or suspended lawyer practiced during the period on or after the date of the acts which resulted in disbarment or suspension through and including the effective date of disbarment or suspension.

COMMENT:

The definition of the practice of law is established by G.S. 84-2.1. Limiting the practice of law to members of the bar protects the public against rendition of legal services by unqualified

persons. Paragraph (A) does not prohibit a lawyer from employing the services of paraprofessionals and delegating functions to them, so long as the lawyer retains responsibility for the delegated work. See Rule 3.3. Likewise, it does not prohibit lawyers from providing professional advice and instruction to non-lawyers whose employment requires knowledge of law; for example, claims adjusters, employees of financial or commercial institutions, social workers, accountants and persons employed in government agencies. In addition, a lawyer may counsel non-lawyers who wish to proceed pro se.

In the absence of statutory prohibitions or specific conditions placed on a disbarred or suspended attorney in the order revoking or suspending the license, such individual may be hired to perform the services of a law clerk or legal assistant by a law firm with which he was not affiliated at the time of or after the acts resulting in discipline. Such employment is, however, subject to certain restrictions. A licensed attorney in the firm must take full responsibility for and employ independent judgment in adopting any research, investigative results, briefs, pleadings, or other documents or instruments drafted by such individual. The individual may not directly advise clients or communicate in person or in writing in such a way as to imply that he is acting as an attorney or in any way in which he or she seems to assume responsibility for a client's legal matters. The disbarred or suspended attorney should have no communications or dealings with or on behalf of clients represented by such disbarred or suspended attorneys or by any individual or group of individuals with whom he or she practiced during the period on or after the date of the acts which resulted in discipline through and including the effective date of the discipline. Further, the employing attorney or law firm should perform no services for clients represented by the disbarred or suspended attorney during such period. Care should be taken to ensure that clients fully understand that the disbarred or suspended attorney is not acting as an attorney, but merely as a law clerk or lay employee. Under some circumstances, as where the individual may be known to clients or in the community, it may be necessary to make an affirmative statement or disclosure concerning the disbarred or suspended attorney's status with the law firm. Additionally, a disbarred or suspended attorney should be paid on some fixed basis, such as a straight salary or hourly rate, rather than on the basis of fees generated or received in connection with particular matters on which he or she works. Under these circumstances, a law firm employing a disbarred or suspended attorney would not be acting unethically

and would not be assisting a non-lawyer in the unauthorized practice of law.

An attorney or law firm should not employ a disbarred or suspended attorney who was associated with such attorney or firm at any time on or after the date of the acts which resulted in the disbarment or suspension through and including the time of the disbarment or suspension. Such employment would show disrespect for the court or body which disbarred or suspended the attorney. Such employment would also be likely to be prejudicial to the administration of justice and would create an appearance of impropriety. It would also be practically impossible for the disciplined lawyer to confine himself to activities not involving the actual practice of law if he were employed in his former office setting and obliged to deal with the same staff and clientele.

RULE 3.2 Dividing Legal Fees with a Non-Lawyer

A lawyer or law firm shall not share legal fees with a non-lawyer, except that:

(A) An agreement by a lawyer with his firm, partner, or associate may provide for the payment of money, over a reasonable period of time after his death, to his estate or to one or more specified persons.

(B) A lawyer who undertakes to complete unfinished legal business of a deceased lawyer or disbarred lawyer may pay to the estate of the deceased lawyer or to the disbarred lawyer that proportion of the total compensation which fairly represents the services rendered by the deceased lawyer or disbarred lawyer.

(C) A lawyer or law firm may include non-lawyer employees in a retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement.

COMMENT:

The provisions of this Rule express traditional limitations on sharing fees. These limitations are to protect the lawyer's professional independence of judgment.

RULE 3.3 Responsibilities Regarding Non-Lawyer Assistants

With respect to a non-lawyer employed or retained by or associated with a lawyer:

(A) A partner in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the non-lawyer's conduct is compatible with the professional obligations of the lawyer;

(B) A lawyer having direct supervisory authority over a non-lawyer shall make reasonable efforts to ensure that the non-lawyer's conduct is compatible with the professional obligations of the lawyer; and

(C) A lawyer shall be responsible for conduct of such a non-lawyer that would violate the Rules of Professional Conduct if engaged in by a lawyer if:

(1) The lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

(2) The lawyer is a partner in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

COMMENT:

Lawyers generally employ assistants in their practice, including secretaries, investigators, law student interns, and paraprofessionals. Such assistants, whether employees or independent contractors, act for the lawyer in rendition of the lawyer's professional services. A lawyer should give such assistants appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information relating to representation of the client, and should be responsible for their work product. The measures employed in supervising non-lawyers should take account of the fact that they do not have legal training and are not subject to professional discipline.

CANON IV. A LAWYER SHOULD PRESERVE THE CONFIDENCES OF HIS CLIENT.

RULE 4 Preservation of Confidential Information

(A) "Confidential information" refers to information protected by the attorney-client privilege under applicable law, and other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client. For the purposes of this rule, "client" refers to present and former clients.

(B) Except when permitted under Rule 4(C), a lawyer shall not knowingly:

(1) Reveal confidential information of his client.

(2) Use confidential information of his client to the disadvantage of the client.

(3) Use confidential information of his client for the advantage of himself or a third person, unless the client consents after full disclosure.

(C) A lawyer may reveal:

(1) Confidential information, the disclosure of which is impliedly authorized by the client as necessary to carry out the goals of the representation.

(2) Confidential information with the consent of the client or clients affected, but only after full disclosure to them.

(3) Confidential information when permitted under the Rules of Professional Conduct or required by law or court order.

(4) Confidential information concerning the intention of his client to commit a crime, and the information necessary to prevent the crime.

(5) Confidential information to the extent the lawyer reasonably believes necessary to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client; to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved; or to respond to allegations in any proceeding concerning the lawyer's representation of the client.

COMMENT:

The lawyer is part of a judicial system charged with upholding the law. One of the lawyer's functions is to advise clients so that they may avoid any violation of the law in the proper exercise of their rights.

The observance of the ethical obligation of a lawyer to hold inviolate confidential information of the client not only facilitates the full development of facts essential to proper representation of the client but also encourages people to seek early legal assistance.

Almost without exception, clients come to lawyers in order to determine what their rights are and what is, in the maze of laws

and regulations, deemed to be legal and correct. The common law recognizes that the client's confidences must be protected from disclosure.

A fundamental principle in the client-lawyer relationship is that the lawyer maintain confidentiality of information relating to the representation. The client is thereby encouraged to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter.

The principle of confidentiality is given effect in two related bodies of law, the attorney-client privilege (which includes the work product doctrine) in the law of evidence and the rule of confidentiality established in professional ethics. The attorney-client privilege applies in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule applies not merely to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law.

The requirement of maintaining confidentiality of information relating to representation applies to government lawyers who may disagree with the policy goals that their representation is designed to advance.

A lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation, except to the extent that the client's instructions or special circumstances limit that authority. In litigation, for example, a lawyer may disclose information by admitting a fact that cannot properly be disputed, or in negotiation by making a disclosure that facilitates a satisfactory conclusion.

Lawyers in a firm may, in the course of the firm's practice, disclose to each other information relating to a client of the firm, unless the client has instructed that particular information be confined to a specified lawyer or lawyers.

The confidentiality rule is subject to limited exceptions. For instance, in becoming privy to information about a client, a lawyer may foresee that the client intends to commit a crime and may reveal that information to prevent the crime. However, to

the extent a lawyer is required or permitted to disclose a client's purposes, the client will be inhibited from revealing facts which would enable the lawyer to counsel against a wrongful course of action. The public is better protected if full and open communication by the client is encouraged than if it is inhibited.

Several situations must be distinguished.

First, the lawyer may not counsel or assist a client in conduct that is criminal or fraudulent. Similarly, a lawyer has a duty not to use false evidence. This duty is essentially a special instance of the duty to avoid assisting a client in criminal or fraudulent conduct.

Second, the lawyer may have been innocently involved in past conduct by the client that was criminal or fraudulent. In such a situation the lawyer has not violated Rule 7.2(A)(8), because to "counsel or assist" criminal or fraudulent conduct requires knowing that the conduct is of that character.

Third, the lawyer may learn that a client intends prospective conduct that is criminal. As stated in paragraph (C)(4), the lawyer has professional discretion to reveal information in order to prevent the crime. It is, of course, sometimes difficult for a lawyer to "know" when such a purpose will actually be carried out, for the client may have a change of mind.

The lawyer's exercise of discretion requires consideration of such factors as the nature of the lawyer's relationship with the client and with those who might be injured by the client, the lawyer's own involvement in the transaction, and factors that may extenuate the conduct in question. Where practical, the lawyer should seek to persuade the client to take suitable action. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to the purpose. A lawyer's decision not to take preventive action permitted by paragraph (C)(4) does not violate this Rule.

After withdrawal the lawyer is required to refrain from making disclosure of the client's confidences, except as otherwise provided in Rule 4. This Rule does not prevent the lawyer from giving notice of the fact of withdrawal, and the lawyer may also withdraw or disaffirm any opinion, document, affirmation, or the like.

Where a legal claim or disciplinary charge alleges complicity of the lawyer in a client's conduct or other misconduct of the lawyer involving representation of the client, the lawyer may re-

spond to the extent the lawyer reasonably believes necessary to establish a defense. The same is true with respect to a claim involving the conduct or representation of a former client. The lawyer's right to respond arises when an assertion of such complicity has been made. Paragraph (C)(5) does not require the lawyer to await the commencement of an action or proceeding that charges such complicity, so that the defense may be established by responding directly to a third party who has made such an assertion. The right to defend, of course, applies where a proceeding has been commenced. Where practicable and not prejudicial to the lawyer's ability to establish the defense, the lawyer should advise the client of the third party's assertion and request that the client respond appropriately. In any event, disclosure should be no greater than the lawyer reasonably believes is necessary to vindicate innocence, the disclosure should be made in a manner which limits access to the information to the tribunal or other persons having a need to know it, and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.

If the lawyer is charged with wrongdoing in which the client's conduct is implicated, the rule of confidentiality should not prevent the lawyer from defending against the charge. Such a charge can arise in a civil, criminal or professional disciplinary proceeding, and can be based on a wrong allegedly committed by the lawyer against the client, or on a wrong alleged by a third person; for example, a person claiming to have been defrauded by the lawyer and client acting together. A lawyer entitled to a fee is permitted by paragraph (C)(5) to prove the services rendered in an action to collect it. This aspect of the rule expresses the principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary. As stated above, the lawyer must make every effort practicable to avoid unnecessary disclosure of information relating to representation, to limit disclosure to those having the need to know it, and to obtain protective orders or make other arrangements minimizing the risk of disclosure.

If a lawyer is called as a witness to give testimony concerning a client, absent waiver by the client, Rule 4(B) requires the lawyer to invoke the attorney-client privilege when it is applicable. The lawyer must comply with the final orders of a court or other tribunal of competent jurisdiction requiring the lawyer to give information about the client.

The Rules of Professional Conduct in various circumstances permit or require a lawyer to disclose information relating to the representation. A lawyer may be obligated or permitted by other provisions of law to give information about a client. Whether another provision of law supersedes Rule 4 is a matter of interpretation beyond the scope of these Rules, but a presumption should exist against such a supersession.

The duty of confidentiality continues after the client-lawyer relationship has terminated.

CANON V. A LAWYER SHOULD EXERCISE INDEPENDENT PROFESSIONAL JUDGMENT ON BEHALF OF HIS CLIENT.

RULE 5.1 Conflicts of Interest: General Rule

(A) A lawyer shall not represent a client if the representation of that client will be or is likely to be directly adverse to another client, unless:

(1) The lawyer reasonably believes the representation will not adversely affect the interest of the other client; and

(2) Each client consents after full disclosure which shall include explanation of the implications of the common representation and the advantages and risks involved.

(B) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

(1) The lawyer reasonably believes the representation will not be adversely affected; and

(2) The client consents after full disclosure which shall include explanation of the implications of the common representation and the advantages and risks involved.

(C) A lawyer shall have a continuing obligation to evaluate all situations involving potentially conflicting interests, and shall withdraw from representation of any party he cannot adequately represent or represent without using confidential information or secrets of another client or former client except as Rule 4 would permit with respect to a client.

(D) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after full disclosure.

COMMENT:

Loyalty is an essential element in the lawyer's relationship to a client. An impermissible conflict of interest may exist before representation is undertaken, in which event the representation should be declined. If such a conflict arises after representation has been undertaken, the lawyer should withdraw from the representation. See Rule 2.8.

As a general proposition, loyalty to a client prohibits undertaking representation directly adverse to that client without that client's consent. Paragraph (A) expresses that general rule. Thus, a lawyer ordinarily may not act as advocate against a person the lawyer represents in some other matter, even if it is wholly unrelated. On the other hand, simultaneous representation in unrelated matters of clients whose interests are only generally adverse, such as competing economic enterprises, does not require consent of the respective clients. Paragraph (A) applies only when the representation of one client would be directly adverse to the other.

Loyalty to a client is also impaired when a lawyer cannot consider, recommend or carry out an appropriate course of action for the client because of the lawyer's other responsibilities or interests. The conflict in effect forecloses alternatives that would otherwise be available to the client. Paragraph (B) addresses such situations. A possible conflict does not itself preclude the representation. The critical questions are the likelihood that a conflict will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client. Consideration should be given to whether the client wishes to accommodate the other interest involved.

A client may consent to representation notwithstanding a conflict. However, as indicated in paragraph (A)(1) with respect to representation directly adverse to a client, and paragraph (B)(1) with respect to material limitations on representation of a client, when a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances, the law-

yer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent. When more than one client is involved, the question of conflict must be resolved as to each client. Moreover, there may be circumstances where it is impossible to make the disclosure necessary to obtain consent. For example, when the lawyer represents different clients in related matters and one of the clients refuses to consent to the disclosure necessary to permit the other client to make an informed decision, the lawyer cannot properly ask the latter to consent.

The lawyer's own interest should not be permitted to have adverse effect on representation of a client. For example, a lawyer's need for income should not lead the lawyer to undertake matters that cannot be handled competently and at a reasonable fee. If the probity of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice. A lawyer may not allow related business interests to affect representation, for example, by referring clients to an enterprise in which the lawyer has an undisclosed interest.

Paragraph (A) prohibits representation of opposing parties in litigation. Simultaneous representation of parties whose interests in litigation may conflict, such as co-plaintiffs or co-defendants, is governed by paragraph (B). An impermissible conflict may exist by reason of substantial discrepancy in the parties' testimony, incompatibility in positions in relation to an opposing party or the fact that there are substantially different possibilities of settlement of the claims or liabilities in question. Such conflicts can arise in criminal cases as well as civil. The potential for conflict of interest in representing multiple defendants in a criminal case is so grave that ordinarily a lawyer should decline to represent more than one codefendant. On the other hand, common representation of persons having similar interests is proper if the risk of adverse effect is minimal and the requirements of paragraph (B) are met.

Ordinarily, a lawyer may not act as advocate against a client the lawyer represents in some other matter, even if the other matter is wholly unrelated. However, there are circumstances in which a lawyer may act as advocate against a client. For example, a lawyer representing an enterprise with diverse operations may accept employment as an advocate against the enterprise in an unrelated matter if doing so will not adversely affect the lawyer's relationship with the enterprise or conduct of the suit and if both

clients consent upon consultation. The propriety of concurrent representation can depend on the nature of the litigation. For example, a suit charging fraud entails conflict to a degree not involved in a suit for a declaratory judgment concerning statutory interpretation.

A lawyer may represent parties having antagonistic positions on a legal question that has arisen in different cases, unless representation of either client would be adversely affected. Thus, it is ordinarily not improper to assert such positions in cases pending in different trial courts, but it may be improper to do so in cases pending at the same time in an appellate court.

Conflicts of interest in contexts other than litigation sometimes may be difficult to assess. Relevant factors in determining whether there is potential for adverse effect include the duration and intimacy of the lawyer's relationship with the client or clients involved, the functions being performed by the lawyer, the likelihood that actual conflict will arise and the likely prejudice to the client from the conflict if it does arise. The question is often one of proximity and degree.

For example, a lawyer may not represent multiple parties to a negotiation whose interests are fundamentally antagonistic to each other, but common representation is permissible where the clients are generally aligned in interest even though there is some difference of interest among them.

Conflict questions may also arise in estate planning and estate administration. A lawyer may be called upon to prepare wills for several family members, such as husband and wife, and, depending upon the circumstances, a conflict of interest may arise. In estate administration the identity of the client may be unclear under the law of a particular jurisdiction. Under one view, the client is the fiduciary; under another view the client is the estate or trust, including its beneficiaries. The lawyer should make clear the relationship to the parties involved.

A lawyer for a corporation or other organization who is a member of its board of directors should determine whether the responsibilities of the two roles may conflict. The lawyer may be called on to advise the corporation in matters involving actions of the directors. Consideration should be given to the frequency with which such situations may arise, the potential intensity of the conflict, the effect of the lawyer's resignation from the board and the possibility of the corporation's obtaining legal advice from another lawyer in such situations. If there is material risk that

the dual role will compromise the lawyer's independence of professional judgment, the lawyer should not serve as a director.

Resolving questions of conflict of interest is primarily the responsibility of the lawyer undertaking the representation. In litigation, a court may raise the question when there is reason to infer that the lawyer has neglected the responsibility. In a criminal case, inquiry by the court is generally required when a lawyer represents multiple defendants. Where the conflict is such as clearly to call in question the fair or efficient administration of justice, opposing counsel may properly raise the question. Such an objection should be viewed with caution, however, for it can be misused as a technique of harassment.

RULE 5.2 The Lawyer as Witness

(A) A lawyer shall not accept employment in contemplated or pending litigation if he knows or it is obvious that he or a lawyer in his firm ought to be called as a witness, except that he may undertake the employment and he or a lawyer in his firm may testify

(1) If the testimony will relate solely to an uncontested matter.

(2) If the testimony will relate solely to a matter of formality and there is no reason to believe that substantial evidence will be offered in opposition to the testimony.

(3) If the testimony will relate solely to the nature and value of legal services rendered in the case by the lawyer or his firm to the client.

(4) As to any matter, if refusal would work a substantial hardship on the client because of the distinctive value of the lawyer or his firm as counsel in the particular case.

(B) If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that he or a lawyer in his firm ought to be called as a witness on behalf of his client, he shall withdraw from the conduct of the trial and his firm, if any, shall not continue representation in the trial, except that he may continue the representation and he or a lawyer in his firm may testify under the circumstances enumerated in (A) above.

(C) If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that he or a lawyer in his firm may be called as a witness other than on behalf of his client, he may continue the representation until it is apparent that his testimony is or may be prejudicial to his client.

COMMENT:

Combining the roles of advocate and witness can prejudice the opposing party and can involve a conflict of interest between the lawyer and client.

A witness is required to testify on the basis of personal knowledge while an advocate is expected to explain and comment on evidence given by others. It may not be clear whether a statement by an advocate-witness should be taken as proof or as an analysis of the proof.

Paragraph (A)(1) recognizes that if the testimony will be uncontested, the ambiguities in the dual role are purely theoretical. Paragraph (A)(3) recognizes that where the testimony concerns the extent and value of legal services rendered in the action in which the testimony is offered, permitting the lawyers to testify avoids the need for a second trial with new counsel to resolve that issue. Moreover, in such a situation the judge has first-hand knowledge of the matter in issue; hence, there is less dependence on the adversary process to test the credibility of the testimony.

Apart from these two exceptions, paragraph (A)(4) recognizes that a balancing is required between the interests of the client and those of the opposing party. Whether the opposing party is likely to suffer prejudice depends on the nature of the case, the importance and probable tenor of the lawyer's testimony, and the probability that the lawyer's testimony will conflict with that of other witnesses. Even if there is risk of such prejudice, in determining whether the lawyer should be disqualified due regard must be given to the effect of disqualification on the lawyer's client. It is relevant that one or both parties could reasonably foresee that the lawyer would probably be a witness.

RULE 5.3 Avoiding Acquisition of Interest in Litigation

(A) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation he is conducting for a client, except that he may:

(1) Acquire a lien granted by law to secure his fee or expenses.

(2) Contract with a client for a reasonable contingent fee in civil cases, except as prohibited by Rule 2.6.

(B) While representing a client in connection with contemplated or pending litigation, a lawyer shall not advance or guarantee financial assistance to his client, except that a lawyer may advance or guarantee the expenses of litigation, including court costs, expenses of investigation, expenses of medical examination and costs of obtaining and presenting evidence, provided the client remains ultimately liable for such expenses.

COMMENT:

A lawyer's acquisition of a proprietary interest in his client's cause of action or any res involved therein might cloud his judgment and impair his ability to function as an advocate.

RULE 5.4 Limiting Business Relations with a Client

(A) A lawyer shall not enter into a business transaction with a client if they have differing interests therein and if the client expects the lawyer to exercise his professional judgment therein for the protection of the client unless the client has consented after full disclosure. A lawyer shall not enter into a business transaction with a client under any circumstances unless it is fair to the client.

(B) Prior to conclusion of all aspects of the matter giving rise to his employment, a lawyer shall not enter into any arrangement or understanding with a client or a prospective client by which he acquires an interest in publication rights with respect to the subject matter of his employment or proposed employment.

(C) During or subsequent to legal representation of a client, a lawyer shall not enter into a business transaction with a client for which a fee or commission will be charged in lieu of, or in addition to, a legal fee, if the business transaction is related to the subject matter of the legal representation, any financial proceeds from the representation, or any information, confidential or otherwise, acquired by the lawyer during the course of the representation.

COMMENT:

As a general principle, all transactions between client and lawyer should be fair and reasonable to the client. In such transactions a review by independent counsel on behalf of the client is often advisable. Furthermore, a lawyer may not exploit information relating to the representation to the client's disadvantage or his own advantage, unless the client consents after full disclosure.

For example, a lawyer who has learned that the client is investing in specific real estate may not, without the client's consent, seek to acquire nearby property where doing so would adversely affect the client's plan for investment.

An agreement by which a lawyer acquires literary or media rights concerning the conduct of the representation creates a conflict between the interests of the client and the personal interests of the lawyer. Measures suitable in the representation of the client may detract from the publication value of an account of the representation. Paragraph (B) does not prohibit a lawyer representing a client in a transaction concerning literary property from agreeing that the lawyer's fee shall consist of a share in ownership in the property, if the arrangement conforms to Rule 2.6 and Rule 5.3.

Because of actual and potential conflicts of interests, a lawyer may not sell business services to a client or former client if the proposed transaction relates to the subject matter or the proceeds of representation. For example, a lawyer who is also a securities broker or insurance agent should not endeavor to sell securities or insurance to a client when he knows by virtue of the representation that such client has received funds suitable for investment.

RULE 5.5 Client Gifts

A lawyer shall not prepare an instrument giving the lawyer or a person related to the lawyer as a parent, child, sibling, or spouse any substantial gift from a client, including a testamentary gift, except where the client is related to the donee.

COMMENT:

A lawyer may accept a gift from a client, if the transaction meets general standards of fairness. For example, a simple gift such as a present given at a holiday or as a token of appreciation is permitted. If effectuation of a substantial gift requires preparing a legal instrument such as a will or conveyance, however, the client should have the detached advice that another lawyer can provide. Paragraph (C) recognizes an exception where the client is a relative of the donee or the gift is not substantial.

RULE 5.6 Fees from Persons other than the Client

A lawyer shall not accept compensation for representing a client from one other than the client unless:

(A) The client consents after full disclosure;

(B) There is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and

(C) Information relating to representation of the client is protected as required by Rule 4.

COMMENT:

A lawyer may be paid from a source other than the client, if the client is informed of that fact and consents and the arrangement does not compromise the lawyer's duty of loyalty to the client. For instance, when a corporation and its directors or employees are involved in a controversy in which they have conflicting interests, the corporation may provide funds for separate legal representation of the directors or employees, if the clients consent after consultation and the arrangement ensures the lawyer's professional independence.

Rule 5.6 requires disclosure of the fact that the lawyer's services are being paid for by a third party. Such an arrangement must also conform to the requirements of Rule 4 concerning confidentiality and Rule 5.1 concerning conflict of interest. Where the client is a class, consent may be obtained on behalf of the class by court-supervised procedure.

RULE 5.7 Settlement of Claims of Multiple Clients

A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless each client consents after full disclosure, including disclosure of the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

RULE 5.8 Malpractice Liability

A lawyer shall not make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless permitted by law and the client is independently represented in making the agreement, or settle a disputed claim for such liability with an unrepresented client or former client without first advising that person in writing that independent representation may be appropriate in connection therewith.

RULE 5.9 Representation of Adverse Parties by Related Lawyers

A lawyer related to another lawyer as parent, child, sibling, or spouse shall not represent a client in a representation directly

adverse to a person who the lawyer knows is represented by the other lawyer except upon consent by the client after full disclosure regarding the relationship. This provision shall not be construed to disqualify other lawyers in the affected lawyer's firm.

COMMENT:

Rule 5.9 applies to related lawyers who are in different firms. Related lawyers in the same firm are governed by Rules 5.1 and 5.10. The disqualification stated in Rule 5.9 is personal and is not imputed to members of firms with whom the lawyers are associated.

RULE 5.10 Responsibility of Counsel Representing an Organization

A lawyer who represents a corporation or other organization represents and owes his allegiance to the entity and shall not permit his professional judgment to be compromised in favor of any other entity or individual.

COMMENT:

A lawyer employed or retained by a corporation or similar entity owes his allegiance to the entity and not to a stockholder, director, officer, employee, representative, or other person connected with the entity. In advising the entity, a lawyer should keep paramount its interest and his professional judgment should not be influenced by the personal desires of any person or organization. Occasionally a lawyer for an entity is requested by a stockholder, director, officer, employee, representative, or other person connected with the entity to represent him in an individual capacity; in such a case the lawyer may serve the individual only if the lawyer is convinced that differing interests are not present.

The lawyer representing an entity should keep in mind that confidential information received by the lawyer during the course of the professional relationship is protected by Rule 4 and may not be disclosed to persons or entities associated with the entity unless such disclosure is explicitly or impliedly authorized by the client in order to carry out the representation or as otherwise permitted by Rule 4.

The lawyer is also obligated to generally comply with Rule 5.1 concerning conflicts of interest.

RULE 5.11 Imputed Disqualification: General Rule

(A) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practic-

ing alone would be prohibited from doing so by the Rules of Professional Conduct, unless otherwise specifically provided herein.

(B) When a lawyer becomes associated with a firm, the firm may not knowingly represent a person in the same or a substantially related matter in which that lawyer, or a firm with which the lawyer was associated, had previously represented a client whose interests are materially adverse to that person and about whom the lawyer had acquired information protected by Rule 4 that is material to the matter.

(C) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer unless:

(1) The matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and

(2) A lawyer remaining in the firm has information protected by Rule 4 that is material to the matter.

(D) A disqualification prescribed by this Rule may be waived by the affected client under the conditions stated in Rule 5.1.

COMMENT:

For purposes of the Rules of Professional Conduct, the term "firm" includes lawyers in a private firm, and lawyers employed in the legal department of a corporation or other organization, or in a legal services organization. Whether two or more lawyers constitute a firm within this definition can depend on the specific facts. For example, two practitioners who share office space and occasionally consult or assist each other ordinarily would not be regarded as constituting a firm. The terms of any formal agreement between associated lawyers are relevant in determining whether they are a firm, as is the fact that they have mutual access to confidential information concerning the clients they serve.

With respect to the law department of an organization, there is ordinarily no question that the members of the department constitute a firm within the meaning of the Rules of Professional Conduct. However, there can be uncertainty as to the identity of the client. For example, it may not be clear whether the law department of a corporation represents a subsidiary or an affiliated corporation, as well as the corporation by which the

members of the department are directly employed. A similar question can arise concerning an unincorporated association with its local affiliates.

Similar questions can also arise with respect to lawyers in legal aid. Lawyers employed in the same unit of a legal service organization constitute a firm, but not necessarily those employed in separate units. As in the case of independent practitioners, whether the lawyers should be treated as associated with each other can depend on the particular rule that is involved, and on the specific facts of the situation.

Where a lawyer has joined a private firm after having represented the government, the situation is governed by Rule 9.1(A) and (B); where a lawyer represents the government after having served private clients, the situation is governed by Rule 9.1(C). The individual lawyer involved is bound by the Rules generally.

Different provisions are thus made for movement of a lawyer from one private firm to another and for movement of a lawyer between a private firm and the government. The government is entitled to protection of its client confidences, and therefore to the protections provided in Rules 4 and 9.1. However, if the more extensive disqualification in Rule 5.5 were applied to former government lawyers, the potential effect on the government would be unduly burdensome. The government deals with all private citizens and organizations, and thus has a much wider circle of adverse legal interests than does any private law firm. In these circumstances, the government's recruitment of lawyers would be seriously impaired if Rule 5.5 were applied to the government. On balance, therefore, the government is better served in the long run by the protections stated in Rule 9.1.

The rule of imputed disqualification stated in paragraph (A) gives effect to the principle of loyalty to the client as it applies to lawyers who practice in a law firm. Such situations can be considered from the premise that a firm of lawyers is essentially one lawyer for purposes of the rules governing loyalty to the client, or from the premise that each lawyer is vicariously bound by the obligation of loyalty owed by each lawyer with whom the lawyer is associated. Paragraph (A) operates only among the lawyers currently associated in a firm. When a lawyer moves from one firm to another, the situation is governed by paragraphs (B) and (C).

When lawyers have been associated in a firm but then end their association, however, the problem is more complicated. The fiction that the law firm is the same as a single lawyer is no longer wholly realistic. There are several competing considerations. First, the client previously represented must be reasonably

assured that the principle of loyalty to the client is not compromised. Second, the rule of disqualification should not be so broadly cast as to preclude other persons from having reasonable choice of legal counsel. Third, the rule of disqualification should not unreasonably hamper lawyers from forming new associations and taking on new clients after having left a previous association. In this connection, it should be recognized that today many lawyers practice in firms, that many to some degree limit their practice to one field or another, and that many move from one association to another several times in their careers. If the concept of imputed disqualification were defined with unqualified rigor, the result would be radical curtailment of the opportunity of lawyers to move from one practice setting to another and of the opportunity of clients to change counsel.

Reconciliation of these competing principles in the past has been attempted under two rubrics. One approach has been to seek per se rules of disqualification. For example, it has been held that a partner in a law firm is conclusively presumed to have access to all confidences concerning all clients of the firm. Under this analysis, if a lawyer has been a partner in one law firm and then becomes a partner in another law firm, there is a presumption that all confidences known by a partner in the first firm are known to all partners in the second firm. This presumption might properly be applied in some circumstances, especially where the client has been extensively represented, but may be unrealistic where the client was represented only for limited purposes. Furthermore, such a rigid rule exaggerates the difference between a partner and an associate in modern law firms.

The other rubric formerly used for dealing with vicarious disqualification is the appearance of impropriety proscribed in Canon 9 of the ABA Model Code of Professional Responsibility. This rubric has a twofold problem. First, the appearance of impropriety can be taken to include any new client-lawyer relationship that might make a former client feel anxious. If that meaning were adopted, disqualification would become little more than a question of subjective judgment by the former client. Second, since "impropriety" is undefined, the term "appearance of impropriety" is question-begging. It therefore has to be recognized that the problem of imputed disqualification cannot be properly resolved either by simple analogy to a lawyer practicing alone or by the very general concept of appearance of impropriety.

A rule based on a functional analysis is more appropriate for determining the question of vicarious disqualification. Two functions are involved; preserving confidentiality and avoiding positions adverse to a client.

Preserving confidentiality is a question of access to information. Access to information, in turn, is essentially a question of fact in particular circumstances, aided by inferences, deductions or working presumptions that reasonably may be made about the way in which lawyers work together. A lawyer may have general access to files of all clients of a law firm and may regularly participate in discussions of their affairs; it should be inferred that such a lawyer in fact is privy to all information about all the firm's clients. In contrast, another lawyer may have access to files of only a limited number of clients and participate in discussion of the affairs of no other clients; in the absence of information to the contrary, it should be inferred that such a lawyer in fact is privy to information about the clients actually served but not those of other clients.

Application of paragraphs (B) and (C) depends on a situation's particular facts. In any such inquiry, the burden of proof should rest upon the firm whose disqualification is sought.

Paragraphs (B) and (C) operate to disqualify the firm only when the lawyer involved has actual knowledge of information protected by Rule 4. Thus, if a lawyer while with one firm acquired no knowledge of information relating to a particular client of the firm, and that lawyer later joined another firm, neither the lawyer individually nor the second firm is disqualified from representing another client in the same or a related matter even though the interests of the two clients conflict.

Independent of the question of disqualification of a firm, a lawyer changing professional association has a continuing duty to preserve confidentiality of information about a client formerly represented.

The second aspect of loyalty to a client is the lawyer's obligation to decline subsequent representations involving positions adverse to a former client arising in substantially related matters. This obligation requires abstention from adverse representation by the individual lawyer involved, but does not properly entail abstention of other lawyers through imputed disqualification. Thus, if a lawyer left one firm for another, the new affiliation would not preclude the firms involved from continuing to represent clients with adverse interests in the same or related matters, so long as the conditions of Rule 5.5(B) and (C) concerning confidentiality have been met.

CANON VI. A LAWYER SHOULD REPRESENT HIS CLIENT COMPETENTLY.

RULE 6 Failing to Act Competently

(A) A lawyer shall not:

(1) Handle a legal matter which he knows or should know that he is not competent to handle, without associating with him a lawyer who is competent to handle it. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

(2) Handle a legal matter without preparation adequate under the circumstances.

(B) A lawyer shall:

(1) Keep the client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.

(2) Explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

(3) Act with reasonable diligence and promptness in representing the client.

COMMENT:

In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter, and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question. In many instances, the required proficiency is that of a general practitioner. Expertise in a particular field of law may be required in some circumstances.

A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar. A newly admitted lawyer can be as competent as a practitioner with long experience. Some important legal skills, such as the analysis of precedent, the evaluation of evidence, and legal drafting, are required in all legal problems.

Perhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge. A lawyer can provide adequate representation in a wholly novel field through necessary study. Competent representation can also be provided through the association of a lawyer of established competence in the field in question.

In an emergency a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required where referral to or consultation or association with another lawyer would be impractical. Even in an emergency, however, assistance should be limited to that reasonably necessary in the circumstances, for ill considered action under emergency conditions can jeopardize the client's interest.

A lawyer may accept representation where the requisite level of competence can be achieved by reasonable preparation. This applies as well to a lawyer who is appointed as counsel for an unrepresented person.

Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation. The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more elaborate treatment than matters of lesser consequence.

To maintain the requisite knowledge and skill, a lawyer should engage in continuing study and education.

The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so. For example, a lawyer negotiating on behalf of a client should provide the client with facts relevant to the matter, inform the client of communications from another party, and take other reasonable steps that will permit the client to make a decision regarding a serious offer from another party. A lawyer who receives from opposing counsel an offer of settlement in a civil controversy or a proffered plea bargain in a criminal case should promptly inform the client of its substance unless prior discussions with the client have left it clear that the proposal will be acceptable. Even when a client

delegates authority to the lawyer, the client should be kept advised of the status of the matter.

Adequacy of communication depends in part on the kind of advice or assistance involved. For example, in negotiations where there is time to explain a proposal, the lawyer should review all important provisions with the client before proceeding to an agreement. In litigation a lawyer should explain the general strategy and prospects of success and ordinarily should consult the client on tactics that might injure or coerce others. On the other hand, a lawyer ordinarily cannot be expected to describe trial or negotiation strategy in detail. The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests, and the client's overall requirements as to the character of representation.

Ordinarily, the information to be provided is that appropriate for a client who is a comprehending and responsible adult. However, fully informing the client according to this standard may be impracticable, for example, where the client is a child or suffers from mental disability. When the client is an organization or group, it is often impossible or inappropriate to inform every one of its members about its legal affairs; ordinarily, the lawyer should address communications to the appropriate officials of the organization. Where many routine matters are involved, a system of limited or occasional reporting may be arranged with the client. Practical exigency may also require a lawyer to act for a client without prior consultation.

In some circumstances, a lawyer may be justified in delaying transmission of information when the client would be likely to react imprudently to an immediate communication. Thus, a lawyer might withhold a psychiatric diagnosis of a client when the examining psychiatrist indicates that disclosure would harm the client. A lawyer may not withhold information to serve the lawyer's own interest or convenience. Rules or court orders governing litigation may provide that information supplied to a lawyer may not be disclosed to the client and should be obeyed.

A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and may take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf. However, a lawyer

is not bound to press for every advantage that might be realized for a client. A lawyer has professional discretion in determining the means by which a matter should be pursued. A lawyer's workload should be controlled so that each matter can be handled adequately.

Perhaps no professional shortcoming is more widely resented than procrastination. A client's interests often can be adversely affected by the passage of time or the change of conditions; in extreme instances, as when a lawyer overlooks a statute of limitations, the client's legal position may be destroyed. Even when the client's interests are not affected in substance, however, unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer's trustworthiness.

Unless the relationship is terminated as provided in Rule 2.8, a lawyer should carry through to conclusion all matters undertaken for a client. If a lawyer's employment is limited to a specific matter, the relationship terminates when the matter has been resolved. If a lawyer has served a client over a substantial period in a variety of matters, the client sometimes may assume that the lawyer will continue to serve on a continuing basis unless the lawyer gives notice of withdrawal. Doubt about whether a client-lawyer relationship still exists should be clarified by the lawyer, preferably in writing, so that the client will not mistakenly suppose the lawyer is looking after the client's affairs when the lawyer has ceased to do so. For example, if a lawyer has handled a judicial or administrative proceeding that produced a result adverse to the client but has not been specifically instructed concerning pursuit of an appeal, the lawyer should advise the client of the possibility of appeal before relinquishing responsibility for the matter.

CANON VII. A LAWYER SHOULD REPRESENT HIS CLIENT ZEALOUSLY WITHIN THE BOUNDS OF THE LAW.

RULE 7.1 Representing the Client Zealously

(A) A lawyer shall not intentionally:

(1) Fail to seek the lawful objectives of his client through reasonably available means permitted by law and these Rules, except as provided by Rule 7.1(B). A lawyer does not violate this Rule, however, by acceding to reasonable requests of opposing counsel which do not prejudice the rights of his client, by being punctual in fulfilling all professional commitments, by

avoiding offensive tactics, or by treating with courtesy and consideration all persons involved in the legal process.

(2) Fail to carry out a contract of employment entered into with a client for professional services, but he may withdraw as permitted under Rules 2.9 and 5.1.

(3) Prejudice or damage his client during the course of the professional relationship, except as required under Rule 7.2(B).

(4) Counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client in making a good faith effort to determine the validity, scope, meaning or application of the law.

(B) In his representation of a client, a lawyer may:

(1) Where permissible, exercise his professional judgment to waive or fail to assert a right or position of his client.

(2) Refuse to aid or participate in conduct that he believes to be unlawful, even though there is some support for an argument that the conduct is legal.

(3) Limit the objectives of the representation if the client consents after full disclosure.

(C) A lawyer shall:

(1) Abide by a client's decision whether to accept an offer of settlement of a matter. In a criminal case, the lawyer shall abide by the client's decision as to the plea to be entered, whether to waive jury trial, and whether the client will testify.

(2) Consult with the client regarding the relevant limitations on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

COMMENT:

Both lawyer and client have authority and responsibility in the objectives and means of representation. The client has ulti-

mate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations. Within those limits, a client also has a right to consult with the lawyer about the means to be used in pursuing those objectives. At the same time, a lawyer is not required to pursue objectives or employ means simply because a client may wish that the lawyer do so. A clear distinction between objectives and means sometimes cannot be drawn, and in many cases the client-lawyer relationship partakes of a joint undertaking. In questions of means, the lawyer should assume responsibility for technical and legal tactical issues, but should defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected.

Legal representation should not be denied to people who are unable to afford legal services, or whose cause is controversial or the subject of popular disapproval. By the same token, representing a client does not constitute approval of the client's views or activities.

The objectives or scope of services provided by a lawyer may be limited by agreement with the client or by the terms under which the lawyer's services are made available to the client. For example, employment may be for a specifically defined purpose. Representation provided through a legal aid agency may be subject to limitations on the types of cases the agency handles. When a lawyer has been retained by an insurer to represent an insured, the representation may be limited to matters related to the insurance coverage. The terms upon which representation is undertaken may exclude specific objectives or means. Such limitations may exclude objectives or means that the lawyer regards as repugnant or imprudent.

An agreement concerning the scope of representation must accord with the Rules of Professional Conduct and other law. Thus, the client may not be asked to agree to representation so limited in scope as to violate Rule 6, or to surrender the right to terminate the lawyer's services or the right to settle litigation that the lawyer might wish to continue.

A lawyer is required to give an honest opinion about the actual consequences that appear likely to result from a client's conduct. The fact that a client uses advice in a course of action that is criminal or fraudulent does not, of itself, make a lawyer a party to the course of action. However, a lawyer may not knowingly assist a client in criminal or fraudulent conduct. There is a critical

distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity.

When the client's course of action has already begun and is continuing, the lawyer's responsibility is especially delicate. The lawyer is not permitted to reveal the client's wrongdoing, except where permitted by Rule 4. However, the lawyer is required to avoid furthering the illicit purpose, for example, by suggesting how it might be concealed. A lawyer may not continue assisting a client in conduct that the lawyer originally supposes is legally proper but then discovers is criminal or fraudulent. Withdrawal from the representation, therefore, may be required.

Where the client is a fiduciary, the lawyer may be charged with special obligations in dealings with a beneficiary.

Paragraph (A)(4) applies whether or not the defrauded party is a party to the transaction. Hence, a lawyer should not participate in a sham transaction; for example, a transaction to effectuate criminal or fraudulent escape of tax liability. Paragraph (A)(4) does not preclude undertaking a criminal defense incident to a general retainer for legal services to a lawful enterprise. The last clause of paragraph (A)(4) recognizes that determining the validity or interpretation of a statute or regulation may require a course of action involving disobedience of the statute or regulation or of the interpretation placed upon it by governmental authorities.

RULE 7.2 Representing the Client Within the Bounds of the Law

(A) In his representation of a client, a lawyer shall not:

(1) File a suit, assert a position, conduct a defense, controvert an issue, delay a trial, or take other action on behalf of his client when he knows or when it is obvious that such action would be frivolous or would serve merely to harass or maliciously injure another.

(2) Knowingly advance a claim or defense that is unwarranted under existing law, except that he may advance such claim or defense if it can be supported by good faith argument for an extension, modification, or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend as to require that every element of the case against his client be established.

(3) Conceal or knowingly fail to disclose that which he is required by law to reveal.

(4) Knowingly make a false statement of law or fact.

(5) Knowingly use perjured testimony or false evidence.

(6) Participate in the creation or preservation of evidence when he knows or it is obvious that the evidence is false.

(7) Unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value.

(8) Counsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent.

(9) Knowingly engage in other illegal conduct or conduct contrary to a Disciplinary Rule.

(B) A lawyer who receives information clearly establishing that:

(1) His client intends to or has, in the course of the representation, perpetrated a fraud upon a person or tribunal shall promptly call upon his client to rectify the same, and, if the client refuses or is unable to do so, he shall discontinue his representation of the client in that matter; and if the representation involves litigation, the lawyer shall (if applicable rules require) request the tribunal to permit him to withdraw, but without necessarily revealing his reason for wishing to withdraw.

(2) A person other than his client has perpetrated a fraud upon a tribunal shall promptly reveal the fraud to the tribunal.

COMMENT:

The advocate's task is to present the client's case with persuasive force. Performance of that duty while maintaining confidences of the client is qualified by the advocate's duty of candor to the tribunal. However, an advocate does not vouch for the evidence submitted in a cause; the tribunal is responsible for assessing its probative value.

An advocate is responsible for pleadings and other documents prepared for litigation, but is usually not required to have

personal knowledge of matters asserted therein, for litigation documents ordinarily present assertions by the client, or by someone on the client's behalf, and not assertions by the lawyer. However, an assertion purporting to be of the lawyer's own knowledge, as in an affidavit by the lawyer or in a statement in open court, may properly be made only when the lawyer knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry. There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation. The obligation prescribed in Rule 7.1(A)(4) not to counsel a client to commit or assist the client in committing a fraud applies in litigation.

When evidence that a lawyer knows to be false is provided by a person who is not the client, the lawyer must refuse to offer it regardless of the client's wishes. If the false evidence is introduced before the lawyer discovers its falsity, the lawyer shall reveal the fraud to the tribunal.

When false evidence is offered by the client, however, a conflict may arise between the lawyer's duty to keep the client's revelations confidential and the duty of candor to the court. Upon ascertaining that material evidence is false, the lawyer should seek to persuade the client that the evidence should not be offered or, if it has been offered, that its false character should immediately be disclosed. If the persuasion is ineffective, the lawyer must seek to withdraw.

RULE 7.3 Special Responsibilities of a Prosecutor

The prosecutor in a criminal or quasi-criminal case shall:

(A) Refrain from prosecuting a charge that he knows is not supported by probable cause, unless otherwise directed by statutory mandate;

(B) Make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;

(C) Not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;

(D) Make timely disclosure to the defense of all evidence or information known to him that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing,

disclose to the defense and to the tribunal all unprivileged mitigating information known to him, except when he is relieved of this responsibility by a protective order of the tribunal; and

(E) Exercise reasonable care to prevent investigators, law enforcement personnel, employees, or other persons assisting or associated with him from making an extrajudicial statement that he would be prohibited from making under Rule 7.7.

COMMENT:

The responsibility of a public prosecutor, which for these purposes includes a government lawyer having a prosecutorial role, differs from that of the usual advocate; his duty is to seek justice, not merely to convict. This special duty exists because (1) the prosecutor represents the sovereign and therefore should use restraint in the discretionary exercise of government powers, such as in the selection of cases to prosecute; (2) during trial the prosecutor is not only an advocate but he also may make decisions normally made by an individual client, and those affecting the public interest should be fair to all; and (3) in our system of criminal justice the accused is to be given the benefit of all reasonable doubts. With respect to evidence and witnesses, the prosecutor has responsibilities different from those of a lawyer in private practice; the prosecutor should make timely disclosure to the defense of available evidence, known to him, that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment. Further, a prosecutor should not intentionally avoid pursuit of evidence merely because he believes it will damage the prosecutor's case or aid the accused.

Paragraph (C) does not apply to an accused appearing pro se with the approval of the tribunal. Nor does it forbid the lawful questioning of a suspect who has knowingly waived the rights to counsel and silence.

The exception in paragraph (D) recognizes that a prosecutor may seek an appropriate protective order from the tribunal if disclosure of information to the defense could result in substantial harm to an individual or to the public interest.

RULE 7.4 Communicating with One of Adverse Interest

During the course of his representation of a client a lawyer shall not:

(A) Communicate or cause another to communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer

in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

(B) Give advice to a person who is not represented by a lawyer, other than the advice to secure counsel, if the interests of such person are, or have a reasonable possibility of being, in conflict with the interests of his client.

(C) In dealing on behalf of a client with a person who is not represented by counsel, state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.

COMMENT:

This Rule does not prohibit a lawyer who does not have a client relative to a particular matter from consulting with a person or entity who, though represented concerning the matter, seeks another opinion as to his legal situation. A lawyer from whom such an opinion is sought should, but is not required to, inform the first lawyer of his participation and advice.

This Rule does not prohibit communication with a party, or an employee of a party, concerning matters outside the representation. For example, the existence of a controversy between a government agency and a private party, or between two organizations, does not prohibit a lawyer for either from communicating with non-lawyer representatives of the other regarding a separate matter. Also, parties to a matter may communicate directly with each other and a lawyer having independent justification for communicating with the other party is permitted to do so. Communications authorized by law include, for example, the right of a party to a controversy with a government agency to speak with government officials about the matter.

After a lawyer for a party has been notified that an adverse or potentially adverse organization is represented by counsel in a particular matter, this rule would prohibit communications by said lawyer concerning the matter with persons having managerial responsibility on behalf of the organization, and with any other employee whose act or omission in connection with that matter may be imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission

on the part of the organization. If an employee of the organization is represented in the matter by his or her own counsel, the consent by that counsel to a communication would be sufficient for purposes of this Rule.

This Rule also covers any person, whether or not a party to a formal proceeding, who is represented by counsel concerning the matter in question.

RULE 7.5 Threatening Criminal Prosecution

A lawyer shall not present, participate in presenting, or threaten to present criminal charges primarily to obtain an advantage in a civil matter.

COMMENT:

The criminal courts are intended for the use of the State in trying persons accused of violating society's penal laws. They are not intended to provide forums for the adjustment of civil disputes. A lawyer should never institute or threaten to institute criminal proceedings to gain a tactical advantage in a civil dispute.

RULE 7.6 Trial Conduct

(A) A lawyer shall not disregard or advise his client to disregard a standing rule of a tribunal or a ruling of a tribunal made in the course of a proceeding, but he may take appropriate steps in good faith to test the validity of such rule or ruling.

(B) In presenting a matter to a tribunal, a lawyer shall disclose:

(1) Legal authority in the controlling jurisdiction known to him to be directly adverse to the position of his client and which is not disclosed by opposing counsel.

(2) Unless privileged or irrelevant, the identities of the clients he represents and the persons who employed him.

(C) In appearing in his professional capacity before a tribunal, a lawyer shall not:

(1) State or allude to any matter that he has no reasonable basis to believe is relevant to the case or that will not be supported by admissible evidence.

(2) Ask any question that he has no reasonable basis to believe is relevant to the case and that is intended to degrade a witness or other person.

(3) Assert his personal knowledge of the facts in issue, except when testifying as a witness.

(4) Assert his personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant, or the guilt or innocence of an accused; but he may argue, on his analysis of the evidence, for any position or conclusion with respect to the matters stated herein.

(5) Fail to comply with known local customs of courtesy or practice of the bar or a particular tribunal without giving to opposing counsel timely notice of his intent not to comply.

(6) Engage in undignified or discourteous conduct which is degrading to a tribunal.

(7) Intentionally or habitually violate any established rule of procedure or evidence.

(8) Engage in conduct intended to disrupt a tribunal.

COMMENT:

The complexity of law often makes it difficult for a tribunal to be fully informed unless the pertinent law is presented by the lawyers in the cause. A tribunal that is fully informed on the applicable law is better able to make a fair and accurate determination of the matter before it. The adversary system contemplates that each lawyer will present and argue the existing law in the light most favorable to his client. Where a lawyer knows of legal authority in the controlling jurisdiction directly adverse to the position of his client, he should inform the tribunal of its existence unless his adversary has done so; but, having made such disclosure, he may challenge its soundness in whole or in part.

In order to bring about just and informed decisions, evidentiary and procedural rules have been established by tribunals to permit the inclusion of relevant evidence and argument and the exclusion of all other considerations. The expression by a lawyer of his personal opinion as to the justness of a cause, as to the credibility of a witness, as to the culpability of a civil litigant, or as to the guilt or innocence of an accused is not a proper subject for argument to the trier of fact. It is improper as to factual matters because admissible evidence possessed by a lawyer should be presented only as sworn testimony. It is improper as to all other matters because, were the rule otherwise, the silence of a lawyer

on a given occasion could be construed unfavorably to his client. However, a lawyer may argue, on his analysis of the evidence, for any position or conclusion with respect to any of the foregoing matters.

Rules of evidence and procedure are designed to lead to just decisions and are part of the framework of the law. Thus, while a lawyer may take steps in good faith and within the framework of the law to test the validity of rules, he is not justified in consciously violating such rules and he should be diligent in his efforts to guard against his unintentional violation of them. As examples, a lawyer should subscribe to or verify only those pleadings that he believes are in compliance with applicable law and rules; a lawyer should not make any prefatory statement before a tribunal in regard to the purported facts of the case on trial unless he believes that his statement will be supported by admissible evidence; a lawyer should not ask a witness a question solely for the purpose of harassing or embarrassing him; and a lawyer should not by subterfuge put before a jury matters which it cannot properly consider.

RULE 7.7 Trial Publicity

(A) A lawyer participating in or associated with the investigation of a criminal matter shall not make or participate in making an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication where there is a reasonable likelihood of interference with a fair jury proceeding. A lawyer may state:

(1) Information contained in a public record.

(2) That the investigation is in progress.

(3) The general scope of the investigation including a description of the offense, and, if permitted by law, the identity of the victim.

(4) A request for assistance in apprehending a suspect or assistance in other matters and the information necessary thereto.

(5) A warning to the public of any danger.

(B) A lawyer associated with the prosecution or defense of a criminal matter shall not, from the time of the filing of a complaint, information, or indictment, the issuance of an arrest warrant, or arrest until conclusion of jury proceedings, make or cause another person to make an extrajudicial statement that a reasona-

ble person would expect to be disseminated by means of public communication if there is a reasonable likelihood of interference with a fair jury proceeding and the statement relates to:

(1) The character, reputation, or prior criminal record (including arrests, indictments, or other charges of crime) of the accused.

(2) The possibility of a plea of guilty to the offense charged or to a lesser offense.

(3) The existence or contents of any confession, admission, or statement given by the accused or his refusal or failure to make a statement.

(4) The performance or results of any examination or test or the refusal or failure of the accused to submit to any examination or test.

(5) The identity, testimony, or credibility of a prospective witness.

(6) Any opinion as to the guilt or innocence of the accused, the evidence, or the merits of the case.

(C) Rule 7.7(B) does not preclude a lawyer during such period from announcing:

(1) The name, age, residence, occupation, and family status of the accused.

(2) If the accused has not been apprehended, any information necessary to aid in his apprehension or to warn the public of any dangers he may present.

(3) A request for assistance in obtaining evidence.

(4) The identity of the victim of the crime.

(5) The fact, time and place of arrest, resistance, pursuit, and use of weapons.

(6) The identity of investigating and arresting officers or agencies and the length of the investigation.

(7) The nature, substance, or text of the charge.

(8) Quotations from or references to public records of the court in the case.

(9) The scheduling or result of any step in the judicial proceedings.

(10) That the accused denies the charges made against him.

(D) A lawyer shall not make or cause another person to make an extrajudicial statement regarding a civil jury proceeding (or an administrative proceeding from which or ancillary to which the right to a civil jury trial exists) that a reasonable person would expect to be disseminated by means of public communication and that the lawyer knows or reasonably should know will have a reasonable likelihood of materially prejudicing such jury proceeding and impairing the integrity of the judicial process. An extrajudicial statement will likely have such an effect when the statement relates to:

(1) The character, credibility, reputation, or criminal record (including arrests, indictments, or other charges of crime, whether past, present or forthcoming) of a party, witness, prospective party, or witness, or the expected testimony of the aforesaid, unless such information would be clearly admissible at the proceeding;

(2) A companion criminal case or proceeding in which there is a common core of facts that could result in incarceration, the possibility of a guilty plea to the offense, or the existence or contents of any confession, admission, or statement given by a party, witness, or prospective party or witness or that person's refusal or failure to make a statement, unless such information would be clearly admissible at the proceeding;

(3) The performance or results of any examination or test, or the refusal of a person to submit to an examination or test, or the identity or nature of physical evidence expected to be presented at trial unless such information would be clearly admissible at the proceeding;

(4) Any opinion as to the guilt or innocence of a party, witness, or prospective party or witness in a companion criminal case or proceeding in which there is a common core of facts that could result in incarceration;

(5) The details of a settlement offer or the failure of the other party to accept a settlement offer;

(6) Information the lawyer knows or reasonably should know is likely to be inadmissible at trial and would, if disclosed, create a substantial risk of prejudicing an impartial proceeding;

(7) Any statement of law or fact which the lawyer knows to be false and which would, if stated, create a substantial risk of prejudicing an impartial proceeding;

(8) Any opinion as to the merits of the claims or defenses of a party, except as required by law or administrative rule.

(E) Any word, phrase, or sentence in paragraph (A) above which may be found by a court to be in violation of the Constitutions of the United States or North Carolina shall be deemed severable from all other words, phrases and sentences of that paragraph.

(F) A lawyer involved in the investigation or litigation of a civil jury matter may state without elaboration:

(1) The general nature of the claim or defense;

(2) The information contained in a public record;

(3) That an investigation of the matter is in progress, including the general scope of the investigation, the offense or claim or defense involved and, except when prohibited by law, the identity of the persons involved;

(4) The scheduling or result of any step in litigation;

(5) A request for assistance in obtaining evidence and information necessary thereto;

(6) A warning of danger concerning the behavior of a person involved, when there is a reason to believe that such danger exists; and

(7) In a companion criminal case:

(a) The name, age, residence, occupation, and family status of the accused.

(b) If the accused has not been apprehended, any information necessary to aid in his apprehension or to warn the public of any dangers he may present.

(c) A request for assistance in obtaining evidence.

(d) The identity of the victim of the crime.

(e) The fact, time, and place of arrest, resistance, pursuit, and use of weapons.

(f) The identity of investigating and arresting officers or agencies and the length of the investigation.

(g) The nature, substance, or text of the charge.

(h) Quotations from or references to public records of the court in the case.

(i) The scheduling or result of any step in the judicial proceedings.

(G) The foregoing provisions of Rule 7.7 do not preclude a lawyer from replying to charges of misconduct publicly made against him or from participating in the proceedings of legislative, administrative, or other investigative bodies.

(H) A lawyer shall exercise reasonable care to prevent his employees and associates from making an extrajudicial statement that he would be prohibited from making under this Rule.

(I) A lawyer, in the representation of a client, shall not knowingly make a false statement of fact, state or allude to any matter or any person not reasonably related to the client's case, or use the public record or the processes of the courts to knowingly convey false statements of fact or other information regarding any matter or any person not reasonably related to the client's case.

COMMENT:

It is difficult to strike a balance between protecting the right to a fair trial and safeguarding the right of free expression. Preserving the right to a fair trial necessarily entails some curtailment of the information that may be disseminated about a party prior to trial, where trial by jury is involved. If there were no such limits, the result would be the practical nullification of the protective effect of the rules of forensic decorum and the exclusionary rules of evidence. On the other hand, there are vital social interests served by the free dissemination of information about events having legal consequences and about legal proceedings themselves. The public has a right to know about threats to its safety and measures aimed at assuring its security. It also has a legitimate interest in the conduct of judicial proceedings, particularly in matters of general public concern. Furthermore, the

subject matter of legal proceedings is often of direct significance in debate and deliberation over questions of public policy.

RULE 7.8 Communication with or Investigation of Jurors

(A) Before the trial of a case a lawyer connected therewith shall not communicate with or cause another to communicate with anyone he knows to be a member of the venire from which the jury will be selected for the trial of the case.

(B) During the trial of a case:

(1) A lawyer connected therewith shall not communicate with or cause another to communicate with any member of the jury.

(2) A lawyer who is not connected therewith shall not communicate with or cause another to communicate with a juror concerning the case.

(C) This rule does not prohibit a lawyer from communicating with veniremen or jurors in the course of official proceedings.

(D) After discharge of the jury from further consideration of a case with which the lawyer was connected, the lawyer shall not ask questions of or make comments to a member of that jury that are calculated merely to harass or embarrass the juror or to influence his actions in future jury service.

(E) A lawyer shall not conduct or cause, by financial support or otherwise, another to conduct a vexatious or harassing investigation of either a venireman or a juror.

(F) All restrictions imposed by this rule upon a lawyer also apply to communications with or investigations of members of the family of a venireman or a juror.

(G) A lawyer shall reveal promptly to the court improper conduct by a venireman or a juror, or by another toward a venireman or a juror or a member of his family, of which the lawyer has knowledge.

COMMENT:

To safeguard the impartiality that is essential to the judicial process, veniremen and jurors should be protected against extraneous influences. When impartiality is present, public confidence in the judicial system is enhanced. There should be no extrajudicial communication with veniremen prior to trial or with jurors during trial by or on behalf of a lawyer connected with the case.

Furthermore, a lawyer who is not connected with the case should not communicate with or cause another to communicate with a venireman or a juror about the case. After the trial, communication by a lawyer with a juror is permitted so long as he refrains from asking questions or making comments that tend to harass or embarrass the juror or to influence actions of the juror in future cases. Were a lawyer to be prohibited from communicating after trial with a juror, he could not ascertain if the verdict might be subject to legal challenge, in which event the invalidity of a verdict might go undetected. When an extrajudicial communication by a lawyer with a juror is permitted by law, it should be made considerately and with deference to the personal feelings of the juror.

Vexatious or harassing investigations of veniremen or jurors seriously impair the effectiveness of our jury system. For this reason, a lawyer or anyone on his behalf who conducts an investigation of veniremen or jurors should act with circumspection and restraint.

Communications with or investigations of members of families of veniremen or jurors by a lawyer or by anyone on his behalf are subject to the restrictions imposed upon the lawyer with respect to his communications with or investigations of veniremen and jurors.

Because of his duty to aid in preserving the integrity of the jury system, a lawyer who learns of improper conduct by or towards a venireman, a juror or a member of the family of either should make a prompt report to the court regarding such conduct.

RULE 7.9 Contact with Witnesses

A lawyer shall not:

(A) Advise or cause a person to secrete himself or to leave the jurisdiction of a tribunal for the purpose of making him unavailable as a witness therein.

(B) Pay, offer to pay, or acquiesce in the payment of compensation to a witness contingent upon the content of his testimony or the outcome of the case, but a lawyer may advance, guarantee, or acquiesce in the payment of:

(1) Expenses reasonably incurred by a witness in attending or testifying.

(2) Reasonable compensation to a witness for his loss of time in attending or testifying.

(3) A reasonable fee for the professional services of an expert witness.

(C) Falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law.

(D) Request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

(1) The person is a relative or an employee or other agent of a client; and

(2) The lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

COMMENT:

Witnesses should always testify truthfully and should be free from any financial inducements that might tempt them to do otherwise. A lawyer should not pay or agree to pay a non-expert witness an amount in excess of reimbursement for expenses and financial loss incident to his being a witness; however, a lawyer may pay or agree to pay an expert witness a reasonable fee for his services as an expert. But in no event should a lawyer pay or agree to pay a contingent fee to any witness. A lawyer should exercise reasonable diligence to see that his client and lay associates conform to these standards.

RULE 7.10 Contact with Officials

(A) A lawyer shall not give or lend anything of substantial value to a judge, official, or employee of a tribunal.

(B) In an adversary proceeding, a lawyer shall not communicate, or cause another to communicate, as to the merits of the cause with a judge or an official before whom the proceeding is pending except:

(1) In the course of official proceedings in the cause.

(2) In writing, if he promptly delivers a copy of the writing to opposing counsel or to the adverse party if he is not represented by a lawyer.

(3) Orally, upon adequate notice to opposing counsel or to the adverse party if he is not represented by a lawyer.

(4) As otherwise authorized by law.

COMMENT:

The impartiality of a public servant in our legal system may be impaired by the receipt of gifts or loans. A lawyer, therefore, is never justified in making a gift or a loan to a judge, a hearing officer, or an official or employee of a tribunal.

All litigants and lawyers should have access to tribunals on an equal basis. Generally, in adversary proceedings a lawyer should not communicate with a judge relative to a matter pending before, or which is to be brought before, a tribunal over which he presides in circumstances which might have the effect or give the appearance of granting undue advantage to one party. For example, a lawyer should not communicate with a tribunal by a writing unless a copy thereof is promptly delivered to opposing counsel or to the adverse party if he is not represented by a lawyer. Ordinarily an oral communication by a lawyer with a judge or hearing officer should be made only upon adequate notice to opposing counsel, or, if there is none, to the opposing party. A lawyer should not condone or lend himself to private importunities by another with a judge or hearing officer on behalf of himself or his client.

CANON VIII. A LAWYER SHOULD ASSIST IN IMPROVING THE LEGAL SYSTEM.

RULE 8.1 Action as a Public Official

A lawyer who holds public office shall not:

(A) Use his public position to obtain, or attempt to obtain, a special advantage in legislative matters for himself, or for a client under circumstances where he knows or it is obvious that such action is not in the public interest.

(B) Use his public position to influence, or attempt to influence, a tribunal to act in favor of himself or his client.

(C) Accept anything of value from any person when the lawyer knows or it is obvious that the offer is for the purpose of influencing his action as a public official.

COMMENT:

Lawyers often serve as legislators or as holders of other public offices. This is highly desirable, as lawyers are uniquely qualified to make significant contributions to the improvement of

the legal system. A lawyer who is a public officer, whether full or part-time, should not engage in activities in which his personal or professional interests are or foreseeably may be in conflict with his official duties.

RULE 8.2 Statements Concerning Judges and Other Adjudicatory Officers

(A) A lawyer shall not knowingly make false statements of fact concerning the qualifications of a candidate for election or appointment to a judicial office.

(B) A lawyer shall not knowingly make false accusations against a judge or other adjudicatory officer.

(C) A lawyer who is a candidate for judicial office shall comply with the applicable provisions of the Code of Judicial Conduct.

COMMENT:

Assessments by lawyers are relied on in evaluating the professional or personal fitness of persons being considered for election or appointment to judicial office and to public legal offices, such as attorney general, prosecuting attorney, and public defender. Expressing honest and candid opinions on such matters contributes to improving the administration of justice. Conversely, false statements by a lawyer can unfairly undermine public confidence in the administration of justice.

When a lawyer seeks judicial office, the lawyer should be bound by applicable limitations on political activity.

To maintain the fair and independent administration of justice, lawyers are encouraged to continue traditional efforts to defend judges and courts unjustly criticized.

CANON IX. A LAWYER SHOULD AVOID EVEN THE APPEARANCE OF PROFESSIONAL IMPROPRIETY.

RULE 9.1 Successive Government and Private Employment

(A) Except as law may otherwise expressly permit, a lawyer shall not represent a private client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency consents after full disclosure. No lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter without the consent of the public agency involved.

(B) Except as law may otherwise expressly permit, a lawyer having information that the lawyer knows is confidential government information about a person acquired when the lawyer was a public officer or employee may not represent a private client whose interests are adverse to that person on a matter in which the information could be used to the material disadvantage of that person. A firm with which that lawyer is associated may undertake or continue representation in the matter only with the consent of the person about whom the information was obtained.

(C) Except as law may otherwise expressly permit, a lawyer serving as a public officer or employee shall not:

(1) Participate in a matter in which the lawyer participated personally and substantially while in private practice or non-governmental employment, unless under applicable law no one is, or by lawful delegation may be, authorized to act in the lawyer's stead in the matter; or

(2) Negotiate for private employment with any person who is involved as a party or as attorney for a party in a matter in which the lawyer is participating personally and substantially.

(D) As used in this Rule, the term "matter" includes:

(1) Any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties; and

(2) Any other matter covered by the conflict of interest rules of the appropriate government agency.

(E) As used in this Rule, the term "confidential government information" means information which has been obtained under governmental authority and which, at the time this Rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose, and which is not otherwise available to the public.

COMMENT:

This Rule prevents a lawyer from exploiting public office for the advantage of a private client.

A lawyer representing a government agency, whether employed or specially retained by the government, is subject to the

Rules of Professional Conduct, including the prohibition against representing adverse interests stated in Rule 5.1.

Where the successive clients are a public agency and a private client, the risk exists that power or discretion vested in public authority might be used for the special benefit of a private client. A lawyer should not be in a position where benefit to a private client might affect performance of the lawyer's professional functions on behalf of public authority. Also, unfair advantage could accrue to the private client by reason of access to confidential government information about the client's adversary obtainable only through the lawyer's government service.

When the client is an agency of one government, that agency should be treated as a private client for purposes of this Rule if the lawyer thereafter represents an agency of another government, as when a lawyer represents a city and subsequently is employed by a federal agency.

Paragraph (B) operates only when the lawyer in question has knowledge of the information, which means actual knowledge; it does not operate with respect to information that merely could be imputed to the lawyer.

Paragraphs (A) and (C) do not prohibit a lawyer from jointly representing a private party and a government agency when doing so is permitted by Rule 5.1 and is not otherwise prohibited by law.

Paragraph (C) does not disqualify other lawyers in the agency with which the lawyer in question has become associated.

RULE 9.2 Former Judge or Arbitrator

(A) Except as stated in paragraph (D), a lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as a judge or other adjudicative officer, arbitrator or law clerk to such a person, unless all parties to the proceeding consent after full disclosure.

(B) A lawyer shall not negotiate for employment with any person who is involved as a party or as an attorney for a party in a matter in which the lawyer is participating personally and substantially as a judge, other adjudicative officer, or arbitrator. A lawyer serving as a law clerk to a judge, other adjudicative officer, or arbitrator may negotiate for employment with a party or attorney involved in a matter in which the clerk is participating personally and substantially, but only after the lawyer has notified the judge, other adjudicative officer, or arbitrator.

(C) If a lawyer is disqualified by paragraph (A), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in the matter unless:

(1) The disqualified lawyer is screened from participation in the matter and is apportioned no part of the fee therefrom; and

(2) Written notice is promptly given to the appropriate tribunal to enable it to ascertain compliance with the provisions of this Rule.

(D) An arbitrator selected as a partisan of a party in a multi-member arbitration panel is not prohibited from subsequently representing that party.

COMMENT:

This Rule generally parallels Rule 9.1. The term "personally and substantially" signifies that a judge who was a member of a multi-member court, and thereafter left judicial office to practice law, is not prohibited from representing a client in a matter pending in the court, but in which the former judge did not participate. So also the fact that a former judge exercised administrative responsibility in a court does not prevent the former judge from acting as a lawyer in a matter where the judge had previously exercised remote or incidental administrative responsibility that did not affect the merits.

CANON X. A LAWYER SHOULD STRICTLY PRESERVE THE IDENTITY OF FUNDS AND PROPERTY HELD IN TRUST.

RULE 10.1 Preserving Identity of Funds and Property of a Client

(A) Any property received by a lawyer in a fiduciary capacity shall at all times be held and maintained separately from the lawyer's property, designated as such, and disbursed only in accordance with these rules.

(B) As a prerequisite to the receipt of any money or funds belonging to another person or entity, either from a client or from third parties, a lawyer shall maintain one or more bank accounts, separately identifiable from any business or personal account of the lawyer, which account or accounts shall be clearly labeled and designated as a trust account. The account or accounts shall be maintained at a bank in North Carolina, unless otherwise directed in writing by the client. For purposes of these Rules, the following definitions will apply:

(1) A "bank" is defined as a federally or North Carolina chartered bank, savings and loan association, or credit union.

(2) A "trust account" is an account maintained under the Rules of Professional Conduct in which the lawyer holds any funds in a fiduciary relationship, including those held on behalf of or belonging to a client, other than those funds held as a court appointed fiduciary.

(3) The term "lawyer" shall include all members of the North Carolina State Bar and any law firm in which they are members unless the context clearly indicates otherwise.

(4) The term "client" shall include all persons, firms, or entities for which the lawyer performs any services, including acting as an escrow agent.

(5) The term "instrument" shall include any instrument under the Uniform Commercial Code and any record of the electronic transfer of funds.

(C) All money or funds received by a lawyer either from a client or from a third party to be delivered all or in part to a client, except that received for payment of fees presently owed to the lawyer by the client or as reimbursement for expenses properly advanced by the lawyer on behalf of the client, shall be deposited in a lawyer trust account. No funds belonging to the lawyer shall be deposited into the trust account or accounts except:

(1) Funds sufficient to open or maintain an account, pay any bank service charges, or pay any intangibles tax, or

(2) Funds belonging in part to a client and in part presently or potentially to the lawyer. Such funds shall be deposited into the trust account, but the portion belonging to the lawyer shall be withdrawn when the lawyer becomes entitled to the funds unless the right of the lawyer to receive the portion of the funds is disputed by the client, in which event the disputed portion shall remain in the trust account until the dispute is resolved.

(D) Except as authorized by Rule 10.3, interest earned on funds deposited in a trust account (less any deduction for bank service charges, fees of the bank, and intangible taxes collected

by the bank with respect to the funds) shall belong to the client or clients whose funds have been deposited. The lawyer shall have no right or claim to such interest. A lawyer shall not use or pledge the funds held in a trust account to obtain credit or other personal financial benefit.

(E) Any property or securities belonging to a client received by a lawyer shall be promptly identified and labeled as the property of the client and placed in a safe deposit box or other place of safekeeping as soon as practicable. The lawyer shall notify the client of the location of the property kept for safekeeping by the lawyer. Any safe deposit box used to safekeep client property shall be located in this state unless the client consents in writing to another location. The lawyer shall not keep any of his or his law firm's property which is not clearly identified in such safe deposit box or other place of safekeeping.

(F) Any property or titles to property, personal or real, delivered to the attorney as security for the payment of any fee or other obligation owed to the lawyer by the client shall be held in trust under these Rules and shall clearly indicate that the property is held in trust as security for the obligation and shall not appear as a direct conveyance to the lawyer. This provision does not apply where the transfer of the property is for payment of fees presently owed to the lawyer by the client; such transfers are subject to the Rules governing fees and other business transactions between the lawyer and client.

RULE 10.2 Record Keeping and Accounting of Client Funds or Property

(A) A lawyer shall promptly notify his client of the receipt of any funds, securities, or property belonging in whole or in part to the client.

(B) A lawyer shall maintain complete records of all funds, securities, or other property of a client received by the lawyer. A lawyer shall retain the records required under this Rule for a period of six (6) years following completion of the transactions generating the records.

(C) The minimum records of funds received and disbursed by the lawyer shall consist of the following:

(1) A journal, file of receipts, file of deposit slips, or checkbook stubs listing the source, client, and date of the receipt of all trust funds. All receipts of trust money shall be deposited intact with the lawyer re-

taining a duplicate deposit slip or other recored sufficiently detailed to show the identity of the item. Where the funds received are a mix of trust funds and non-trust funds, then the deposit shall be made to the trust account intact and the non-trust portion shall be withdrawn when the bank has credited the account upon final settlement or payment of the instrument.

(2) A journal, which may consist of cancelled checks, showing the date, recipient of all trust fund disbursements, and the client balance against which the instrument is drawn. An instrument drawn from the account for payment of fees or expenses to the lawyer shall be made payable to the lawyer and indicate from which client balance the payment is drawn. No instruments drawn on the trust account shall be payable to cash or bearer.

(3) A file or ledger containing a record for each person or entity from whom or for whom trust money has been received which shall accurately maintain the current balance of funds held in the trust account for that person.

(4) All cancelled checks drawn on the trust account, whether or not the checks constitute the journal required in (2) above.

(5) Any bank statements or documents received from the bank regarding the account, including, but not limited to, notices of the return of any instrument drawn on the account for insufficient funds.

(D) A lawyer shall reconcile the trust account balances of funds belonging to all clients at least quarterly. A lawyer shall render to the client appropriate accountings of the receipt and disbursement of any funds, securities, or property belonging to the client in the possession of the lawyer. Accountings of funds shall be in writing. An accounting shall be provided to the client upon the completion of the disbursement of the funds, securities, or property held by the lawyer, at such other times as may be reasonably requested by the client, and at least annually if funds are retained for a period of more than one year.

(E) A lawyer shall promptly pay or deliver to the client or to third persons as directed by the client the funds, securities, or

properties belonging to the client to which the client is entitled in the possession of the lawyer.

(F) Every lawyer maintaining a trust account shall file with the bank where the account is maintained a directive to the drawee bank as follows: Such bank shall report to the Executive Director of the North Carolina State Bar, solely for its information, when any check drawn on the trust account is returned for insufficient funds. No trust account shall be maintained in any bank which does not agree to make such reports pursuant to the directive.

(G) A lawyer shall produce any of the records required to be kept by this rule upon lawful demand made in accordance with the Rules and Regulations of the North Carolina State Bar.

RULE 10.3 Interest on Lawyers' Trust Accounts

(A) Pursuant to a plan promulgated by the North Carolina State Bar and approved by the North Carolina Supreme Court, a lawyer may elect to create or maintain an interest bearing trust account for those funds of clients which, in his good faith judgment, are nominal in amount or are expected to be held for a short period of time. A lawyer may be compelled to invest on behalf of a client in accordance with Rule 10.1, only those funds not nominal in amount or not expected to be held for a short period of time. Funds deposited in a permitted interest bearing trust account under the plan must be available for withdrawal upon request and without delay. The account shall be maintained in a depository institution authorized by state or federal law to do business in North Carolina and insured by the Federal Deposit Insurance Corporation, the Federal Savings and Loan Insurance Corporation, or the North Carolina Guaranty Corporation. A lawyer participating in the plan shall deliver to all clients from whom or for whose benefit such funds are received a notice reading substantially as follows and comply with its provisions:

IMPORTANT NOTICE TO CLIENTS
THIS OFFICE PARTICIPATES IN THE NORTH CAROLINA PLAN REGARDING THE GENERATION OF INTEREST ON ATTORNEYS' TRUST ACCOUNTS

Under this plan, funds deposited on behalf of a client that are nominal in amount or are expected to be held for a short period of time will be deposited in an interest bearing trust account and the interest generated will be remitted to the North Carolina State Bar to fund programs for the public's

benefit. The costs of maintaining an interest bearing account on an individual client's funds which are nominal in amount or held for a short period of time exceed the amount of interest that may be earned on such funds. Therefore, such client funds are placed in one trust account from which distribution is made at the client's direction and, until recent changes in banking laws, the trust account could not earn interest. Under current law, a trust account is permitted to earn interest under certain circumstances. It is only when all client funds are deposited into the single account with the interest going to a public purpose that such an account can be established. Under no conditions, including any request that the funds not be placed in such an account, can the client benefit individually from the interest earned. The attorney will not receive any of the interest generated under the plan.

(B) Lawyers or law firms electing to deposit client funds in a trust account under the plan shall direct the depository institution:

(1) To remit interest or dividends, as the case may be (less any deduction for bank service charges, fees of the depository institution, and intangible taxes collected with respect to the deposited funds) at least quarterly to the North Carolina State Bar;

(2) To transmit with each remittance to the North Carolina State Bar a statement showing the name of the lawyer or law firm maintaining the account with respect to which the remittance is sent and the rate of interest applied in computing the remittance;

(3) To transmit to the depository lawyer or law firm at the same time a report showing the amount remitted to the North Carolina State Bar and the rate of interest applied in computing the remittance.

(C) Certificates of Deposit may be obtained by a lawyer or law firm on some or all of the deposited funds of clients, so long as there is no impairment of the right to withdraw or transfer principal immediately.

COMMENT:

The purpose of an attorney's trust account is to segregate the funds belonging to clients from those belonging to the attorney. The attorney is in a fiduciary relationship with the client and should never use money belonging to the client for personal

purposes. Failure to place client funds in a trust account can subject the funds to claims of the attorney's creditors or place the funds in the attorney's estate in the event of death or disability. The general rule is that every receipt of money from a client or for a client which will be used or delivered on the client's behalf is held in trust and should be placed in the trust account. Therefore, every attorney who receives funds belonging to clients must maintain a trust account.

The definitions in Rule 10.1(B) are basic and allow the rule to encompass accounts maintained at institutions other than commercial banks. Additionally, the definition of check is intended to encompass any device by which funds may be withdrawn, including non-negotiable instruments, transfers, and direct computer transfers.

Rule 10.1 is patterned after former Disciplinary Rule 9-102. However, the language used clarifies the deposit requirements. Under the prior rule there was some confusion as to whether payments of clients to attorneys for payment of expenses should be deposited in the trust account. The new language eliminates the ambiguity. Under the new rule, all money received by the attorney except that to which the attorney is presently entitled must be deposited in the trust account, including funds for payment of expenses. Funds delivered to the attorney by the client for payment of potential expenses are intended to be used for only that purpose and the funds should never be used by the attorney for personal purposes or subjected to the potential claims of the attorney's creditors.

There is a question as to whether a payment of a retainer by the client should be placed in the trust account. The determination depends upon the fee arrangement with the client. A retainer in its truest sense is a payment by the client for the reservation of the exclusive services of the attorney which by agreement of the parties is non-refundable upon discharge of the attorney. It is a payment to which the attorney is immediately entitled and should not be placed in the trust account. A "retainer" which is actually a deposit by the client of an advance payment of a fee to be billed on an hourly basis, is not a payment to which the attorney is immediately entitled. This is really a security deposit and should be placed in the trust account. As the attorney earns the fee or bills against the retainer, the funds should be withdrawn from the account.

The attorney may come into possession of property belonging to the client other than money. Similar considerations apply con-

cerning the segregation of such property from that of the attorney.

The lawyer must notify the client of the receipt of the client's property. It is the lawyer's responsibility to assure that complete and accurate records of the receipt and disbursement of client property are maintained. Therefore, there are minimum record-keeping requirements.

The lawyer is also responsible for keeping his client advised of the status of any property held by the lawyer. Therefore, it is essential that the attorney reconcile the trust account regularly. The attorney also has an affirmative duty to produce an accounting for the client in writing and to deliver it to the client, either at the conclusion of the transaction or periodically if funds are held for an appreciable period. Such accountings must be made at least quarterly, and can be made at more frequent intervals in the discretion of the attorney.

The lawyer is also responsible for making payments from his trust account only as directed by the client or only on the client's behalf.

A properly maintained trust account should not have any checks returned by the bank for insufficient funds. Although even the best maintained accounts are subject to bank errors, such legitimate problems are easily explained. Therefore, the reporting requirement should not be burdensome.

NORTH CAROLINA
WAKE COUNTY

I, B. E. James, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments were duly adopted by the Council of the North Carolina State Bar at its meeting on Friday, July 26, 1985.

Given over my hand and the Seal of the North Carolina State Bar, this the 31st day of July, 1985.

B. E. JAMES
Secretary

After examining the foregoing amendments to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 7th day of October, 1985.

JOSEPH BRANCH
Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar be spread upon the Minutes of the Supreme Court and that they be published in the forthcoming volume of the Reports as provided by the Act incorporating the North Carolina State Bar.

This the 7th day of October, 1985.

BILLINGS, 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

When an appeal is taken pursuant to G.S. 7A-30(2), the only issues properly before the Court are those on which the dissenting judge in the Court of Appeals based his dissent. *Clifford v. River Bend Plantation, Inc.*, 460.

Although the plaintiffs were not entitled to argue an issue in the Supreme Court because the dissent upon which they appealed was based on an issue not properly raised at trial or preserved for appeal, the issue was heard by the Supreme Court in the interest of justice. *Ibid.*

§ 3. Review of Constitutional Questions

The Supreme Court will not pass upon a constitutional question not raised and passed upon in the court below. *Powe v. Odell*, 410.

§ 5. Supervisory Jurisdiction of Supreme Court

The Supreme Court will not exercise its supervisory power to determine the merits of claims set forth in the State's complaint seeking a declaratory judgment concerning rulings on the constitutionality and construction of the Safe Roads Act. *State ex rel. Edmisten v. Tucker*, 326.

§ 46. Presumptions Arising from Lower Court Proceedings

Where one member of the Supreme Court did not participate in a decision and the remaining six members are equally divided, the decision of the Court of Appeals is left undisturbed and stands without precedential value. *Eason v. Gould, Inc.*, 618; *Lynch v. Hazelwood*, 619.

§ 49.1. Sufficiency of Record to Show Prejudicial Error

The exclusion of testimony will not be considered prejudicial error where appellant failed to show what the excluded testimony would have been. *Carter v. Carr*, 613.

§ 64. Affirmance or Reversal

Where two members of the Supreme Court did not participate in the consideration or decision of a case, and of the remaining members of the Court there are not four votes either to affirm or reverse the decision of the Court of Appeals, the decision is left undisturbed but should not be considered as having precedential value. *Frady v. Groves Thread*, 316.

§ 67. Force and Effect of Decisions of Supreme Court in General

Because a case had not been decided on direct appeal at the time *State v. Peoples*, 311 N.C. 515, was certified, the holding in *Peoples* was applied retroactively where the admission of hypnotically induced testimony constituted reversible error. *S. v. Flack*, 448.

ARBITRATION AND AWARD

§ 2. Agreements to Arbitrate as Bar to Action

A party to a contract did not waive its right to arbitrate by filing pleadings concerning a dispute arising from the contract and by negotiating informally for two years in an effort to come to agreement. *Cyclone Roofing Co. v. LaFave Co.*, 224.

There was nothing indicating that the party opposing arbitration would be prejudiced by having to arbitrate after pleadings were filed where no motions were filed, no discovery was conducted, no evidence was lost, and there was no evidence

ARBITRATION AND AWARD — Continued

that the opposing party had incurred substantial expenses in preparation for litigation. *Ibid.*

§ 7. Conclusiveness of Award

The superior court properly confirmed the award of the arbitrator where there were no evident mathematical errors, errors relating to form, or errors evidencing that the arbitrator exceeded his powers. *Cyclone Roofing Co. v. LaFave Co.*, 224.

ARREST AND BAIL

§ 3. Right of Officers to Arrest without Warrant in General

Defendant was, in effect, placed under arrest when he was escorted from a bus station to the police department where the officer admitted that defendant would not have been free to go. *S. v. Zuniga*, 251.

§ 3.1. Warrantless Arrest; Requirement of Probable Cause

Flight may properly be considered in assessing probable cause for arrest. *S. v. Zuniga*, 251.

§ 9.1. Propriety of Revocation of Bail

Defendant's violation of a condition of her bail bond that she have no contact with a male codefendant was a legitimate reason for the revocation of her bond. *S. v. Albert*, 567.

AUTOMOBILES AND OTHER VEHICLES

§ 11.5. Accidents Involving Vehicles Parked Directly on Road

The trial court erred in failing to submit to the jury the issue of causation based on plaintiff's negligence *per se* or common law negligence where plaintiff had stopped his truck, which was struck by defendant, partially on the highway. *Adams v. Mills*, 181.

§ 75.1. Sufficiency of Evidence of Contributory Negligence in Parking

There was sufficient evidence from which a jury could find contributory negligence by plaintiff in parking his truck partially on the highway. *Adams v. Mills*, 181.

§ 105.2. Sufficiency of Evidence on Issue of Respondeat Superior under G.S. 20-71.1

In an action arising from a truck accident, there was a genuine issue of material fact where plaintiff relied on the presumption of agency arising from registration of a motor vehicle, and defendant presented evidence of the absence of agency. *DeArmon v. B. Mears Corp.*, 749.

§ 120. Driving under the Influence Generally; Elements of the Offense

G.S. 20-138.1(a)(2) is not unconstitutionally vague because a drinking driver does not know precisely when his body alcohol level has risen above the 0.10 statutory maximum. *S. v. Rose*, 441; *S. v. Howren*, 454.

The statute making it a crime for persons to have an alcohol concentration of 0.10 or more at any relevant time after driving on the highways or public vehicular areas of this State, G.S. 20-138.1(a)(2), merely sets forth the elements of the offense and does not impermissibly declare individuals with an alcohol concentration of 0.10 or more to be presumptively guilty of a crime. *Ibid.*

AUTOMOBILES AND OTHER VEHICLES — Continued

§ 125. Warrant for Operating Vehicle while under the Influence of Intoxicating Liquor

A citation which charged that defendant did "unlawfully and willfully operate a motor vehicle on a street or highway while subject to an impairing substance, G.S. 20-138.1" met the statutory requirements of G.S. 20-138.1(c). *S. v. Coker*, 432.

A citation charging the operation of a motor vehicle "while subject to an impairing substance" was sufficiently clear and distinct for a person of common understanding to know what was intended. *Ibid.*

A citation charging defendant with operating rather than driving a motor vehicle need not be quashed because the legislature intended "driver" and "operator" to be synonymous, and because the use of "operate" is not so great a refinement on the statutory short form pleading as to render the charge unintelligible. *Ibid.*

A citation which charged driving while subject to an impairing substance was sufficient without specifying the evidence the State would present regarding the impairing substance or stating whether the State intended to proceed under a theory of driving while under the influence or driving with a blood alcohol content of .10. *Ibid.*

§ 126.2. Competency of Blood and Breathalyzer Tests

G.S. 20-139.1(e1), which provides for the introduction of an affidavit from a chemical analyst to prove alcohol concentration, is a statutory exception to the hearsay rule, based on the business and public records exception, and is constitutionally permissible. *S. v. Smith*, 361.

A defendant charged with driving while impaired prior to 1 January 1985 was not denied equal protection because only one chemical breath analysis was required whereas a person charged with driving while impaired after 1 January 1985 must be given two chemical breath tests. *S. v. Howren*, 454.

§ 126.3. Blood and Breathalyzer Tests; Manner and Time of Administration

The statute allowing a defendant only 30 minutes to obtain counsel before undergoing a breathalyzer test does not violate defendant's constitutional right to counsel. *S. v. Howren*, 454.

The statute putting the burden on defendant to show that a breathalyzer machine has not been properly maintained does not violate the rule of *Mullaney v. Wilbur*. *Ibid.*

There was sufficient evidence to submit the offense of driving with a blood alcohol content of .10 to the jury when the breathalyzer registered .09 in simulator tests because a deviation above .10 is not permitted. *S. v. Shuping*, 421.

§ 126.4. Blood and Breathalyzer Tests; Warnings to Defendant

Defendant was not entitled to be informed of his constitutional rights before undergoing a breathalyzer test. *S. v. Howren*, 454.

BILLS OF DISCOVERY

§ 5. Inspection of Writings

The statute providing that S.B.I. records and evidence are not public records but "may be made available to the public only upon an order of a court of competent jurisdiction" permits a member of the public to obtain access to S.B.I. records only when such person is entitled to access under one of the procedures already provided by law for discovery in civil or criminal cases. *News and Observer v. State; Co. of Wake v. State; Murphy v. State*, 276.

BURGLARY AND UNLAWFUL BREAKINGS

§ 5.9. Sufficiency of Evidence of Breaking and Entering and Larceny of Business Premises

The State's evidence of first-degree burglary was sufficient to survive defendant's motion to dismiss. *S. v. Noland*, 1.

§ 5.11. Sufficiency of Evidence of Breaking and Entering and Robbery

The court properly denied defendant's motions to dismiss the charges of first degree burglary, first degree murder, and robbery with a dangerous weapon. *S. v. Young*, 669.

§ 6. Instructions

In a prosecution for first degree murder and first degree burglary, the court did not err in failing to instruct the jury that it could convict defendant of first degree burglary only if the house entered was owned by the deceased and the defendant had no ownership interest therein. *S. v. Harold*, 787.

CONSPIRACY

§ 5.1. Admissibility of Statements of Coconspirators

Statements of the two male codefendants in the furtherance of a conspiracy were competent evidence against the female defendant. *S. v. Albert*, 567.

CONSTITUTIONAL LAW

§ 18. Right of Free Press and Speech

Application of the use tax to *The Village Advocate* does not violate the Free Speech and Free Press clauses of the First Amendment to the U.S. Constitution. *In re Assessment of Taxes Against Village Publishing Corp.*, 211.

Members of the public do not have a First Amendment right of access to an S.B.I. report on the criminal investigation of a former school superintendent. *News and Observer v. State; Co. of Wake v. State; Murphy v. State*, 276.

§ 19. Exclusive Emoluments and Privileges

G.S. 24-5, which allows prejudgment interest on claims covered by liability insurance, is not a special emolument or privilege within the meaning of Art. I, § 32 of the North Carolina Constitution. *Lowe v. Tarble*, 467.

§ 28. Due Process

The trial court's inquiry into the numerical division of the jury after the jury reported that it was deadlocked did not as a matter of law violate defendant's right to due process or to trial by jury. *S. v. Fowler*, 304.

§ 30. Discovery

Defendant's motion for appropriate relief was remanded for a hearing de novo to determine whether undisclosed evidence would have created a reasonable doubt in the jury's mind which did not otherwise exist in light of all other evidence the jury heard. *S. v. Craven*, 580.

§ 31. Affording the Accused the Basic Essentials for Defense

Defendant was denied his constitutional right to compulsory process in his retrial for first-degree sexual offense by the trial court's denial of his pretrial motion to compel the attendance of a proposed witness. *S. v. Rankin*, 592.

CONSTITUTIONAL LAW — Continued

§ 43. Right to Counsel; What Is Critical Stage of Proceedings

The administration of a breathalyzer test is not a critical stage of a prosecution in a driving while impaired case which entitles defendant to the presence of counsel. *S. v. Howren*, 454.

§ 45. Right to Appear Pro Se

Where a defendant clearly indicates that he wishes to proceed *pro se*, the court is required to make inquiry to determine whether defendant has been clearly advised of his right to the assistance of counsel, understands the consequences of his decision, and comprehends the nature of the charges and the range of permissible punishments. *S. v. McCrowre*, 478.

§ 48. Effective Assistance of Counsel

Strickland v. Washington, 80 L.Ed. 2d 674, is expressly adopted as a uniform standard to be applied to measure ineffective assistance of counsel. *S. v. Braswell*, 553.

Defendant was not denied effective assistance of counsel where the evidence of his guilt was overwhelming and it is not reasonably probable that the jury would have reached a different result had none of the alleged errors of counsel occurred. *Ibid.*

§ 49. Waiver of Right to Counsel

The court erred by permitting defendant to go to trial without the assistance of counsel where defendant had stated that he wanted to discharge his assigned counsel, but did not indicate that he wanted to proceed without the assistance of counsel. *S. v. McCrowre*, 478.

§ 63. Exclusion from Jury for Opposition to Capital Punishment

North Carolina's jury selection process is constitutional and the trial court did not err by death-qualifying the jury. *S. v. Noland*, 1; *S. v. Huffstetler*, 92; *S. v. Payne*, 647; *S. v. Young*, 669.

§ 66. Right of Confrontation; Presence of Defendant at Proceedings

Defendant waived his right to be present during a voir dire hearing where his counsel was present at the hearing and where defendant knew or should have known that the hearing would be held but did not assert his right to attend. *S. v. Braswell*, 553.

§ 70. Right of Confrontation; Cross-examination of Witnesses

G.S. 20-139.1(e1), which provides for the introduction of an affidavit from a chemical analyst to prove alcohol concentration, does not violate a defendant's Sixth Amendment right to confrontation. *S. v. Smith*, 361.

In a prosecution for first-degree sexual offense and taking indecent liberties with a child, the court did not err by allowing into evidence a written statement prepared by the victim's sister after the sister had left the courtroom. *S. v. Craven*, 580.

§ 80. Death and Life Imprisonment Sentences

The defendant failed to prove that the exercise of prosecutorial discretion undermines the constitutionality of the death penalty statute, G.S. 15A-2000, since he did not show that the prosecutor employed an arbitrary standard in selecting which cases to try as capital cases. *S. v. Noland*, 1.

CONSTITUTIONAL LAW — Continued

The imposition of a mandatory life sentence for a first degree sexual offense committed upon a four-year-old child did not constitute cruel and unusual punishment. *S. v. Higginbottom*, 760.

CONTRACTS

§ 5. Form and Requisites of Agreements and Parol Provisions

Where a written contract to purchase a house made no mention of any warranty against flooding and contained a merger clause, statements made before the signing of the contract could not be used to prove the existence of a warranty. *Clifford v. River Bend Plantation, Inc.*, 460.

§ 18.1. Enforceability of Modification; Particular Circumstances

There was no parol modification of a purchase contract where plaintiffs complained to defendant's president after a flood at the house which they had just purchased from defendant and defendant's president said that the house was warranted and that he would take care of the matter, and sent plaintiffs a letter saying that warranties for workmanship, material, and subcontractors were for one year but proposing steps to correct the flooding. *Clifford v. River Bend Plantation, Inc.*, 460.

CORPORATIONS

§ 27.2. Liability of Corporation for Torts

Defendant corporation was liable under the doctrine of *respondeat superior* for punitive damages awarded to plaintiff for the tort of malicious prosecution committed by an employee of the corporation in the course of his employment. *Jones v. Gwynne*, 393.

CRIMINAL LAW

§ 5. Mental Capacity in General

While defendant may have testified from fear of reprisal, there was insufficient evidence that defendant was incompetent to proceed. *S. v. Baker*, 34.

§ 9.1. Aiders and Abettors; Presence at Scene

The evidence was sufficient to convict the defendant of first degree rape and first degree sexual offense as an aider and abettor. *S. v. Randolph*, 198.

§ 13. Jurisdiction in General

Statements in an indictment naming the county where the crime allegedly occurred may be challenged at any time, not just in a timely motion to dismiss for improper venue. *S. v. Randolph*, 198.

§ 15. Venue

Where a murder occurred on a bridge over a river which forms a boundary between two counties, either of those counties was a proper venue for the murder trial. *S. v. Bullard*, 129.

§ 15.1. Prejudice as Ground for Change of Venue

There was no error in denying a defendant's motions for a change of venue or a change in venire where there was no indication of prejudice to defendant. *S. v. Baker*, 34.

CRIMINAL LAW — Continued

A murder defendant failed to show that under the totality of the circumstances he was deprived of a fair jury by the denial of his motions for a change of venue on grounds of community bias and pretrial publicity. *S. v. Vereen*, 499.

§ 32.2. Particular Presumptions

Where there is evidence that defendant has committed a robbery with what appears to the victim to be a firearm or other dangerous weapon and nothing to the contrary appears in evidence, the presumption that the victim's life was endangered or threatened is mandatory. *S. v. Joyner*, 779.

§ 34.7. Admissibility of Evidence of Other Offenses to Show Intent

In a prosecution for first-degree sexual offense and for taking indecent liberties with a child, there was no error in permitting the victim's brother and another child to testify about incidents with defendant other than those for which defendant was charged. *S. v. Craven*, 580.

§ 34.8. Admissibility of Evidence of Other Offenses to Show Common Scheme

Evidence of other crimes for which defendant was not on trial was properly admitted under common law rules of evidence to show a common scheme. *S. v. Hyman*, 601.

§ 39. Evidence in Rebuttal of Facts Brought out by Adverse Party

Testimony that defendant pulled a pistol from his pocket and shot it into the ground three months before the murder in question was competent to contradict defendant's testimony that he kept the pistol in his trunk and did not carry it on his person. *S. v. Bullard*, 129.

§ 40.2. Defendant's Motion for Transcript

The retrial of an indigent defendant on rape, burglary and larceny charges without providing him with a transcript of his original trial was error entitling him to a new trial. *S. v. Reid*, 322.

§ 42.3. Admissibility of Clothing; Identification and Connection with Crime

There was no error in admitting items of clothing which allegedly belonged to defendant where the clothing was found not far from the scene of the murder, was covered with blood consistent with the blood type of the victim, and where the clothing was identified as being defendant's or being like defendant's. *S. v. Huffstetler*, 92.

§ 42.4. Admissibility of Weapons; Identification and Connection with Crime

A pocketknife found on the floor of a car in which a kidnapping and rape allegedly occurred was sufficiently connected to the crime for its admission into evidence. *S. v. Brown*, 237.

§ 42.5. Admission of Articles Found at Scene or Used or Taken during Crime; Identification and Connection with Crime

In a prosecution arising from a service station robbery, there was no prejudice from the admission of a credit card, even though there was no evidence that defendant or his companion had ever possessed the card, because defendant did not show a reasonable possibility that exclusion would have changed the result at trial. *S. v. Hyman*, 601.

§ 42.6. Articles and Clothing Connected with Crime; Chain of Custody

The State showed a sufficient chain of custody to permit the introduction of a red emergency room bag and clothing worn by the victim the night he was attacked. *S. v. McDonald*, 264.

§ 43.4. Inflammatory Photographs

There was no error from the admission of photographs showing the victim's nude body with a sheet tied around her neck where the use of photographs was limited to illustrating testimony and the photographs were neither excessive in number nor unduly inflammatory. *S. v. Hannah*, 286.

There was no error in the admission of photographs showing the alleged murder weapon being fitted into holes in coveralls which belonged to the victim. *S. v. Young*, 669.

§ 50.1. Admissibility of Expert Opinion Testimony

There was no error in admitting the opinion testimony of an expert in the field of forensic serology which was partly based on lab tests performed by someone else because the tests are sufficiently reliable to support the admission of an expert opinion based on those tests. *S. v. Huffstetler*, 92.

§ 51. Qualification of Experts

The trial court did not err in permitting a physical anthropologist to testify as an expert in bare footprint comparison without making findings as to her qualifications as an expert. *S. v. Bullard*, 129.

There was no error in permitting a witness to respond to hypothetical questions as an expert in serology where there was ample evidence to support the trial judge's qualification of the witness as an expert. *S. v. Young*, 669.

§ 60. Evidence in Regard to Fingerprints

Although a nontestimonial identification order was not required for the State to acquire an additional palm print from defendant during the trial, the fact that the State complied with the restrictive procedures of G.S. 15A-271 in obtaining a nontestimonial identification order did not prejudice defendant. *S. v. Vereen*, 499.

§ 60.2. Fingerprint Cards

There was no error in the admission of a fingerprint card where a jailer testified that he took the fingerprints of Johnny Hyman, but the jailer never identified defendant as being the same Johnny Hyman he fingerprinted. *S. v. Hyman*, 601.

§ 61.2. Competency of Evidence of Footprints or Shoe Prints

Expert testimony by a physical anthropologist identifying a bloody bare footprint by comparing known and unknown footprint impressions by size and shape without relying on ridge detail was reliable and admissible. *S. v. Bullard*, 129.

§ 66.1. Identification of Defendant; Opportunity for Observation

There was evidence of a sufficient opportunity for observation by a witness so that there was no substantial likelihood of misidentification. *S. v. Hannah*, 286.

The credibility of an identification witness and the weight to be given his testimony is for the jury to decide. *Ibid.*

CRIMINAL LAW — Continued

§ 66.9. Identification of Defendant from Photographs; Suggestiveness of Procedure

The trial court properly concluded that a pretrial photographic identification procedure did not violate defendant's due process rights. *S. v. Hannah*, 286.

§ 66.12. Identification of Defendant; Confrontation in Courtroom

Although a witness observed defendant at the defense table during a probable cause hearing, the trial court correctly ruled that the identification at the hearing was not unduly suggestive or violative of defendant's due process rights because the witness had already identified defendant from a pictorial lineup. *S. v. Hannah*, 286.

§ 66.17. Sufficiency of Evidence of Independent Origin of In-Court Identification in Cases Involving other Pretrial Identification Procedures

There was no prejudice when the district attorney tendered, in the presence of the identification witness, a stipulation that defendant's fingerprints had been found in the victim's car because the witness had already identified defendant in a non-suggestive identification procedure and in a *voir dire*. *S. v. Hannah*, 286.

§ 68. Other Evidence of Identity

Testimony that a hair found in a sheet knotted around the victim's neck was consistent with a hair taken from defendant and inconsistent with the victim's hair was relevant because it tended to place defendant in the victim's presence at the time of the murder. *S. v. Hannah*, 286.

§ 69. Telephone Conversations

A witness was properly permitted to testify regarding a telephone conversation with the female defendant tending to show her complicity in the murder of her husband. *S. v. Albert*, 567.

§ 71. Shorthand Statements of Fact

Testimony by a witness that, based on a telephone conversation with the victim on the night of an alleged rape, she thought the victim was scared and that the victim pretended to be calm and tried to signal the witness that something was wrong was admissible as shorthand statements of fact. *S. v. Brown*, 237.

§ 73.2. Statements not within Hearsay Rule

In a prosecution for first-degree sexual offense and taking indecent liberties with a child, there was no error in the admission of a note from a classmate of the victim's sister or in allowing the victim's stepmother to testify about what the sister said she had seen. *S. v. Craven*, 580.

§ 75.2. Voluntariness of Confession; Effect of Officers' Threats

There was evidence to support findings that defendant was not threatened or intoxicated and conclusions that his pretrial confession was voluntary. *S. v. Baker*, 34.

§ 75.7. Admissibility of Confession; Requirement that Defendant be Warned of Constitutional Rights; What Constitutes Custodial Interrogation

Defendant was not denied his rights under the federal or North Carolina constitutions by the admission of statements made without Miranda warnings because a reasonable person in defendant's position would not have believed himself to be in custody. *S. v. Braswell*, 553.

CRIMINAL LAW — Continued

§ 75.10. Admissibility of Confession; Waiver of Constitutional Rights

Defendant was not intoxicated when he waived his right to counsel, and his waiver was voluntary despite a prior request for counsel because defendant himself initiated further communication with the police. *S. v. Baker*, 34.

§ 75.12. Use of Confession Obtained in Violation of Defendant's Constitutional Rights; Error in Admission is not Prejudicial

There was no error in admitting defendant's statement made without a Miranda warning where defendant's statement was introduced only on rebuttal and where the court conducted a voir dire hearing before admitting the evidence. *S. v. McCray*, 519.

§ 75.13. Confessions Made to Persons other than Police Officers

In a prosecution for first degree murder, incriminating statements made by defendant to and within the hearing of fellow jailmates were admissible. *S. v. Payne*, 647.

§ 76.2. Confession; When Voir Dire Hearing Required

The trial court did not err by failing to conduct *ex mero motu* a voir dire hearing as to the admissibility of testimony from defendant's jailmates. *S. v. Payne*, 647.

§ 79. Declarations of Codefendants and Coconspirators

Statements of the two male codefendants in the furtherance of a conspiracy were competent evidence against the female defendant. *S. v. Albert*, 567.

§ 79.1. Declarations by Codefendant Subsequent to Commission of Crime

Defendant opened the door to evidence concerning a statement made by a witness implicating herself, defendant and a codefendant in a murder. *S. v. Albert*, 567.

§ 84. Evidence Obtained by Unlawful Means

Defendant's statement given as a result of a plea arrangement was not involuntary because the plea arrangement was subsequently revoked when defendant violated a condition thereof, and testimony of defendant's daughter, even if based on information taken from defendant's statement, was thus not inadmissible as "fruit of the poisonous tree." *S. v. Albert*, 567.

§ 85. When Character Evidence Relating to Defendant Is Admissible

There was no abuse of discretion where the court allowed defendant to present only one of five character witnesses. *S. v. McCray*, 519.

§ 86.2. Impeachment of Defendant; Prior Convictions

In a prosecution for first-degree murder by a prison inmate using a knife, there was no error in allowing the district attorney to cross-examine defendant about specific acts committed by defendant involving a knife which resulted in convictions for seven robberies. *S. v. McCray*, 519.

§ 86.4. Impeachment of Defendant; Prior Accusations of Crime

There was no prejudicial error in a prosecutor asking questions from juvenile petitions on cross-examination. *S. v. Baker*, 34.

§ 87.1. Leading Questions

The trial court did not abuse its discretion by allowing the prosecutor to lead witnesses during direct examination. *S. v. Young*, 669.

CRIMINAL LAW — Continued

§ 87.2. Leading Questions; Illustrative Cases

The trial court did not err in permitting the prosecutor to ask leading questions in examining the four-year-old victim of a sexual offense. *S. v. Higginbottom*, 760.

§ 87.4. Redirect Examination

The prosecutor's question concerning the veracity of a witness's statement was a proper subject for redirect examination. *S. v. Albert*, 567.

§ 89. Credibility of Witnesses

In a prosecution for first-degree sexual offense and taking indecent liberties with a child, there was no prejudice in the exclusion of testimony with which defendant hoped to show that the children testifying against him had fantasized the events in question, or in sustaining objections to questions defendant wished to ask one of the children on cross-examination. *S. v. Craven*, 580.

§ 89.5. Credibility of Witnesses; Slight Variances in Corroborating Testimony

Testimony by a child's mother that the child told her that certain sexual acts were "yucky" was admissible to corroborate testimony by the child even though the child did not testify that the acts were "yucky." *S. v. Higginbottom*, 760.

§ 90. Rule that Party Is Bound by and May not Discredit His Own Witness

The trial court did not abuse its discretion by permitting the State to impeach its witness through the use of prior inconsistent statements where there was evidence that the State was surprised by his testimony at trial. *S. v. McDonald*, 264.

§ 91.6. Continuance to Obtain Additional Evidence

A murder defendant's rights to the effective assistance of counsel and due process were not violated by the trial court's denial of a continuance to give defendant's expert additional time to gather information pertaining to pretrial publicity and community prejudice in support of his motion for a change of venue. *S. v. Vereen*, 499.

§ 92.1. Consolidation of Charges against Multiple Defenses; Same Offense

The trial court did not err in allowing joinder of murder and attempted robbery charges against three defendants. *S. v. Albert*, 567.

§ 96. Withdrawal of Evidence

The defendant in a murder case was not prejudiced by the admission of testimony that defendant possessed a pocketknife a year before the victim's death. *S. v. Bullard*, 129.

The trial court did not err in denying defendant's motion for a mistrial in a murder case when the court admitted and subsequently withdrew from evidence the victim's pocketbook and items therein which were discovered in an abandoned house located on the street where defendant lived. *S. v. Vereen*, 499.

§ 98. Presence and Conduct of Witnesses

When a child witness became emotionally upset, the trial court did not abuse its discretion in ordering a recess during which the child was taken to the district attorney's office. *S. v. Higginbottom*, 760.

CRIMINAL LAW — Continued

§ 98.2. Sequestration of Witnesses

The trial court did not abuse its discretion by denying defendant's motion to sequester the State's chief witnesses where the testimony eventually presented included many discrepancies. *S. v. Young*, 669.

§ 99. Conduct of the Court

The trial court did not abuse its discretion by denying defendant's motion that officers wear street clothes while testifying. *S. v. Young*, 669.

§ 99.2. Expression of Opinion by the Court; Remarks During Trial

There was no prejudice in the trial court's remark to the jury that the court would be required to conduct a sentencing hearing if defendant should be found guilty, even though a sentencing hearing was not required if there was no evidence of aggravating circumstances. *S. v. Huffstetler*, 92.

The court did not err in asking a witness questions to clarify her identification of the second party to a telephone conversation. *S. v. Albert*, 567.

§ 99.4. Expression of Opinion by the Court; Remarks in Connection with Objections and Rulings Thereon

The trial court's remarks did not constitute an expression of opinion on the quality of counsel's objections. *S. v. Albert*, 567.

§ 99.7. Expression of Opinion by the Court; Admonitions to Witnesses

The trial court's admonishment of certain disorderly defense witnesses out of the presence of the jury did not constitute an expression of opinion. *S. v. Higginbottom*, 760.

§ 99.9. Expression of Opinion by the Court; Examination of Witnesses by the Court

The court's question to a witness was clearly an attempt to clarify the witness's testimony and did not rise to the level of an opinion. *S. v. Craven*, 580.

§ 101.4. Conduct or Misconduct Affecting or During Jury Deliberation

There was no prejudice when the court allowed the jury to take photographs which had been admitted into evidence into the jury room because defendant did not show a reasonable probability that a different result would have been reached had this error not been committed. *S. v. Huffstetler*, 92.

The trial court did not abuse its discretion in permitting the jury to examine certain documents because they contained markings or underlining. *S. v. Albert*, 567.

§ 102.1. Latitude and Scope of Jury Argument

The State was within the bounds of proper argument in reading the law on amnesia to the jury, and the prosecutor's "misquoting" of the law did not require the judge to act *ex mero motu*. *S. v. Noland*, 1.

§ 102.6. Particular Comments in Argument to Jury

The trial court was within the bounds of its discretion in allowing a prosecutor's remarks which touched upon matters not testified to but were reasonable inferences based on the evidence and were within the latitude afforded counsel in argument. *S. v. Huffstetler*, 92.

The trial court did not err by failing to interfere *ex mero motu* where the prosecutor commented during his closing argument that the prosecutor's duty is to see that the guilty are convicted and the innocent acquitted. *S. v. Payne*, 647.

CRIMINAL LAW — Continued

§ 102.8. Jury Argument; Comment on Failure to Testify

In a first degree murder prosecution in which defendant did not testify, there was no error in allowing the prosecutor to argue to the jury that "there was no evidence that you heard in this case that is consistent with [the defendant's] innocence." *S. v. Huffstetler*, 92.

The prosecutor did not comment impermissibly on defendants' failure to testify where the comment was brief and where the defendants failed to properly object and did not request a curative instruction. *S. v. Randolph*, 198.

§ 102.9. Jury Argument; Comment on Defendant's Character and Credibility Generally

The evidence in a murder case supported jury arguments by the prosecutor that defendant "is the baddest on the block" and that defendant killed the victim to regain his reputation as a "bad" man following an attack by the victim on defendant. *S. v. Hamlet*, 162.

The prosecutor's jury argument that defendant's testimony that he was shocked by the killing was not true and that this was a way of life with defendant was supported by the evidence. *Ibid.*

The prosecutor's references to defendant as an "animal" and to his environment as a "jungle" were not so improper as to require action by the trial court *ex mero motu*. *Ibid.*

In a prosecution for first degree murder, the State did not err in arguing for the death penalty on the basis of retribution. *S. v. Young*, 669.

§ 102.12. Jury Argument; Comment on Sentence or Punishment

The trial court did not err in failing to act *ex mero motu* to take curative action when a prosecutor emphasized to the jury the seriousness of an aggravating factor. *S. v. Noland*, 1.

The prosecutor's argument that the imposition of a sentence of death would be a deterrent to future dangerous activity by defendant was not improper. *Ibid.*

The prosecutor's improper injection of his personal viewpoint concerning the deterrent effect of the death penalty in his jury argument during the guilt phase of a first-degree murder trial was not so grossly improper as to require action by the trial court *ex mero motu*. *S. v. Hamlet*, 162.

§ 106. Sufficiency of Evidence

The State's evidence of first-degree burglary was sufficient to survive defendant's motion to dismiss. *S. v. Noland*, 1.

§ 109.1. Propriety of Peremptory Instructions

The district attorney could argue the weight of a mitigating factor to the jury, and the trial judge was not required to give a peremptory instruction, when there was evidence of prior criminal activity. *S. v. Noland*, 1.

§ 112.1. Instructions on Reasonable Doubt

The trial court did not err in refusing to include an instruction that the jury "must be satisfied to a moral certainty" of defendant's guilt in its charge on reasonable doubt. *S. v. Brown*, 237.

§ 113.1. Instructions Summarizing Evidence

The trial court did not commit error in failing to summarize defendant's evidence while instructing the jury. *S. v. Eason*, 320.

CRIMINAL LAW — Continued

§ 113.7. Instructions on Aiding and Abetting

The trial court did not err in failing to instruct that defendants could be convicted as aiders and abettors if the jury found that defendant "or some other person" was the perpetrator of the crimes. *S. v. Albert*, 567.

§ 114. Expression of Opinion by Court in the Charge

A jury instruction which may have been requested by defendant, and which was quoted almost verbatim from the Pattern Jury Instruction on first-degree murder, did not suggest to the jury that a finding of guilty of first-degree murder was appropriate, nor did it intimate to the jury that the trial judge believed defendant was guilty. *S. v. Noland*, 1.

§ 114.2. No Expression of Opinion in Statement of Evidence

The court's instruction that evidence tended to show that a witness "was an accomplice in the commission of these crimes that are charged" did not constitute an expression of opinion that the crimes had been committed. *S. v. Albert*, 567.

There was no error in the court's characterization of defendant's action during recapitulation because the victim had testified in detail about defendant's acts and the court instructed the jury that it was to determine the true facts. *S. v. Craven*, 580.

§ 114.3. No Expression of Opinion in Other Instructions

The trial court's instruction that "it is not necessarily the number of witnesses or the quantity of evidence, but rather, it is the quality or convincing force of the evidence that may be of the most concern to you" did not constitute an expression of opinion as to the credibility of defendant's witnesses because it followed the testimony of the last of the defendant's witnesses. *S. v. Higginbottom*, 760.

§ 120.1. Instructions on Consequences of Verdict and Punishment in Capital Cases

A jury instruction which may have been requested by defendant, and which was quoted almost verbatim from the Pattern Jury Instruction on first-degree murder, did not suggest to the jury that a finding of guilty of first-degree murder was appropriate, nor did it intimate to the jury that the trial judge believed defendant was guilty. *S. v. Noland*, 1.

The court did not err by failing to instruct the jury that a sentencing hearing would be held only if there was evidence of aggravating circumstances because a sentencing hearing was, in fact, required. *S. v. Huffstetler*, 92.

§ 122. Additional Instructions after Initial Retirement of Jury

The trial court's inquiry into the numerical division of the jury after the jury reported that it was deadlocked did not as a matter of law violate defendant's right to due process or to trial by jury. *S. v. Fowler*, 304.

The trial court's inquiry into the numerical division of the jury after the jury reported late Friday afternoon that it was deadlocked was not coercive in the totality of the circumstances. *Ibid.*

§ 135.1. Death Sentence as Mandatory

The defendant failed to prove that the exercise of prosecutorial discretion undermines the constitutionality of the death penalty statute, G.S. 15A-2000, since he did not show that the prosecutor employed an arbitrary standard in selecting which cases to try as capital cases. *S. v. Noland*, 1.

CRIMINAL LAW — Continued

§ 135.3. Exclusion of Veniremen Opposed to Death Penalty

North Carolina's jury selection process is constitutional and the trial court did not err by death-qualifying the jury. *S. v. Noland*, 1; *S. v. Huffstetler*, 92.

Jurors who would automatically vote against the imposition of capital punishment were properly excused for cause even though a prosecutor's questions included the incorrect assumption that a verdict of guilty of first degree murder standing alone might result in the death penalty. *Ibid.*

§ 135.4. Cases under N.C.G.S. § 15A-2000; Separate Sentencing Proceeding

In a first-degree murder sentencing proceeding, the issues as framed by the court were constitutionally valid and free of prejudicial error. *S. v. Noland*, 1.

The trial court did not err by instructing the jury that it was required to reach a unanimous decision in its determination of mitigating factors. *Ibid.*

The death sentence imposed was neither excessive nor disproportionate to the penalty imposed in similar cases considering both the crime and the defendant. *Ibid.*

The issue of whether the "heinous, atrocious, or cruel" aggravating circumstance was unconstitutionally vague and overbroad was not properly before the Court. *S. v. Young*, 669.

§ 135.6. Separate Sentencing Proceeding; Competency of Evidence

Any error in the trial court's refusal to permit the defendant's sister to testify to his nonviolent nature was harmless because his mother and wife testified that he was nonviolent and because the jury found his nonviolent past to be a mitigating circumstance. *S. v. Huffstetler*, 92.

§ 135.7. Separate Sentencing Proceeding; Instructions

In a prosecution for first degree murder, the trial court did not commit reversible error in the sentencing phase where it mistakenly instructed the jury that an issue was whether the mitigating circumstances were sufficient rather than insufficient to outweigh the aggravating circumstances. *S. v. Young*, 669.

The court was not required to instruct the jury that it would impose a sentence of life imprisonment if the jury could not agree on a recommendation of punishment. *Ibid.*

§ 135.8. Separate Sentencing Proceeding; Aggravating Circumstances

The trial court did not err in failing to act *ex mero motu* to take curative action when a prosecutor emphasized to the jury the seriousness of an aggravating factor. *S. v. Noland*, 1.

The district attorney could argue the existence of a mitigating factor to the jury, and the trial judge was not required to give a peremptory instruction, when there was evidence of prior criminal activity. *Ibid.*

The evidence in a first-degree murder case was insufficient to support submission to the jury of the especially heinous, atrocious, or cruel aggravating circumstance. *S. v. Hamlet*, 162.

The evidence presented by the State was sufficient to permit the jury to consider as an aggravating circumstance whether the murder was "especially heinous, atrocious, or cruel." *S. v. Huffstetler*, 92.

The defendant in a first-degree murder case was not prejudiced by the court's error in submitting two aggravating factors—that the murder was committed while defendant was engaged in the commission of a first-degree burglary or an attempt

to commit first-degree rape and that the murder was part of a course of conduct involving other crimes of violence—based on the same evidence of an attempt to rape the victim's daughter. *S. v. Vereen*, 499.

§ 135.9. Separate Sentencing Proceeding; Mitigating Circumstances

The burden of persuasion as to the existence of mitigating circumstances is on the defendant. *S. v. Noland*, 1.

A peremptory instruction is proper only when all the evidence, if believed, tends to show that a particular mitigating factor exists. *Ibid.*

There was no error in failing to require the jury to list each mitigating factor it found on the issue sheet, although the better practice is to require the jury to specify mitigating factors found and not found. *Ibid.*

The evidence was not sufficient to require the submission to the jury as a mitigating circumstance that defendant testified under oath and revealed his role in the victim's death. *S. v. Huffstetler*, 92.

In a prosecution for first degree murder, the prosecutor did not improperly attempt to turn the mitigating circumstance of youth into an aggravating circumstance. *S. v. Young*, 669.

§ 135.10. Separate Sentencing Proceeding; Review

A sentence of death imposed on defendant was not disproportionate considering both the crime and the defendant. *S. v. Vereen*, 499.

A death sentence was vacated as disproportionate to the penalty imposed in the pool of similar cases. *S. v. Young*, 669.

§ 138. Severity of Sentence and Determination Thereof; Fair Sentencing Act

The court erred in a sentencing hearing by failing to find a statutory mitigating factor when all of the evidence supported the existence of that factor. *S. v. Gardner*, 70.

The trial judge is not required to consider whether the evidence supports the existence of non-statutory mitigating factors in the absence of a specific request by defense counsel. *Ibid.*

The evidence was insufficient to support the trial court's finding as an aggravating factor that defendant caused serious mental injury to a kidnapping and rape victim "in that she has been confined to the hospital a portion of this week, even though she is now at home." *S. v. Brown*, 237.

The trial court in a rape case erred in finding two aggravating factors based upon defendant's prior conviction of rape. *Ibid.*

The trial court did not err in failing to find as factors in mitigation of the second-degree murder of defendant's husband that defendant was a passive participant, that she was a female of advanced years, and that she was the primary supporting spouse. *S. v. Albert*, 567.

The trial court erred in failing to find as a factor in mitigation that the female defendant had no record of criminal convictions. *Ibid.*

§ 146.3. Appeal; Exercise of Supervisory Jurisdiction

The Supreme Court vacated the death penalty and ordered a new trial in the exercise of its supervisory powers where meaningful appellate review was precluded by the inaccurate and inadequate transcription of the trial proceedings and where no adequate record could be formulated. *S. v. Sanders*, 318.

CRIMINAL LAW — Continued

§ 162. Appeal; Necessity for Objection to Evidence at Trial

The defendant cannot complain on appeal about various methods used by the district attorney to elicit answers from a child witness where defendant failed to object at trial and his failure to object was a tactical decision. *S. v. Higginbottom*, 760.

§ 169. Harmless Error in the Admission or Exclusion of Evidence

There was no prejudice from the admission of testimony about a pubic hair sample taken from defendant, although a comparison with a pubic hair found on the victim was excluded, because there was other compelling evidence of defendant's guilt. *S. v. Hannah*, 286.

§ 169.7. Exclusion of Evidence; Error Cured by other Evidence

In a prosecution for first-degree sexual offense and taking indecent liberties with a child, there was no prejudicial error in the exclusion of testimony that a detective had not talked with teachers or neighbors about the reputation for truthfulness of children testifying against defendant because the detective stated that she had never talked with teachers or neighbors about the children. *S. v. Craven*, 580.

§ 181. Postconviction Hearing

Defendant's motion for appropriate relief filed in the Supreme Court was denied where defendant failed to file supporting affidavits and the alleged fact on which the motion was based could not be ascertained from the record. *S. v. Payne*, 647.

§ 181.2. Postconviction Hearing; Findings of Fact

Findings of fact made by a court in its order granting or denying a motion for appropriate relief are binding on appeal if supported by evidence in the record, even if the evidence is conflicting. *S. v. Baker*, 34.

§ 181.3. Postconviction Hearing; Review of Judgment Entered at Hearing

The disposition of post-trial motions for appropriate relief is within the discretion of the trial court. *S. v. Higginbottom*, 760.

DEAD BODIES

§ 3. Mutilation

Summary judgment was properly granted for defendant in an action for wrongful autopsy. *In re Grad v. Kaasa*, 310.

DECLARATORY JUDGMENT ACT

§ 4.1. Validity of Statutes and Ordinances

District court judges who ruled adversely to the State on the constitutionality and construction of the Safe Roads Act may not be considered as litigants antagonistic to either the Attorney General or the people of North Carolina in regard to the validity and construction of the Act, and the trial court properly dismissed the Attorney General's declaratory judgment action against such judges for failure of the complaint to disclose an actual or existing controversy between the parties. *State ex rel. Edmisten v. Tucker*, 326.

HOMICIDE — Continued

§ 12. Indictment

A murder indictment in the form prescribed by G.S. 15-144 was proper although it failed to inform defendant whether she would be tried for a capital or a noncapital offense. *S. v. Albert*, 567.

§ 15. Relevancy and Competency of Evidence in General

Testimony that defendant pulled a pistol from his pocket and shot it into the ground three months before the murder in question was competent to contradict defendant's testimony that he kept the pistol in his trunk and did not carry it on his person. *S. v. Bullard*, 129.

§ 17.2. Evidence of Threats

In a prosecution for first-degree murder, a proper foundation was laid for three letters written by defendant which implied that he intended to murder his wife and commit suicide. *S. v. Braswell*, 553.

§ 19.1. Evidence Competent on Question of Self-Defense; Evidence of Character or Reputation

Evidence of decedent's character and reputation was properly excluded where the State's and defendant's own evidence clearly indicated that defendant was the aggressor. *S. v. McCray*, 519.

§ 20.1. Photographs

Photographs of the area where the victim's body was found were properly admitted as illustrations of testimony. *S. v. Huffstetler*, 92.

§ 21. Motions for Nonsuit

Defendant's motion to dismiss the charge of first degree murder was properly denied where there was substantial evidence of each essential element of the offense charged and of the defendant being the perpetrator of the crime. *S. v. McDonald*, 264.

§ 21.5. Sufficiency of Evidence of First Degree Murder

The State's evidence was sufficient for the jury in a prosecution for first-degree murder of a man who had previously shot and wounded defendant's son. *S. v. Bullard*, 129.

There was sufficient evidence of premeditation and deliberation to submit first degree murder to the jury. *S. v. Huffstetler*, 92.

The court properly denied defendant's motions to dismiss the charges of first degree murder, first degree burglary and robbery with a dangerous weapon. *S. v. Young*, 669.

The State's evidence of premeditation and deliberation was sufficient to support conviction of defendant for first-degree murder by shooting the victim with a gun. *S. v. Hamlet*, 162.

There was sufficient evidence of premeditation and deliberation to support submission of an issue of defendant's guilt of first-degree murder. *S. v. Vereen*, 499.

§ 25.2. Instructions on First Degree Murder; Premeditation and Deliberation

The court's instructions could not have caused the jury to believe it could convict defendant of first-degree murder if it found that premeditation occurred after the fatal shot was fired. *S. v. Hamlet*, 162.

HOMICIDE — Continued

A conviction for first degree murder was not dependent upon a burglary conviction where the court charged the jury only on the theory that the killing was committed with premeditation. *S. v. Harold*, 787.

§ 27.1. Instructions on Voluntary Manslaughter; Heat of Passion

Defendant was not entitled to a jury instruction on the lesser included offense of manslaughter based on a sudden heat of passion triggered by terror where defendant inmate responded to taunts by another inmate by retrieving a hidden knife, attacking the other inmate in a different cell block without warning, and chasing and cornering the other inmate. *S. v. McCray*, 519.

INDICTMENT AND WARRANT

§ 3. Jurisdiction of Grand Jury

Where all of the evidence tended to show that a kidnapping and larceny occurred in Cumberland County, a Wake County Grand Jury had no jurisdiction to indict defendants for those crimes. *S. v. Randolph*, 198.

§ 7.1. Formalities

The legislature has the power, within constitutional parameters, to prescribe the manner in which a criminal charge can be stated in a pleading. *S. v. Coker*, 432.

§ 13.1. Discretionary Denial of Motion for Bill of Particulars

Defendant did not show prejudicial error in the denial of his motion for a bill of particulars. *S. v. Randolph*, 198.

The State was not required to allege the aggravating factors on which it would rely in seeking the death penalty in either the indictment or in a bill of particulars. *S. v. Payne*, 647.

The trial court did not err by denying defendant's motion for a bill of particulars where defendant had access to the information sought. *Ibid.*

INSURANCE

§ 35. Right to Proceeds where Beneficiary Causes Death of Insured

A beneficiary of a life insurance policy who intentionally and feloniously killed or procured the killing of the insured was barred from recovery of the policy proceeds under common law principles even though the beneficiary was not a "slayer" under G.S. 31A-3(3) because she had not been convicted of killing the insured. *Jones v. All American Life Ins. Co.*, 725.

The submission of a disjunctive issue of whether plaintiff killed or procured the killing of the insured in an action on a life insurance policy did not prevent a unanimous verdict and was proper. *Ibid.*

An insurance company seeking to disqualify plaintiff beneficiary from recovery of life insurance proceeds under the common law theory that the beneficiary procured the killing of the insured was not required to identify the principal in the killing. *Ibid.*

§ 110.1. Liability Insurance; Extent of Liability of Insurer; Liability for Costs and Interest

The statute providing for prejudgment interest on non-contract claims covered by liability insurance, G.S. 24-5, does not violate equal protection provisions of the U.S. or N.C. Constitutions. *Powe v. Odell*, 410.

INSURANCE — Continued

Although G.S. 24-5 favors certain classes of litigants by distinguishing between defendants who carry liability insurance and those who do not, it is not a special emolument or privilege within the meaning of Art. I, § 32 of the North Carolina Constitution. *Lowe v. Tarble*, 467.

INTEREST

§ 2. Time and Computation

The statute providing for prejudgment interest on non-contract claims covered by liability insurance, G.S. 24-5, does not violate equal protection provisions of the U.S. or N.C. Constitutions. *Powe v. Odell*, 410; *Lowe v. Tarble*, 467.

JURY

§ 6. Voir Dire Examination Generally; Practice and Procedure

There was no abuse of discretion in the trial court's denial of defendant's motions for individual *voir dire* of the venire, for sequestration of the venire, and to prohibit jury dispersal. *S. v. Huffstetler*, 92.

§ 6.2. Voir Dire; Form of Questions

There was no error in sustaining objections to counsel's statements during *voir dire* which were efforts to instruct the jury on the law. *S. v. Huffstetler*, 92.

§ 6.3. Voir Dire; Propriety and Scope of Examination Generally

The court did not err in refusing to permit defendant to question prospective jurors concerning the positions leaders of their churches held on the death penalty. *S. v. Huffstetler*, 92.

§ 7.11. Challenges for Cause; Scruples against Capital Punishment

North Carolina's jury selection process is constitutional and the trial court did not err by death-qualifying the jury. *S. v. Noland*, 1.

KIDNAPPING

§ 1.3. Instructions

Where a kidnapping indictment alleged that defendant confined the victim for the purpose of facilitating the felony of rape and that defendant did not release the victim in a safe place, the trial court committed plain error in instructing the jury that it could convict defendant of kidnapping if it found that defendant confined the victim "for the purpose of terrorizing her" and that it could convict defendant of first-degree kidnapping if it found that defendant "sexually assaulted" the victim. *S. v. Brown*. 237.

MALICIOUS PROSECUTION

§ 11.1. Proof of Existence of Probable Cause; Facts Occurring after Institution of Prosecution

Where a malicious prosecution action was based on warrants charging defendant with embezzlement, the prosecutor had voluntarily dismissed the warrants, and plaintiff was later indicted for embezzlement, the indictments could not be considered as evidence of probable cause in the malicious prosecution action. *Jones v. Gwynne*, 393.

MALICIOUS PROSECUTION — Continued

§ 15. Damages

In a malicious prosecution action based upon charges against plaintiff for embezzlement, the evidence was sufficient to warrant submission of a punitive damages issue to the jury on the theory that the manner in which the investigation of the alleged embezzlement was conducted by the individual defendant showed a reckless and wanton disregard of plaintiff's rights. *Jones v. Gwynne*, 393.

MANDAMUS

§ 3.1. Duties of Public Officers

A superior court judge has no jurisdiction to issue a writ of mandamus to a district court judge. *State ex rel. Edmisten v. Tucker*, 326; *In re Redwine*, 482.

MASTER AND SERVANT

§ 65.2. Workers' Compensation; Back Injuries

Plaintiff was entitled to compensation for permanent total disability under G.S. 97-29 where, in addition to his initial back injury, plaintiff also suffered from arachnoiditis resulting in extreme pain in plaintiff's legs which made walking and other movement practically impossible. *Fleming v. K-Mart Corp.*, 538.

§ 89.1. Workers' Compensation; Remedies against Third-Person Tortfeasors Generally; Fellow Employee as Third Person

A directed verdict should not have been granted for defendant in a common law negligence action arising from a prank played by defendant on plaintiff co-employee. *Pleasant v. Johnson*, 710.

PHYSICIANS, SURGEONS, AND ALLIED PROFESSIONS

§ 13. Limitations of Action for Malpractice

As used in the discovery exception for non-apparent injuries in the statute of limitations for malpractice actions, G.S. 1-15(c), the term "bodily injury" denotes an awareness by plaintiff that wrongful or negligent conduct was involved in addition to the fact of his or her injury by defendant, and plaintiff's discovery of defendant's failure to inform her of the availability of a drug as a less drastic alternative to the hysterectomy performed by defendant physician on plaintiff more than two years earlier qualified as discovery of a non-apparent "injury" which comes within the one-year discovery provision of the statute. *Black v. Littlejohn*, 626.

PROCESS

§ 9.1. Personal Service on Nonresident Individuals in Another State; Minimum Contacts Test

In an action arising from a truck accident, the trial court did not make sufficient findings to support its conclusions that it had personal jurisdiction over defendant Florida corporation where plaintiff relied entirely on the registration of the truck to defendant and defendant produced evidence that the truck had been leased with the lessee having full control over the truck. *DeArmon v. B. Mears Corp.*, 749.

PROHIBITION, WRIT OF

§ 1. Generally

A superior court judge has no jurisdiction to issue a writ of prohibition to a district court judge. *State ex rel. Edmisten v. Tucker*, 326; *In re Redwine*, 482.

PUBLIC RECORDS

§ 1. Generally

The statute providing that S.B.I. records and evidence are not public records but "may be made available to the public only upon an order of a court of competent jurisdiction" permits a member of the public to obtain access to S.B.I. records only when such person is entitled to access under one of the procedures already provided by law for discovery in civil or criminal cases. *News and Observer v. State; Co. of Wake v. State; Murphy v. State*, 276.

A newspaper publishing company was not entitled to access to an S.B.I. report on a criminal investigation of a former school superintendent. *Ibid.*

RAPE AND ALLIED OFFENSES

§ 4.3. Evidence of Character or Reputation of Prosecutrix

Cross-examination of the prosecutrix in a rape trial concerning her prior accusation of rape against another man was properly prohibited until the trial judge had conducted an in-camera hearing to determine the relevancy of the evidence. *S. v. Brown*, 237.

§ 5. Sufficiency of Evidence

There was sufficient evidence to convict a female codefendant of first degree rape and first degree sexual offense as an aider and abettor, and sufficient evidence to convict a male codefendant of first degree sexual offense, where there was no doubt that the male codefendant was aware of the fact that the female codefendant had used a gun to abduct the victim and continued to threaten the victim with the gun. *S. v. Randolph*, 198.

§ 6.1. Instructions on Lesser Degrees of the Crime

The trial court in a prosecution for first-degree rape did not err in failing to submit to the jury the lesser included offenses of attempted first-degree rape and attempted second-degree rape on the ground that the evidence of penetration was equivocal. *S. v. Brown*, 237.

Defendant was not entitled to a jury instruction on second degree sexual offense where there was no evidence which would support a finding of guilt of that charge. *S. v. Randolph*, 198.

§ 7. Sentence and Punishment

The imposition of a mandatory life sentence for a first degree sexual offense committed upon a four-year-old child did not constitute cruel and unusual punishment. *S. v. Higginbottom*, 760.

§ 19. Taking Indecent Liberties with Child

In a prosecution for first-degree sexual offense and taking indecent liberties with a child, the uncorroborated testimony of the victim was sufficient to survive defendant's motion to dismiss. *S. v. Craven*, 580.

ROBBERY

§ 4.3. Armed Robbery Cases where Evidence Held Sufficient

Defendants' conduct rose to the level of a continuing threat of the use of a firearm sufficient to support a conviction for armed robbery where there was a display of a firearm which induced the victim to acquiesce to the defendants' demands, and where on several occasions the defendants indicated that they would use the weapon if the victim resisted. *S. v. Randolph*, 198.

Where there is evidence that defendant has committed a robbery with what appears to the victim to be a firearm or other dangerous weapon and nothing to the contrary appears in evidence, the presumption that the victim's life was endangered or threatened is mandatory. However, when any evidence is introduced tending to show that the life of the victim was not endangered or threatened, the mandatory presumption disappears, leaving only a permissive inference. *S. v. Joyner*, 779.

Defendant presented some evidence from which the jury could but was not required to infer that a rifle was unloaded and had no firing pin at the time of a robbery and that no life was endangered or threatened; therefore, the mandatory presumption of danger or threat to life disappeared, and the trial court properly left the jury free to infer either that the disputed element of armed robbery did or did not exist when it instructed on possible verdicts of guilty of armed robbery, guilty of common law robbery and not guilty. *Ibid.*

The court properly denied defendant's motions to dismiss the charges of robbery with a dangerous weapon, first degree murder, and first degree burglary. *S. v. Young*, 669.

§ 4.7. Cases where Evidence Was Insufficient

The State's evidence disclosed no more than an opportunity for defendant to have taken the victim's wallet containing money and was insufficient to support his conviction of armed robbery. *S. v. Moore*, 607.

SALES

§ 6.4. Warranties in Sale of House by Builder-Vendor

Any warranty created when defendant sent plaintiffs a letter proposing repairs after plaintiffs complained of flooding in their newly purchased house was not enforceable because there was no evidence that defendant intentionally induced detrimental reliance or that any consideration passed to defendant. *Clifford v. River Bend Plantation, Inc.*, 460.

SEARCHES AND SEIZURES

§ 8. Search and Seizure Incident to Warrantless Arrest

North Carolina officers had probable cause to believe that defendant had committed the felonies of rape and murder of a seven-year-old child, and the warrantless search of defendant while he was detained in Knoxville, Tennessee, at the request of North Carolina authorities was proper as being incident to defendant's lawful arrest by Tennessee officers pursuant to information received from North Carolina authorities. *S. v. Zuniga*, 251.

Flight may properly be considered in assessing probable cause for arrest. *Ibid.*

§ 10. Search and Seizure on Probable Cause

Where a law enforcement officer enters private premises in response to a call for help, and finds and secures what reasonably appears to be a crime scene, all

WITNESSES — Continued

§ 7. Refreshing Memory

The admission of hypnotically induced testimony constituted prejudicial error. *S. v. Flack*, 448.

In a prosecution for first degree murder where hypnotically refreshed testimony was introduced, there was no reasonable possibility that a different result would have been reached without the testimony. *S. v. Payne*, 647.

§ 10. Attendance

Defendant was denied his constitutional right to compulsory process in his retrial for first-degree sexual offense by the trial court's denial of his pretrial motion to compel the attendance of a proposed witness. *S. v. Rankin*, 592.

WORD AND PHRASE INDEX